Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 24 January 2019[1]

**Case C-43/18**

**Compagnie d'entreprises CFE SA**
**v**
**Région de Bruxelles-Capitale**

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

**Case C-321/18**

**Terre wallonne ASBL**
**v**
**Région wallonne**

(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 — Directive 92/43/EEC — Conservation of natural habitats and of wild fauna and flora — Measures for the management of areas of conservation — Designation of a special area of conservation — Notion of plans and programmes — Obligation to undertake an environmental assessment — Establishment of conservation objectives for the Walloon Region)

## I. Introduction

1. What is the relationship between the SEA Directive (SEA stands for strategic environmental assessment)[2] and the Habitats Directive?[3] This is the question raised by the two requests for a preliminary ruling from the Conseil d'État (Council of State, Belgium) which I am examining together.

2. It arises against the background of the different assessments of environmental effects provided for by EU law, in this instance in particular the assessment of the implications of plans and projects likely to have an effect on Natura 2000 sites under Article 6(3) of the Habitats Directive and the environmental assessment of plans and programmes under the SEA Directive. Conversely, the best known assessment, the assessment of the environmental effects of projects under the EIA Directive,[4] does not play a particular role here.

1 Original language: German.

2 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).

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

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).

3. The CFE case concerns the implementation of the Habitats Directive through the designation at national level of a special area of conservation, entailing the adoption of various conservation rules, while the Terre wallonne case concerns the establishment of conservation objectives for all Natura 2000 sites in the Walloon Region, the intention also being to implement the Habitats Directive. The objection is raised against both measures that an environmental assessment under the SEA Directive should have been carried out before they were adopted.

4. It must be clarified in particular whether measures directly connected with or necessary to the management of Natura 2000 sites, in this instance the designation of an area of conservation and the establishment of conservation objectives, are excluded in principle from the scope of the environmental assessment under the SEA Directive. In support of this conclusion, it is argued above all that such measures are expressly not subject to an assessment of implications for the site under Article 6(3) of the Habitats Directive. But what does this mean for the environmental assessment under the SEA Directive?

5. In addition, it has to be considered whether those measures specifically satisfy the conditions for an environmental assessment. It must be clarified in particular whether they set a framework for future development consent of projects.

6. The practical importance of these proceedings must be highlighted. Natura 2000 covers around 18% of the land area and 6% of the marine area of the European Union in many thousands of individual sites. As it seems that management measures have often been taken without an environmental assessment up to now, an obligation to undertake an environmental assessment of measures for the management of Natura 2000 sites could call that network into question.

## II. Legal framework

### A. EU law

#### *1. The SEA Directive*

7. 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.’

8. Plans and programmes are defined by 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.’

9. The obligation to undertake a strategic environmental assessment under Article 3(1) to (5) of the SEA Directive is of particular interest to the main proceedings:

'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, 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], 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 [the Habitats Directive].

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.'

### *2. The Habitats Directive*

10. Natura 2000, the network of European areas of conservation, is defined in Article 3(1) of the Habitats Directive:

'A coherent European ecological network of special areas of conservation shall be set up under the title "Natura 2000". This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

…'

11. Article 4 of the Habitats Directive contains specific rules on the designation of sites:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. …

…

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists …

…

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. …

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

12. The following rules concerning the protection of sites are laid down in Article 6(1) to (3) of the Habitats Directive:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

## B. National law

### *1. The designation decision by the Brussels Capital Region for the Forêt de Soignes site*

13. The subject matter of the proceedings which have led to the CFE case is the Arrêté du Gouvernement de la Région de Bruxelles-Capitale portant désignation du site Natura 2000 — BE1000001: 'La Forêt de Soignes avec lisières et domaines boisés avoisinants et la Vallée de la Woluwe — complexe Forêt de Soignes — Vallée de la Woluwe' du 14 avril 2016 (Order of the Government of the Brussels Capital Region of 14 April 2016 designating the Natura 2000 site BE1000001 'Sonian Forest with boundaries and neighbouring wooded areas and the Woluwe Valley — Sonian Forest complex — Woluwe Valley'). [5]

14. That Order essentially specifies which land is part of the special area of conservation, which habitat types and species are present there, what conservation status it had when the site was identified, what conservation status is to be attained and why the site is protected.

15. Article 15 of the Order contains certain prohibitions for the protection of the site:

'1. In application of Article 47(2) of the [Order of 1 March 2012 relating to nature conservation], this Article lays down general prohibitions for the Natura 2000 site designated by this Decree.

2. Subject to any special provisions allowing exemption or derogation, it shall be prohibited, for projects which require neither a permit nor development consent within the meaning of Article 47(2) of the Order [of 1 March 2012 relating to nature conservation]:

1. to remove, uproot, damage or destroy native plant species, including mosses, fungi and lichens, and to destroy, degrade or alter the vegetation cover;

2. …'

### *2. Establishment of conservation objectives in the Walloon Region*

16. The main proceedings in the Terre wallonne case concern the Decree of the Walloon Government of 1 December 2016 establishing conservation objectives for the Natura 2000 network. [6] It establishes quantitative and qualitative conservation objectives for habitat types and species for the entire region.

17. The Decree is based on Article 25a of the Law of 12 July 1973 on nature conservation:

'Article 25a(1) The Government shall establish, at Walloon Region level, conservation objectives for each natural habitat type and each species type for which sites must be designated.

The conservation objectives shall be determined on the basis of the conservation status, at Walloon Region level, of the natural habitat types and species for which sites must be designated and shall serve to maintain or, where appropriate, restore at a favourable conservation status the natural habitat types and species for which sites must be designated.

Those conservation objectives shall have indicative value.

5 *Moniteur belge* No 136 of 13 May 2016, p. 31558.

6 *Moniteur belge* No 340 of 22 December 2016, p. 88148.

(2) On the basis of the conservation objectives referred to in paragraph 1, the Government shall establish conservation objectives applicable at the level of the Natura 2000 sites.

These objectives shall have statutory value. They shall be interpreted in the light of the data referred to in points 2 and 3 of the second subparagraph of Article 26(1).'

18. In the recitals of the Decree, the objective is specifically described as follows:

'…

Whereas, in accordance with Article 1a, [Article] 21a and the first subparagraph of Article 25a(1) of the Law [of 12 July 1973 on nature conservation], it is necessary to establish conservation objectives at the level of the entire territory of Wallonia (and not only for the Natura 2000 network), so as to provide an overview of what needs to be protected or, where appropriate, restored in the Walloon Region in order to maintain or restore at a favourable conservation status habitats and species for which the Natura 2000 network was set up; whereas these objectives have an indicative value.

Whereas the conservation objectives at site level must be established on the basis of the conservation objectives established for the entire Walloon Region; whereas these objectives have a statutory value. …

…

Whereas those objectives apply within a specific Natura 2000 site only where that site is designated for that species or habitat.'

## III. Facts and request for a preliminary ruling

### A. Case C-43/18 — CFE

19. Since 1983 the public limited company C.F.E. (CFE) has owned land covering most of the Plateau de la Foresterie at Watermael-Boitsfort, a municipality in the south of the Brussels Capital Region in Belgium.

20. On 7 December 2004 the European Commission adopted, pursuant to the Habitats Directive, the initial list of sites of Community importance for the Atlantic biogeographical region, which included the Natura 2000 site BE1000001 'La Forêt de Soignes avec lisières et domaines boisés avoisinants et la Vallée de la Woluwe. Complexe Forêt de Soignes — Vallée de la Woluwe' (Sonian Forest with boundaries and neighbouring wooded areas and the Woluwe Valley — Sonian Forest complex — Woluwe Valley).[7] The land owned by CFE forms part of that site.

21. CFE brought an action against the Commission decision, which was dismissed as inadmissible by order of the Court of First Instance of the European Union of 19 September 2006.[8]

22. CFE states that on 9 October 2007 it became aware for the first time that between 1937 and 1987 the municipality of Watermael-Boitsfort had used a significant part of its land as an illegal waste disposal site. On that date the Institut Bruxellois pour la Gestion de l'Environnement (Brussels Institute for Environmental Management, Belgium; IBGE) sent it a notice inviting it to submit a proposal to clean up its land.

7 Decision 2004/813/EC (OJ 2004 L 387, p. 1).

8 Order of 19 September 2006, *CFE* v *Commission* (T-100/05, not published, EU:T:2006:260).

23. On 9 July 2015, the Government of the Brussels Capital Region, on a first reading, approved the preliminary draft order designating the Natura 2000 site. A public inquiry relating to that preliminary draft order was held between 24 September and 7 November 2015. That inquiry gave rise to 202 objections including one from CFE. Nevertheless, the Government adopted the Order designating that Natura 2000 site on 14 April 2016.

24. By an application lodged on 12 July 2016, CFE now seeks the annulment of the Order of 14 April 2016. It objects in particular that no environmental assessment under the SEA Directive was undertaken.

25. In those proceedings the Conseil d'État (Council of State) has therefore referred the following questions to the Court:

'(1) Does an order by which a Member State body designates a special area of conservation, under the Habitats Directive, and which contains conservation objectives and general preventive measures having regulatory force, constitute a plan or programme within the meaning of the SEA Directive?

(2) More particularly, does such an order fall within Article 3(4) of the SEA Directive, as a plan or programme which sets the framework for future development consent of projects, with the result that the Member States must determine whether it is likely to have significant effects on the environment, in compliance with Article 3(5)?

(3) Must Article 3(2)(b) of the SEA Directive be interpreted as meaning that the designation order in question is exempt from the application of Article 3(4) of that directive?'

26. Written observations have been submitted by the Compagnie d'entreprises CFE, the Brussels Capital Region, Ireland, the Czech Republic and the European Commission.

### B. Case C-321/18 — Terre wallonne

27. On 8 November 2012, the procedure commenced for the adoption of a Decree establishing conservation objectives for the Natura 2000 network for the Walloon Region. From 10 December 2012 to 8 February 2013, a public inquiry was conducted in the 218 municipalities affected by the Natura 2000 network. On 1 December 2016, the Walloon Government adopted the Decree.

28. By an application made on 9 February 2017, the non-profit association Terre wallonne seeks the annulment of the Decree of 1 December 2016.

29. In those proceedings, the Conseil d'État (Council of State) has now referred the following questions to the Court:

'(1) Is a decree by which a body of a Member State establishes the conservation objectives for the Natura 2000 network, in accordance with the Habitats Directive, a plan or programme within the meaning of the SEA Directive, and, more specifically, within the meaning of Article 3(2)(a) or Article 3(4) of that directive?

(2) If so, must such a decree be subjected to an environmental assessment in accordance with the SEA Directive, even though such an assessment is not required under the Habitats Directive, on the basis of which the decree was adopted?'

30. Written observations have been submitted by Terre wallonne, the Kingdom of Belgium, Ireland, the Czech Republic and the European Commission.

### C. Joint hearing

31. On 13 December 2018, the Court held a joint hearing in which CFE, the Brussels Capital Region, Belgium and the Commission took part.

## IV. Legal assessment

32. The two requests for a preliminary ruling seek to clarify whether measures directly connected with or necessary to the management of Natura 2000 sites within the meaning of the first sentence of Article 6(3) of the Habitats Directive, as plans or programmes, require an environmental assessment under the SEA Directive.

33. To be precise, the CFE case concerns a measure which establishes a specific national conservation status for an already provisionally protected site and the Terre wallonne case relates to a measure which summarises the conservation objectives for all Natura 2000 sites in the Walloon Region.

34. The Conseil d'État rightly considers that these measures are directly connected with or necessary to the management of Natura 2000 sites. The designation of a special area of conservation establishes the national conservation status of the site and sets the framework for the management of the site and a summary of the conservation objectives for all Natura 2000 sites in the Walloon Region places the respective site-specific framework in a broader context.

35. There is no dispute that these two measures satisfy the conditions of Article 2(1)(a) of the SEA Directive. They were subject to adoption by authorities at regional level and were required by legislative, regulatory or administrative provisions, namely the Habitats Directive and the relevant implementing law.

36. The Conseil d'État's questions address two other sets of issues, namely primarily whether measures for the conservation and management of Natura 2000 sites are in any event excluded from the strategic environmental assessment under the SEA Directive and, if not, whether they meet the other conditions for a strategic environmental assessment under Article 3 of the SEA Directive, in particular whether they set a framework for subsequent development consent of projects.

### A. The strategic environmental assessment of measures for the management of Natura 2000 sites

37. Brussels, Belgium, Ireland and the Commission consider that Article 3(2)(b) of the SEA Directive and the exception for site management measures under Article 6(3) of the Habitats Directive restrict the strategic environmental assessment for Natura 2000 sites to the assessment of plans and projects which are also subject to an assessment of the implications for the site under the Habitats Directive. Measures for the management of Natura 2000 sites would then never require an environmental assessment.

38. Under Article 3(2)(b) of the SEA Directive, an environmental assessment is to be carried out for plans and programmes which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive. That assessment will set out all the environmental effects of the measure in question, although the SEA Directive does not attach any legal consequences to those effects.

39. However, Article 6(3) of the Habitats Directive excludes plans or projects directly connected with or necessary to the management of the site from the assessment of implications provided for therein. The competent national authorities may approve other plans and projects only if the assessment shows that they do not adversely affect the integrity of the site concerned.

40. As the contested measures are directly connected with the management of Natura 2000 sites, they are not subject to the assessment of the implications for the site under Article 6(3) of the Habitats Directive and therefore also do not require an environmental assessment under Article 3(2)(b) of the SEA Directive.

41. It is not yet determined, however, whether an environmental assessment on the basis of Article 3(2)(a) or Article 3(4) of the SEA Directive is precluded.

42. Under Article 3(2)(a) of the SEA Directive, 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, 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.

43. The doubts expressed by various parties as to whether the designation of a special area of conservation or the establishment of conservation objectives for the Natura 2000 sites in a region can be attributed to one of these areas are perfectly understandable.

44. This does not need to be investigated any further, however, as under Article 3(4) of the SEA Directive Member States must determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of (other) projects, are likely to have significant environmental effects.[9] If that is the case, an environmental assessment must also be undertaken.

45. The abovementioned parties correctly state that the EU legislature did not mention site management measures in Article 3 of the SEA Directive. On the other hand, however, none of those provisions expressly states that site management measures are excluded from the strategic environmental assessment.

46. If, nevertheless, the exception for site management should also not apply to the SEA Directive, an inconsistency might seem to arise, at first sight, between the two directives. Why should the EU legislature expressly exclude site management measures from the assessment of implications for the site under Article 6(3) of the Habitats Directive but at the same time make them subject to the environmental assessment requirement under the SEA Directive?

47. There is in fact no such inconsistency, however, because the two assessments have different functions.

48. The assessment of implications for the site under the first sentence of Article 6(3) of the Habitats Directive is intended to clarify whether a plan or a project can be approved pursuant to the second sentence of Article 6(3) or Article 6(4). The competent authorities may agree to a plan or programme pursuant to the second sentence of Article 6(3) only if the assessment contains complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works likely to have an effect on the protected area concerned.[10] In addition, the exception to these strict conditions under Article 6(4) of the Habitats Directive can be applied only after the implications of a plan or project have been analysed in accordance with Article 6(3) of the directive.[11]

9 See judgments of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C:2011:608, paragraphs 45 to 47), and of 21 December 2016, *Associazione Italia Nostra Onlus* (C-444/15, EU:C:2016:978, paragraphs 52 to 54)

10 Judgments of 11 April 2013, *Sweetman and Others* (C-258/11, EU:C:2013:220, paragraph 44); of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 50); and of 17 April 2018, *Commission* v *Poland* (Białowieża Forest) (C-441/17, EU:C:2018:255, paragraph 114).

11 Judgments of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 60) and the case-law cited, and of 17 April 2018, *Commission* v *Poland* (Białowieża Forest) (C-441/17, EU:C:2018:255, paragraph 189).

49. In particular, the requirements for agreement under the second sentence of Article 6(3) of the Habitats Directive preclude its application to site management measures as it will often be impossible in site management to structure the relevant measures in such a way that all reasonable scientific doubt that conservation objectives will be affected can be ruled out. Specifically with regard to the designation of special areas of conservation, Article 4(4) of the Habitats Directive even expressly requires that the competent authorities must in particular establish priorities upon designation of a site, that is to say, they must give precedence to certain objectives over others. [12]

50. For example, the conservation of open land habitat types, particularly meadows, generally requires the removal of bushes or trees which could offer a habitat for protected species or develop into other protected habitat types.

51. Furthermore, it will often be necessary to take certain measures to protect habitat types and species even though not all reasonable scientific doubt over the associated prejudice to the site's conservation objectives can be ruled out. Thus, many habitat types are considered to be reliant on certain forms of cultivation, [13] without, however, being able to rule out the adverse effects of such cultivation in all cases.

52. Unlike the Habitats Directive, the SEA Directive itself does not lay down any substantive requirements for development consent of a project. [14] It is intended above all to ensure that environmental effects of plans and programmes are taken into consideration when they are adopted.

53. Such consideration must in any case include compliance with mandatory environmental requirements, but these may be evident only from rules other than those contained in the SEA Directive, such as the Habitats Directive or the Water Framework Directive. [15]

54. Ireland and the Commission in particular also maintain, however, that measures for the management of Natura 2000 sites would not, by their nature, have any adverse environmental effects, whilst the SEA Directive seeks to identify and take into account such effects.

55. Indeed, according to recital 4 of the SEA Directive, strategic environmental assessment is an instrument for integrating environmental protection into other activities. Its primary aim, on the other hand, is not to make environmental protection measures subject to an assessment.

56. As was already mentioned at the hearing, however, the Court ruled in the *Terre wallonne* judgment of 2010 [16] that even an environmental protection measure can require an environmental assessment. That case concerned the Walloon Region's action programme to implement the Nitrates Directive. [17]

57. As regards measures for the management of Natura 2000 sites, the possibility of conflicting objectives in site management measures shows that such measures do not necessarily protect or improve the environment, but can also affect it adversely.

12 Judgment of 4 March 2010, *Commission* v *France* (C-241/08, EU:C:2010:114, paragraph 53). See also my Opinion in *Commission* v *France* (C-241/08, EU:C:2009:398, points 43, 44 and 71).

13 See Halada, L., Evans, D., Romão, C., Petersen, J.E., 'Which habitats of European importance depend on agricultural practices?', *Biodiversity and Conservation* 20 (2011), 2365 to 2378.

14 See, with regard to the EIA Directive, judgments of 13 December 2007, *Commission* v *Ireland* (C-418/04, EU:C:2007:780, paragraph 231), and of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166, paragraph 46).

15 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

16 Judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355).

17 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).

58. There is also a risk that site management measures will be poorly or inadequately designed and therefore either damage sites themselves or fail to prevent potential damage. In addition, the effectiveness of site management measures is often not established beyond any doubt.

59. Such doubts over the quality of the Decree issued by the Walloon Region have presumably prompted the Terre wallonne environmental association to challenge that Decree in the present proceedings.

60. Consequently, the abstract objective of site management measures of implementing protection of sites under the Habitats Directive does not necessarily lead to the conclusion that such measures cannot have adverse effects on the environment.

61. Against this background, any inconsistency would seem to reside more in the Habitats Directive itself. It makes development consent of plans and projects in connection with Natura 2000 sites subject to a strict assessment to be based on the best scientific knowledge.[18] On the other hand, site management does not — according to the wording of the Habitats Directive at least — require any scientific basis.

62. However, it also cannot be inferred from this that the EU legislature wished to exclude site management from any environmental assessment. Rather, this inconsistency shows above all that, when it adopted the Habitats Directive, the EU legislature did not see any need to lay down definitive, detailed rules in this regard. It evidently took the view that the Member States were responsible for taking the necessary measures.

63. Such measures are necessary because site management may also have a significant effect on the site's conservation objectives and should therefore have a scientific basis at least as solid as for decisions on other plans and projects.[19] Moreover, the fact that the competent authorities utilised public participation when the contested measures were adopted confirms this assessment.

64. If, however, the legislature did not consider rules on environmental assessment and public participation in connection with site management necessary in the context of the Habitats Directive, this does not mean that it wished to exclude the management of Natura 2000 sites when it subsequently adopted general rules on environmental assessment.

65. Rather, the environmental assessment under the SEA Directive, an assessment of effects on the environment under the EIA Directive or, for other cases, public participation with an assessment of environmental effects under Article 6(1)(b) of the Aarhus Convention[20] can usefully supplement the rules of the Habitats Directive on site management in relation to the assessment of potential environmental effects and public participation.

66. Lastly, these considerations can also refute the argument that applying the SEA Directive would result in unacceptable delays in the implementation of the Habitats Directive, as there are significant risks in sacrificing quality assurance measures for the sake of efficiency. What is the benefit of Natura 2000 if sites are quickly identified from a formal point of view, but the actual protection of species and habitat types is inadequate because the individual measures have been taken without a sufficient basis or public participation?

18 Judgments of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583, paragraph 51); of 26 April 2017, *Commission* v *Germany* (Moorburg) (C-142/16, EU:C:2017:301, paragraph 57); and of 17 April 2018, *Commission* v *Poland* (Białowieża Forest) (C-441/17, EU:C:2018:255, paragraph 113).

19 See my Opinion in *Commission* v *France* (C-241/08, EU:C:2009:398, points 70 and 71).

20 Convention on access to information, public participation in decision-making and access to justice in environmental matters of 1998 (OJ 2005 L 124, p. 4), approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1). See judgments of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraphs 57 and 59), and of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, paragraphs 38 and 39).

67. Accordingly, Article 3(2)(b) of the SEA Directive and the exception for site management measures under the first sentence of Article 6(3) of the Habitats Directive do not preclude an obligation to undertake a strategic environmental assessment.

## B. The notions of plan and programme in the context of Article 3(2)(a) and (4) of the SEA Directive

68. It is clear from the above statements that the designation of a special area of conservation and the establishment of conservation objectives for the Natura 2000 sites in a region do not have to be subject to an environmental assessment on the basis of Article 3(2)(b) of the SEA Directive. As was shown in points 42 and 44 above, however, an obligation to undertake an environmental assessment might follow in particular from Article 3(4) of the SEA Directive.

69. This obligation — just like the assessment requirement under Article 3(2)(a) of the SEA Directive — is dependent on whether the plan or programme in question sets the framework for future development consent of *projects*.

70. The Court has stated in this regard that the notion of 'plans and programmes' relates 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.[21] In this respect, the concept of 'a significant body of criteria and detailed rules' must be construed qualitatively and not quantitatively. 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.[22]

### *1. Designation of a special area of conservation*

71. The designation of a special area of conservation, as is at issue in the CFE case, can set a framework in accordance with Article 3(2)(a) or Article 3(4) of the SEA Directive in two ways. First, the establishment of an area of conservation with specific conservation objectives can set a framework for development consent of schemes and, second, specific conservation rules which include such a framework may be associated with the designation.

#### *(a) Establishment of an area of conservation with specific conservation objectives*

##### *(1) Designation per se*

72. The establishment of an area of conservation with specific conservation objectives undoubtedly sets a strict framework for development consent of projects within and around the area of conservation, as such schemes — whether or not they are subject to the EIA Directive[23] — can be approved only in accordance with Article 6(3) and (4) of the Habitats Directive. The criteria on which the necessary assessment is based are the conservation objectives established for the site.

21 Judgments of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 49); of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403, paragraph 53); and *Thybaut and Others* (C-160/17, EU:C:2018:401, paragraph 54).

22 Judgments of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403, paragraph 55), and *Thybaut and Others* (C-160/17, EU:C:2018:401, paragraph 55).

23 See judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraphs 65 and 66).

73. It is true that schemes within that framework are already covered by Article 3(2)(b) of the SEA Directive. However, this does not rule out allocating the establishment of the framework itself to Article 3(2)(a) and (4) of the directive.

74. The establishment of a special area of conservation in connection with Article 6(3) and (4) of the Habitats Directive thus results in a qualitatively significant body of criteria and detailed rules for the grant and implementation of one or more projects.

75. However, such a framework is not necessarily created for the first time with the designation of the special area of conservation. While Article 6(3) and (4) of the Habitats Directive, read in isolation, is applicable only to special areas of conservation, Article 4(5) provides that a site is subject to Article 6(2), (3) and (4) as soon as it is placed on the Community list referred to in the third subparagraph of Article 4(2). Under Article 4(2) of the Habitats Directive, the Commission places on this list the sites which it selects from the site proposals made by the Member States pursuant to Article 4(1). Member States must designate sites placed on the list as special areas of conservation, but they have up to six years to do so under Article 4(4). The protection afforded by Article 6(3) and (4) thus covers the Natura 2000 sites, as a rule, for a long time before they have the status of a special area of conservation.

76. When sites are placed on the Community list, specific conservation objectives are not yet expressly established, but they are evident from all the habitats and species for which the site has been protected according to the information provided by the Member State in the proposal for the site.[24] The framework for development consent of projects set by the establishment of the area of conservation is thus generally created long before the designation of the special area of conservation. Where the designation of a special area of conservation merely confirms that framework, it does not therefore create an obligation to undertake an environmental assessment.

*(2) Modification of conservation objectives by reason of designation*

77. It cannot be ruled out, however, that the designation of a site requires an environmental assessment as a modification of a plan or programme.

78. Under Article 2(a) of the SEA Directive, the notion of 'plans and programmes' also includes their modification. As is shown by Article 3(3), an assessment requirement depends on whether the modifications are likely to have significant environmental effects.

79. The designation of a special area of conservation may in particular influence the site's conservation objectives. Article 4(4) of the Habitats Directive thus requires priorities to be established upon designation. It is also conceivable that the list of protected habitat types and species or the geographical extent of the site will be modified upon designation.

80. The benchmarks for determining whether there are modifications are the habitats and species for which the site was protected when it was placed on the Community list and the areas originally contained in the site, if the habitats, species and areas have not already been modified in the meantime pursuant to Article 4(1) of the Habitats Directive.[25]

81. A modification of conservation objectives alters the framework which the area of conservation sets for projects. If certain habitat types, species or even areas are included in or excluded from protection, the conditions for the approval of schemes likely to have effects on the site are inevitably modified.

24 Judgment of 7 November 2018, *Holohan and Others* (C-461/17, EU:C:2018:883, paragraph 37), and my Opinion in *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:60, point 97).

25 See, with regard to the reduction in the size of a site, judgment of 19 October 2017, *Vereniging Hoekschewaards Landschap* (C-281/16, EU:C:2017:774, paragraphs 16-20 and 30).

82. In the CFE case it would have to be examined in particular whether the inclusion of habitat types and species of regional interest in the protection of the site by Articles 8 and 9 and Annex 4 to the Order sufficiently modified the framework for development consent of projects. Their protection does not stem from the Habitats Directive but only from the legislation of the Brussels Capital Region. The habitat types and species hosted are also immaterial to the site being placed on the Community list. It cannot therefore be ruled out that the site proposal in question did not include the protection of those habitat types and species before the designation of the special area of conservation.

*(3) Teleological reduction of the environmental assessment in relation to the framework set by Article 6(3) and (4)?*

83. The question could be asked, specifically with regard to the framework set by Article 6(3) and (4) of the Habitats Directive, whether the objectives of the SEA Directive actually require an environmental assessment. However, this consideration too ultimately does not preclude environmental assessment.

84. In addition to the abovementioned objective of integrating environmental considerations into the decision, mention must be made of a structural objective of the SEA Directive, stemming from the fact that it complements the EIA Directive, which is more than 10 years older and concerns the consideration of effects on the environment when development consent is granted for projects. The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures.[26] Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context.[27]

85. It could be inferred from this objective that the environmental assessment is not necessary if all environmental effects can be assessed and taken fully into account in connection with development consent of projects. In addition, Article 6(3) and (4) of the Habitats Directive requires, in principle, the effects of plans and projects on the conservation objectives of the sites concerned to be taken fully into account.

86. However, the risk of adverse environmental effects in relation to the definition of Natura 2000 sites and the modification of the extent of their protection resides in the establishment of inadequate conservation objectives. It can no longer be countered satisfactorily later at the level of approval of plans and projects.

*(4) Interim conclusion*

87. Therefore, the designation of a special area of conservation requires an environmental assessment under Article 3(2)(a) and (3) or under Article 3(4) of the SEA Directive if it is associated with modifications of the extent of protection of the area of conservation concerned, in particular modifications of the conservation objectives or the protected areas which affect the application of Article 6(3) and (4) of the Habitats Directive or further-reaching national conservation provisions, where those modifications are likely to have significant environmental effects.

26 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).

27 See my Opinion in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120, points 31 and 32).

### *(b) Establishment of special conservation rules in the designation of sites*

88. In addition to the conservation provisions under Article 6(3) and (4) of the Habitats Directive, specific conservation rules may also be laid down when a site is designated in order, for example, to counter particular risks to which the site is subject.

89. Thus, Article 15 of the Order at issue in Case C-43/18 contains specific prohibitions, such as, in point 1 of paragraph 2, the prohibition on removing, uprooting, damaging or destroying native plant species, including mosses, fungi and lichens, and on destroying, degrading or altering the vegetation cover.

90. In principle, such prohibitions may contain, in addition to the requirements laid down in Article 6(3) and (4) of the Habitats Directive, 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, and thus set a framework within the meaning of Article 3(2)(a) or (4) of the SEA Directive.

91. According to the wording of Article 15 of the Order, however, the prohibitions laid down therein appear not to have this effect because they presumably apply only to activities not requiring development consent. The necessary framework for the application of Article 3(2)(a) or (4) of the SEA Directive, on the other hand, must apply to development consent of projects.

92. No other prohibitions which would have to be complied with in connection with development consent are evident.

93. Consequently, the designation of a special area of conservation requires an environmental assessment under Article 3(2)(a) or under Article 3(4) of the SEA Directive if it lays down specific conservation rules which are applicable in addition to Article 6(3) and (4) of the Habitats Directive and set a framework for development consent of projects which are likely to have significant environmental effects.

### *2. Establishment of regional conservation objectives*

94. The Decree of the Walloon Government of 1 December 2016 establishing conservation objectives for the Natura 2000 network, that is, the measure at issue in the Terre wallonne case, also concerns the implementation of the Habitats Directive, but its function and operation are quite different from the designation of a special area of conservation. It does not establish conservation objectives for certain sites, but summarises them, as it were, for the entire Walloon Region. It thus presents the total areas already existing for certain habitat types in the entire region and in the different Natura 2000 sites and specifies whether the areas for those habitat types in the Natura 2000 sites are to be maintained in size or enlarged. The Decree does not, however, contain any provisions as to how and in which sites in the region those conservation objectives are to be attained.

95. The Decree thus undoubtedly highlights, in a non-technical sense, the framework for all the plans and projects which could affect any site in the Natura 2000 network.

96. However, the Habitats Directive does not define regional conservation objectives, but only conservation objectives for each site.

97. Accordingly, the regional conservation objectives under Article 25a(1) of the Law of 12 July 1973 have merely indicative value. Only the conservation objectives established for each site have a statutory value under Article 25a(2).

98. The eighth recital of the Decree explains the function of the regional conservation objectives as providing an overview of what needs to be protected or, where appropriate, restored in the Walloon Region in order to maintain or restore at a favourable conservation status habitats and species for which the Natura 2000 network was set up.

99. The regional conservation objectives in the Decree thus have primarily an information and coordination function for the management of Natura 2000 sites in the region. They do not, however, contain 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.

100. A decree by which a body of a Member State establishes the conservation objectives for the Natura 2000 network, in accordance with the Habitats Directive, within its area of responsibility as a whole, but not for each Natura 2000 site, and which does not thus lay down any requirements for development consent of projects is not therefore a plan or programme within the meaning of the SEA Directive.

## C. Concluding remarks

101. It should be observed, lastly, that the approach taken here effectively means that the establishment of a Natura 2000 site or certain modifications of its conservation objectives or its extent require an environmental assessment, in principle, if they are likely to have significant environmental effects.

102. It must be assumed that the placing of many sites on the Community list and presumably also some interim modifications of the extent of their protection do not fall within the scope of the SEA Directive *ratione temporis*. However, there would now also seem to be a large number of designations of sites and modifications which did require an environmental assessment in principle, but were not made subject to such assessments. If such designations and modifications have not yet become final, that is to say, definitive, there is therefore a risk that they will be challenged before a court.

103. Nevertheless, any challenges by reason of a failure to undertake an environmental assessment cannot result in a restriction of the extent of protection for Natura 2000 sites. Rather, it would seem necessary, in such cases, to maintain the effects of the notification to the Commission until the defect has been rectified.[28] Only for modifications giving rise to a restriction of protection of the site is annulment or suspension possible until the defect is rectified.

104. Furthermore, it will have to be examined in any case whether or not the requirements of the SEA Directive were nevertheless complied with.[29] Thus, in the present cases public participation took place at least. It is not clear from the papers in the case, on the other hand, whether an environmental report or equivalent documents were also submitted.

28 See judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 42 et seq.), and of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraph 29 et seq.).

29 Judgment of 11 August 1995, *Commission* v *Germany* (Großkrotzenburg, C-431/92, EU:C:1995:260, paragraphs 43 to 45).

## V. Conclusion

105. I therefore suggest that Court rules as follows in Case C-43/18, CFE:

The designation of a special area of conservation requires an environmental assessment under Article 3(2)(a) or under Article 3(4) 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

– if it is associated with modifications of the extent of protection of the area of conservation concerned, in particular modifications of the conservation objectives or the protected areas which affect the application of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora or further-reaching national conservation provisions, where those modifications are likely to have significant environmental effects, or

– if it lays down specific conservation rules which are applicable in addition to Article 6(3) and (4) of Directive 92/43 and set a framework for development consent of projects and are likely to have significant environmental effects.

106. In Case C-321/18, Terre wallonne, I suggest that the Court give the following answer:

A decree by which a body of a Member State establishes the conservation objectives for the Natura 2000 network, in accordance with Directive 92/43, within its area of responsibility as a whole, but not for individual Natura 2000 sites, and does not thus lay down any requirements for development consent of projects is not a plan or programme within the meaning of Directive 2001/42.