Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 September 2021 [1]

**Case C-300/20**

**Bund Naturschutz in Bayern eV**
**v**
**Landkreis Rosenheim,**
**interveners:**
**Landesanwaltschaft Bayern,**
**Vertreter des Bundesinteresses beim Bundesverwaltungsgericht**

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling – Environment – Assessment of the effects of certain plans and programmes on the environment – Strategic environmental assessment – Definition of plans and programmes – Landscape conservation regulation which lays down general prohibitions and development consent requirements not specific to particular projects – Legal consequences of the absence of a strategic environmental assessment – Temporal limitation of the effects of the judgment – Power of the national court to maintain the effects of national measures on a temporary basis)

1. This reference for a preliminary ruling raises issues similar to those addressed by the Court in the judgment of 25 June 2020, concerning wind turbines at Aalter and Nevele, [2] concerning the [strategic] environmental assessment ('SEA') of plans and programmes.

2. In my Opinion in that case, I stated that the assessment of the effects of certain 'projects' or certain 'plans and programmes' on the environment is one of the key instruments available under EU law for attaining a high level of protection of the environment. [3]

3. The environmental assessment of *projects* is governed by Directive 2011/92/EU, [4] the environmental assessment of *plans and programmes* by Directive 2001/42/EC. [5] The two directives complement one another: because the latter 'is intended to bring forward the

1 Original language: Spanish.

2 Judgment in *A and Others (Wind turbines at Aalter and Nevele)* (C-24/19, EU:C:2020:503; 'the judgment in *Wind turbines at Aalter and Nevele*').

3 Opinion of 3 March 2020 (C-24/19, EU:C:2020:143; 'Opinion in *Wind turbines at Aalter and Nevele*'; point 1).

4 Directive 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; 'the EIA Directive').

5 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). Also known as the 'Strategic Environmental Assessment' ('the SEA Directive').

environmental impact assessment to the strategic planning stage of the actions taken by national authorities. The study of the environmental effects required is, therefore, broader or more comprehensive than that relating to a specific project'. [6]

4. As I stated at that time, 'on that basis, the difficulty lies in establishing exactly how far the [strategic environmental assessment] requirements [under the] SEA [Directive] extends. It is clear that it ranks higher than the assessment of specific projects but also that it should not apply to all of a Member State's legislation concerning the environment' [7]

5. This case is a good demonstration of that difficulty, which seems to remain notwithstanding the clarifications contained in the judgment in *Wind turbines at Aalter and Nevele*. It will be necessary to provide an even more precise definition of when a plan or programme contains a reference framework for the preparation of projects covered by Annexes I and II to the EIA Directive and therefore requires a prior SEA.

## I. Legal framework

### *A. EU law – Directive 2001/42*

6. According to 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.'

7. Article 2 states:

'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, through a legislative procedure by Parliament or Government, and

– which are required by legislative, regulatory or administrative provisions;

(b) "environmental assessment" shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

…'

[6] Opinion in *Wind turbines at Aalter and Nevele*, point 36.

[7] *Ibidem*, point 37.

8. Article 3 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, 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 Directive 85/337/EEC, 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.

…’

## *B. German law*

### *1. Gesetz über die Umweltverträglichkeitsprüfung (UVPG) (Law on the Environmental Impact Assessment)*

9. Paragraph 2(7) [8] states:

‘(7) For the purposes of this Law, the only plans and programmes to be regarded as such shall be those provided for in federal legislation or in legal acts of the European Union

1. which are subject to preparation and adoption by a public authority,

[8] Version of 24 February 2010 (BGBl. I, p. 94), as amended by Paragraph 2 of the Law of 12 December 2019 (BGBl. I, p. 2513).

2. which are prepared by an authority for adoption by a government or through a legislative procedure, or

3. which are prepared by a third party for adoption by a public authority.

…'

10. Paragraph 35 states:

'(1) A strategic environmental assessment shall be carried out in the case of the plans and programmes

1. listed in Annex 5(1), or

2. listed in Annex 5(2) which set a framework for decision-making on the permissibility of the projects listed in Annex 1 or projects which, in accordance with *Land* legislation, require an environmental impact assessment or a preliminary assessment of the particular case.

(2) Plans and programmes not provided for in subparagraph 1 shall require a strategic environmental assessment only if they set a framework for decision-making on the permissibility of the projects listed in Annex 1 or other projects and, further to a preliminary assessment of the particular case within the meaning of subparagraph 4, are likely to have significant effects on the environment …

(3) Plans and programmes set a framework for decision-making on the permissibility of projects if they contain criteria of significance to subsequent decisions on development consent, in particular in relation to the need, scope, location, nature or operating conditions of projects or in relation to the use of resources.

…'

*2. Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz – BNatSchG) (Law on Nature Conservation and Landscape Management (Federal Law on Nature Conservation – BNatSchG)) of 29 July 2009*

11. Paragraph 20 [9] provides:

'…

(2) Parts of nature and the landscape may be protected

…

4. in accordance with Paragraph 26, as landscape conservation areas,

…'

[9] Version of 29 July 2009 (BGBl. I, p. 2542), as amended by Paragraph 1 of the Law of 15 September 2017 (BGBl. I, p. 3434).

12. Paragraph 26 provides:

'(1) Landscape conservation areas are areas the designation of which as such is legally binding and in which special protection for nature and the landscape is required

1. to assist the conservation, development or restoration of the productive and functional capacity of the ecosystem or of the regenerative capacity and sustainable use of natural assets, including the protection of biotopes and habitats of certain species of wild fauna and flora,

2. on account of the diversity, distinctiveness and beauty or the special cultural and historical significance of the landscape, or

3. on account of their special significance for recreational purposes.

(2) In the light in particular of Paragraph 5(1) and in accordance with more detailed provisions, any activity within a landscape conservation area which alters the character of that area or which runs counter to the special conservation objective pursued shall be prohibited.' [10]

*3. Bayerisches Gesetz über den Schutz der Natur, die Pflege der Landschaft und die Erholung in der freien Natur (Bayerisches Naturschutzgesetz – BayNatSchG) (Bavarian Law on Nature Conservation, Landscape Management and Outdoor Recreation (Bavarian Law on Nature Conservation – BayNatSchG)) of 23 February 2011*

13. Article 12(1) [11] states:

'(1) Parts of nature and the landscape shall be placed under protection, in accordance with Paragraph 20(2), points 1, 2, 4, 6 and 7, of the Law on Nature Conservation and Landscape Management, by means of a regulation, unless this Law provides otherwise …'

14. Article 18 states:

'(1) An official development consent required under a protective regulation shall be replaced by an official development consent required under other provisions; the latter development consent may be issued only if the conditions for the issue of the development consent required under the protective regulation are met and with the consent of the competent authority under the law governing nature conservation.

…'

15. According to Article 51:

'(1) The bodies below shall be competent to do as follows:

…

[10] Following the hearing in this case, Paragraph 22 of the BNatSchG has been supplemented with subparagraphs 2a and 2b, to allow for the maintenance in force of legal acts which defined nature and landscape conservation areas contrary to the SEA Directive as they were subject to a prior SEA.

[11] GVBl. p. 82, as amended by Paragraph 11a(4) of the Law of 10 December 2019 (GVBl. p. 686).

3. rural districts and independent authorities, to adopt regulations on nature conservation areas within the meaning of Paragraph 26 of the BNatSchG,

…'

*4. Verordnung des Landkreises Rosenheim über das Landschaftsschutzgebiet 'Inntal Süd' (Regulation of the Rural District of Rosenheim on the 'Inntal Süd' landscape conservation area) of 10 April 2013*

16. Paragraph 1 of that regulation [12] provides that 'the object of protection shall be the … River Inn, including the river basin and its alluvial plains, shall be protected'.

17. As regards the conservation objective pursued, Paragraph 3 states:

'The objective of the "Inntal Süd" landscape conservation area is

1. to ensure the productive capacity of the ecosystem; in particular to conserve, promote and restore alluvial forests and deadwoods, as well as the living conditions of the typical species of fauna and flora adapted to the foregoing and of their biocenoses;

2. to preserve the diversity, distinctiveness and beauty of the natural landscape; in particular, to strengthen its character as a riverscape and conserve the rural cultural landscape;

3. to preserve and optimise the functionality of the water regime in order also to promote the continuity of the course of the River Inn and its tributaries, and the retention of surface water;

4. to safeguard and preserve for the community the features of the landscape that are significant for the purposes of recreational activity, while at the same time respecting nature and the landscape as much as possible, and to channel recreational traffic.'

18. In accordance with Paragraph 4, concerning prohibitions, 'in the landscape conservation area, any activity which alters the character of that area or which runs counter to the conservation objective pursued (Paragraph 3) shall be prohibited'.

19. According to Paragraph 5:

'(1) Consent from the Landratsamt Rosenheim (Rosenheim Rural District Council), as the lower authority responsible for nature conservation (Article 43(2), point 3, of the BayNatSchG) shall be required by anyone who, in a landscape conservation area, intends

1. to erect, change or change the use of any kind of construction [Article 2(1) of the Bayerische Bauordnung (Bavarian Building Code)], even if this does not require consent under the building regulations; such construction include in particular:

   (a) buildings such as dwellings, farm and forestry plant building, weekend homes, boathouses, bathing huts, tool sheds, sales kiosks …

   (b) enclosures and other barriers;

[12] ABl. des Landkreises Rosenheim No 5 of 26 April 2013 ('the Inntal Süd Regulation').

(c) jetties and riverbank constructions;

(d) changes to the land surface as a result of excavation or filling, in particular the creation and operation of new quarries, gravel pits, sand pits, mud pits or clay pits and other boreholes, and spoil heaps. This does not apply to fillings or excavations covering a surface area of up to 500 $m^2$ and measuring 0.3 m in height or depth for the purpose of improving the land on sites already in agricultural use;

2. in so far as the constructions in question are not already covered in point 1,

(a) to erect billboards and posters, including advertising devices, with a surface area in excess of 0.5 $m^2$, provided that they do not constitute residential or business names on residential or business premises;

(b) to lay overhead or underground wiring, cabling or piping and to erect masts;

(c) to construct or substantially alter roads, paths or spaces, in particular campsites, sports fields, playgrounds and bathing areas or similar facilities;

(d) to set up vending vans or to erect, secure and operate sales kiosks and vending machines;

3. to drive or park motor vehicles of any kind anywhere other than on roads, paths and spaces dedicated to public traffic or park them in such areas; …

4. to abstract water above ground or underground to an extent beyond that of permitted public use, to alter bodies of water, their banks or beds, the inflow or outflow of water or the piezometric level, to create new bodies of water or to construct drainage systems;

5. drain, dry out or otherwise destroy or cause significant damage to biotopes of special ecological value within the meaning of Paragraph 30 of the BNatSchG and Paragraph 23 of the BayNatSchG, in particular peat bogs, marshes, reed beds, large sedge bogs, wet meadows rich in sedges and reeds, moor grass meadows, natural springs, wooded peat bogs, forests and marshlands and alluvial forests, as well as natural or semi-natural areas of flowing or standing internal waters, including their banks and associated natural or semi-natural riparian vegetation, and natural or semi-natural siltation areas, dead-legs and periodically flooded areas; …

6. to plough, to convert into multi-harvest grassland, fertilise, graze or afforest meadows providing litter for livestock;

7. to pursue, capture or kill wild animals or to remove their breeding sites, habitats or nests;

8. to clear, fell or otherwise remove, in the open countryside and anywhere other than in woodlands, individual trees, hedges, hedgerows or copses or field shrubs that characterise the landscape; …

9. to clear forest stands in full or in part, carry out initial afforestation or perform associated clear-cutting of more than 0.5 hectares, convert deciduous, mixed or alluvial forests into forests with a predominantly coniferous content or establish specialised crops (such as tree nurseries);

10. to destroy or substantially alter, on the banks of bodies of water, riparian vegetation, reed beds or populations of aquatic plants, invade reed beds or bodies of aquatic plants, or use chemical means to remove or control reed beds or clear ditches; …

11. to deposit waste, rubble and other objects, in so far as they are not already subject to the waste regulations, on sites other than those authorised for that purpose, even if the intention is not to landfill within the meaning of the building regulations;

12. to camp or park caravans (including folding trailers) or motorised dwelling vehicles anywhere other than on authorised sites, or allow others to do so;

13. to allow aircraft within the meaning of the Luftverkehrgesetz (Law on Aviation) to take off or land anywhere other than at authorised aerodromes.

(2) Consent shall be granted, without prejudice to other legislative provisions, provided that the intended measure does not produce any of the effects referred to in subparagraph 4 or any such effects can be offset by ancillary stipulations.

…'

20. As regards exemptions, Paragraph 7 states:

'(1) Exemption from the prohibitions laid down in Paragraph 4 of this Regulation may be granted, on a case-by-case basis, in accordance with the conditions laid down in Paragraph 67 of the BNatSchG. …'

## II. Facts, dispute and questions referred for a preliminary ruling

21. The Landkreis Rosenheim (Rural District of Rosenheim, Germany) adopted the Inntal Süd Regulation, with effect from 27 April 2013, without subjecting it to an SEA or to an examination prior to such an assessment.

22. The Inntal Süd Regulation protects an area measuring 4 021 hectares, approximately 650 hectares less than that covered by the previous provisions, of 1952 and 1977, that were totally or partially repealed.

23. Bund Naturschutz in Bayern eV ('Bund Naturschutz') is an environmental association which had taken part in the procedure for drafting the Inntal Süd Regulation. Dissatisfied with the content of the latter, Bund Naturschutz challenged it before the Bayerischer Verwaltungsgerichtshof (Administrative Court, Bavaria, Germany), which dismissed its action as inadmissible.

24. The Bundesverwaltungsgericht (Federal Administrative Court, Germany) has to rule on the appeal in cassation ('*Revision*') brought against the lower court's decision.

25. According to the referring court, the appeal in cassation is inadmissible under national law. With regard to the application for a review of legality, since the appellant cannot claim that the law has been infringed, it lacks standing. That application is inadmissible, since the Inntal Süd Regulation is not a decision and it is not subject under national law to the obligation to carry out an SEA or a preliminary examination.

26. Nonetheless, it goes on to say, the answer to the questions referred for a preliminary ruling might lead to a judgment upholding the claims raised by Bund Naturschutz.

27. The first two questions are intended to clarify whether, in accordance with Article 3(2)(a) of the SEA Directive, there was an obligation to subject the Inntal Süd Regulation to an SEA. If so, the appeal would not only be admissible but would also succeed on the merits: the court would surely have to declare the Inntal Süd Regulation invalid, owing to the failure to complete a necessary stage in the procedure for its adoption.

28. The third question, relating to Article 3(4) of the SEA Directive, is also relevant to the outcome of the dispute. If the Inntal Süd Regulation sets a framework for future development consent of projects, within the meaning of that provision, the Rural District of Rosenheim would be required under national law to subject it to a preliminary assessment and, therefore, to a case-by-case examination within the meaning of Article 3(5) of the SEA Directive. In that event, the appeal would be admissible and well founded, and the Inntal Süd Regulation would have to be declared invalid.

29. It is in this context that the Bundesverwaltungsgericht (Federal Administrative Court) has referred the following questions for a preliminary ruling:

‘(1) Is Article 3(2)(a) of [the SEA] Directive … to be interpreted as meaning that a framework for future development consent of projects listed in Annexes I and II to [Directive 2011/92] (EIA Directive) is set where a regulation on nature conservation and landscape management provides for general prohibitions (with possible exemptions) and compulsory permits which do not specifically relate to projects listed in the annexes to the EIA Directive?

(2) Is Article 3(2)(a) of [the SEA] Directive … to be interpreted as meaning that plans and programmes were prepared for agriculture, forestry, land use, etc. if their objective was to establish a reference framework for one or more of those areas? Or does it suffice if, for the purpose of nature conservation and landscape management, general prohibitions and permit requirements are regulated which have to be assessed in the permit procedure for a variety of projects and uses and which may indirectly impact (“by default”) one or more of those areas?

(3) Is Article 3(4) of [the SEA] Directive … to be interpreted as meaning that a framework for future development consent of projects is set if a regulation adopted for the purpose of nature conservation and landscape management lays down prohibitions and permit requirements for a variety of projects and measures in the protected area which are described in abstract terms, where there are no actual foreseeable or envisaged projects when it is adopted and therefore it does not specifically relate to actual projects?’

30. Written observations have been lodged by Bund Naturschutz, the Rural District of Rosenheim, the Landesanwaltschaft Bayern (Public Prosecutor's Office for the *Land* of Bavaria, Germany), the Czech and German Governments, Ireland and the European Commission. With the exception of the Czech Government, all the aforementioned parties attended the hearing held on 7 June 2021.

## III. Assessment

### *A. First and second questions referred*

31. The referring court wishes to ascertain whether Article 3(2)(a) of the SEA Directive is to be interpreted as meaning that legislation such as the contested regulation constitutes a plan or programme subject the obligation to carry out an SEA.

32. In the judgment in *Wind turbines at Aalter and Nevele*, the Court made, inter alia, the following statements:

'– The purpose of that directive is, as is set out in Article 1, to provide for a high level of protection for 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.'

'– To that end, as Article 1 states, the fundamental objective of [the SEA] Directive … is to subject plans and programmes that are likely to have significant environmental effects to an environmental assessment during their preparation and before their adoption.'

'– Moreover, a broad interpretation of the concept of "plans and programmes" is consistent with the European Union's international undertakings, such as those resulting, inter alia, from Article 2(7) of the Espoo Convention.' [13]

33. The rules governing the scope of the SEA Directive are mainly contained in two related articles:

– Article 2(a) defines the cumulative conditions that must be met by plans and programmes in order for the Directive to be applicable to them: (a) they must be 'subject to preparation and/or adoption by an authority at national, regional or local level or … [be] prepared by an authority for adoption, through a legislative procedure by Parliament or Government'; and (b) they must be required by legislative, regulatory or administrative provisions.

– Article 3(2)(a) sets out the conditions for identifying which of those plans and programmes are likely to have significant environmental effects and must therefore be made subject to an SEA: (a) they must be prepared for certain (sensitive) sectors and economic activities; and (b) they must 'set' the framework for future development consent of projects.

[13] Paragraphs 45, 46 and 49, citing the judgments of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C:2011:608, paragraph 37), and of 7 June 2018, *Thybaut and Others* (C-160/17, EU:C:2018:401; 'the judgment in *Thybaut and Others*'; paragraph 61).

34. Article 3(4) of the SEA Directive extends the obligation to conduct an SEA to plans and programmes relating to activities which are not sensitive but have a high environmental impact. It is these plans and programmes that form the subject of the third question referred for a preliminary ruling.

35. Taken together, those provisions give rise to four conditions which I shall analyse in order to determine whether local legislation such as the Inntal Süd Regulation is a plan or programme covered by Article 3(2)(a) of the SEA Directive.

36. The premiss from which the referring court starts is that, in the light of the case-law of the Court of Justice, that regulation 'constitutes a plan or programme within the meaning of Article 2(a) of [the SEA] Directive'. [14] This is an assertion with which, as I shall explain, I agree.

*1. Preparation or adoption of the plan or programme by a Member State authority*

37. The first condition, which does not usually present interpretative problems, is that the legislation must have been adopted or prepared by a Member State authority at national, regional or local level.

38. In this case, it is common ground that the Inntal Süd Regulation was adopted by a German local authority, that is to say the Rural District of Rosenheim.

*2. Plan or programme prescribed by legislative, regulatory or administrative provisions*

39. In accordance with Article 2(a), second indent, of the SEA Directive, the plans or programmes adopted by the authorities of a Member State which fall within its scope are those that are 'required by legislative, regulatory or administrative provisions'.

40. Since the judgment in *Inter-Environnement Bruxelles and Others*, the plans and programmes that are to be regarded as 'required' within the meaning, and for the application, of that directive, are those whose adoption is regulated by national legislative or regulatory provisions which determine the competent authorities for adopting them and the procedure for preparing them. [15]

41. By that interpretation, the Court adopted a *broad* interpretation of Directive 2001/42, taking the view that the latter applies to plans and programmes regulated by national legislative or regulatory provisions whether their adoption is *compulsory* or *optional*. [16]

42. That case-law has been 'questioned' and, in *Wind turbines at Aalter and Nivele*, it was expressly proposed that the Court should amend it.

[14] Order for reference, paragraph 19.

[15] Judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159; 'judgment in *Inter-Environnement Bruxelles and Others*'; paragraph 3); judgment in *Thybaut and Others*, paragraph 43; and judgment of 12 June 2019, *CFE* (C-43/18, EU:C:2019:483; 'judgment in *CFE*'; paragraph 54).

[16] In *Inter-Environnement Bruxelles and Others*, Advocate General Kokott offered a more restrictive interpretation to the effect that an SEA would be required only for plans and programmes whose adoption is compulsory in that it is prescribed by a provision of domestic law (Opinion of Advocate General Kokott of 17 November 2011 in *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2011:755, points 18 and 19). In points 41 and 42 of her Opinion of 25 January 2018 in *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:39, points 41 and 42), Advocate General Kokott reiterated her position, arguing that the Court has extended the scope of the SEA Directive beyond that which the legislature intended and which the Member States could have foreseen.

43. In that case, however, the Court refused to amend its previous case-law. It reaffirmed that the 'objectives [of the Directive] would be likely to be compromised if Article 2(a) [thereof] were interpreted as meaning that only those plans or programmes whose adoption is compulsory are covered by the obligation to carry out an environmental assessment laid down by that directive. First, … the adoption of those plans and programmes is often not imposed as a general requirement. Second, such an interpretation would allow a Member State to circumvent easily that requirement for an environmental assessment by deliberately refraining from providing that competent authorities are required to adopt such plans and programmes'. [17]

44. The second indent of Article 2(a) of the SEA Directive must therefore be interpreted 'as meaning that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the authorities competent to adopt them and the procedure for preparing them, must be regarded as "required" within the meaning, and for the application, of that directive'. [18]

45. The Landesanwaltschaft Bayern makes a further call for the Court to amend its case-law, [19] but does not, in my opinion, put forward any strong new arguments in support of its proposition. The referring court does not raise any questions in that regard.

46. In my view, that issue was definitively disposed of by the Grand Chamber of the Court of Justice in the judgment in *Wind turbines at Aalter and Nevele* and there is no reason to review that case-law.

47. According to the referring court, [20] the Inntal Süd Regulation was adopted under the enabling provisions of the BNatSchgG. It is therefore a regulation *prescribed* by legislative provisions, even if its preparation was not *compulsory*. It therefore satisfies the second condition for being a plan or programme subject to the obligation to carry out an SEA.

*3. Plan or programme prepared for a (sensitive) economic sector covered by the SEA Directive*

48. Article 3(2)(a) of the SEA Directive states that, subject to paragraph 3 of that provision, 'an environmental assessment shall 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'.

49. In the words of the Court, 'Article 3 of Directive 2001/42 makes the obligation to subject a specific plan or programme to an environmental assessment conditional upon the plan or programme covered by that provision being likely to have significant environmental effects … More specifically, Article 3(2)(a) of that directive provides that a systematic environmental assessment is to be carried out for all plans and programmes that are prepared for certain sectors and set the framework for future development consent of projects listed in Annexes I and II to Directive 2011/92 …'. [21]

[17] Judgment in *Wind turbines at Aalter and Nevele*, paragraph 48.

[18] Judgment in *Wind turbines at Aalter and Nevele*, paragraph 52.

[19] Paragraph 10 of the written observations of the Landesanwaltschaft Bayern.

[20] Paragraph 19 of the order for reference, which cites as the legal basis for the Inntal Süd Regulation Paragraphs 12(1), first sentence, 20(2) and 26 of the BNatSchgG (which govern the power to adopt, amend or repeal regulations on landscape conservation areas) in conjunction with Paragraphs 51(1), point 3, and 52 of the BayNatSchG (which define the competent administrative authority – in this case, the Rural District of Rosenheim – and the procedure respectively).

[21] Judgment in *Wind turbines at Aalter and Nevele*, paragraph 65.

50. These are environmentally *sensitive* sectors as provided for in Annexes I and II to the EIA Directive and Directive 92/43/EEC, [22] which are systematically subject to an SEA. [23]

51. According to the referring court, the Inntal Süd Regulation was introduced for a *sector* (nature and landscape conservation) which does not satisfy the requirements of Article 5 of the SEA Directive and, therefore, is not one of those referred to in Article 3(2)(a) of that directive. [24]

52. What is more, it goes on to say, the Court of Justice has ruled on only very few occasions on the requirement of 'preparation' in connection with a specific sector, and for that reason it asks the Court to clarify:

– whether 'preparation' presupposes that the plan or programme is specifically and deliberately targeted at one of the sectors specified in Article 3(2)(a) of the SEA Directive; or

– whether it is sufficient for plans and programmes to affect such sectors (in this case, agriculture, forestry and land use) in practice, even if they were prepared for another sector not referred to in that provision (in this case, nature and landscape conservation). [25]

53. It is true that the Court has not been particularly demanding when analysing that condition with a view to determining whether a plan or programme requires an SEA prior to its adoption. It is sufficient for the plan or programme to concern, affect, relate to, or have an impact on, one of those sectors in order to be deemed to have been *prepared* for it, if that sector is one of those referred to in Article 3(2)(a) of the SEA Directive. [26]

54. The Court has also adopted a broad interpretation of the sensitive sectors listed in that article. In particular:

– it has stated that the reference to 'town and country planning' and 'land use' shows that 'the sector mentioned is not limited to land use *sensu stricto*, namely the dividing of land into zones and the defining of activities permitted within those zones, but necessarily covers a broader field'; [27]

– it has adopted an interpretation to the effect that an order establishing an urban land consolidation area which allows for derogation from the town planning regulations for plans concerning buildings and town and country planning comes within the 'town and country planning or land use' sector within the meaning of Article 3(2)(a) of the SEA Directive; [28]

[22] Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

[23] Nonetheless, if plans and programmes in these sensitive sectors determine the use of small areas at local level and the introduction of minor modifications to those plans and programmes, they are to be assessed only where the Member States determine that they are likely to have significant environmental effects (Article 3(3) of the SEA Directive). See recital 10 of that directive.

[24] Order for reference, paragraph 27. The referring court infers from recital 10, Article 3(2)(a) and Article 5 of the SEA Directive that a prior SEA is required for plans and programmes explicitly created for and focused on one of the sectors referred to in Article 3(2)(a), which do not include that at issue in this dispute.

[25] Order for reference, paragraph 29.

[26] See judgment in *Wind turbines at Aalter and Nevele*, paragraph 66; judgments of 8 May 2019, '*Verdi Ambiente e Società (VAS) – Aps Onlus' and Others* (C-305/18, EU:C:2019:384, paragraph 48); of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403; 'judgment in *Inter-Environnement Bruxelles and Others*'; paragraphs 42 to 45); judgment in *Thybaut and Others*, paragraphs 47 to 49; and judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816; 'judgment in *D'Oultremont and Others*'; paragraph 44).

[27] Judgment in *Inter-Environnement Bruxelles and Others*, paragraph 43.

[28] Judgment in *Thybaut and Others*, paragraphs 48 and 49.

– it has held that an SEA was required for a presidential decree, establishing protection measures in respect of an area comprising a mountain and certain metropolitan parks,[29] Article 1 of which stated inter alia that its objective was 'protection of the landscape'.[30]

55. In my opinion, there is no reason why national measures to protect nature and the landscape should not *be prepared for* the sensitive sectors identified in Article 3(2)(a) of the SEA Directive, even if they are not directly and specifically, but only indirectly, targeted at their conservation. Provided that the other requirements are met, therefore, such plans and programmes will generally require an SEA prior to their adoption.

56. In its written observations, the Commission argues that Article 3(2)(a) of the SEA Directive contains an exhaustive list of specific sectors which cannot be broadened or extended to other sectors not expressly provided for because this was the legislature's wish.[31]

57. The Court's judgments do not add new sensitive sectors to that exhaustive list. They simply adopt a non-restrictive interpretation of the sectors included on the list and refrain from requiring that the preparation of the plan or programme in question be directly and expressly targeted at one or more of those sectors, it being sufficient for the plan or programme to concern, relate to or have an impact on them.

58. I concur with the Court's interpretation and I see no reason to propose a change to the direction of that line of case-law.

59. The wording of Article 3(2)(a) of the SEA Directive endorses that reading of it. Several language versions use terminology which supports the application of that provision to any plan or programme prepared [in Spanish] *in respect of* sensitive sectors.[32] That phrase allows the text to be interpreted as meaning that the plan or programme does not have to be aimed expressly and exclusively at one of those sectors, but need only have a significant effect on it.

60. Contrary to the view expressed by the Czech and German Governments and Ireland, such an interpretation does not entail an unjustified extension of the scope of Article 3(2)(a) of the SEA Directive, to the detriment of paragraph 4 thereof. To my mind, that interpretation ensures that Member States do not circumvent the obligation to carry out an SEA for plans and programmes affecting sensitive sectors by disguising them through the use of different terminology, for example by stating that they are intended to protect nature and the landscape.

[29] This was Presidential Decree No 187/2011 of 14 June 2011 establishing protection measures in respect of the Mount Hymettus (Hymettos) area and the Goudi and Ilissia metropolitan parks in Greece, in order to bring the protection of that site into line with the spatial planning master plan for the greater Athens area. According to Article 1 of that Decree, 'the objective of the present decree is the effective protection of the Mount Hymettus area and its peripheral areas through the management and ecological conservation of habitats, flora and fauna, enhancement of its important ecological activities for the Attica basin, *protection of the landscape* and building control' (my emphasis).

[30] Judgment of 10 September 2015, *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 20).

[31] In the Proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment (COM/96/0511 final; OJ 1997 C 129, p. 14), the Commission advocated an open and non-exhaustive list of sensitive sectors plans and programmes in respect of which were subject to an obligation to carry out a prior SEA. Nonetheless, the Common Position adopted by the Council on 30 March 2000 (OJ 2000 C 137, p. 11) with a view to the adoption of a Directive of the European Parliament and of the Council on the assessment of the risks of certain plans and programmes on the environment decided to introduce an exhaustive list of sensitive sectors.

[32] Plans and programmes which 'se elaboren con respecto a' (Spanish-language version); which are 'élaborés pour' (French-language version); 'which are prepared for' (English-language version); which 'sono elaborati per' (Italian-language version); which 'tenham sido preparados para' (Portuguese-language version). The German-language version appears to be more restrictive, inasmuch as it speaks of plans and programmes which 'in den Bereichen … ausgearbeitet werden'.

61. In actual fact, the objections raised in that regard arise from a measure of terminological misunderstanding, inasmuch as nature and landscape conservation is not, strictly speaking, a sector that can be regarded as comparable to the sectors specifically listed in Article 3(2)(a) of the SEA Directive. If it could, the *inclusio unius, exclusio alterius* rule of interpretation would apply and the absence of that *purported sector* from the list would duly amount to its exclusion from it.

62. The fact remains, however, that the sectors listed in the provision in question cover very specific fields of activity (agriculture, fisheries, transport, energy, telecommunications, and so forth), whereas nature and landscape conservation is a cross-cutting objective which may in and of itself inform and justify measures that will, whether directly or otherwise, affect each of those sensitive sectors.

63. I do not see why the requirements of Article 5(1) of the SEA Directive can be 'adapted' [33] to plans and programmes in the sectors listed but cannot, on the other hand, be adapted to a regulation which directly targets nature and landscape conservation and indirectly impacts on those sectors. There is, in my opinion, nothing to stop a report being drawn up which identifies, describes and assesses the significant effects which implementing a plan or programme the objective of which is to protect nature and the landscape is likely to have on the environment. [34]

64. The Inntal Süd Regulation, while protecting nature and the landscape in one of the areas designated by the Bavarian legislation (which make up some 30% of the territory of that *Land*), simultaneously has an impact on some of the aforementioned *sensitive sectors*.

65. Bund Naturschutz describes its impact on 'land use', a sector expressly caught by Article 3(2)(a) of the SEA Directive. The Inntal Süd Regulation contains rules on, inter alia, the carrying out of construction work and the pursuit of farming and forestry activities, and its connection with 'land use' (including 'town and country planning') would appear to be unquestionable. [35]

66. The Inntal Süd Regulation lays down a requirement to obtain prior administrative consent for a whole host of activities in the protected area. [36] Those consents *defend* the land against a certain type of use and, in my view, constitute measures concerning the use of that land and town and country planning. Both of those sectors, as I have said, are referred to in Article 3([2])(a) of the SEA Directive.

[33] Order for reference, paragraph 27.

[34] There would be nothing to stop the – positive and negative – environmental effects of a provision such as the Inntal Süd Regulation (for example, the effects of reducing its scope by comparison with that of its predecessors so as to permit house building projects on previously protected land) from being identified, described and identified, notwithstanding that, because it does not include a reference framework, that provision does not necessarily have to be subjected to an SEA, as I shall examine below.

[35] The referring court recognises (paragraph 22 of the order for reference) that the 'Regulation lays down … a number of general obligations and obligations to obtain consent *for an extensive range of projects* and uses'. My emphasis.

[36] In point 43 of her Opinion in *CFE* and *Terre wallonne* (C-43/18 and C-321/18, EU:C:2019:56), Advocate General Kokott confined herself to saying that '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 [provided for in Article 3([2])(a) of Directive 2001/4[2]] are perfectly understandable'.

67. In particular, Paragraph 5 of the Inntal Süd Regulation lays down a requirement to obtain consent for the construction of immoveable property, [37] water management, [38] the conservation of meadows [39] and forestry exploitation, [40] among other activities. [41]

*4. Plan or programme which sets a reference framework for future development consent of projects covered by the EIA Directive*

68. A plan or programme prepared for certain sensitive sectors will be subject to a compulsory SEA, in accordance with Article 3(2)(a) of the SEA Directive, if it sets the framework for future development consent of projects listed in Annexes I and II to the EIA Directive. [42]

69. That article thus makes the obligation to carry out an SEA subject to the following conditions:

– the plans and programmes must set the framework for future development consent for the implementation of projects; and

– the projects must be listed in Annexes I and II to the EIA Directive.

*(a) Plan or programme providing for development consent for projects listed in Annexes I and II to the EIA Directive*

70. According to Article1(2) of the EIA Directive, the term 'project' covers:

– the execution of construction works or of other installations or schemes;

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

71. The term 'project' as defined (in particular under the first indent of Article 1(2)(a) of the EIA Directive), refers to works or interventions involving alterations to the physical aspect of the site. [43]

72. In accordance with Article 2(1) of the EIA Directive, projects to be made subject to assessment are those which are likely to 'have significant effects on the environment by virtue, inter alia, of their nature, size or location', as defined in Article 4 of that directive, which refers to the projects listed in Annexes I and II thereto. [44]

37 Paragraph 5(1), point 1.

38 Paragraph 5(1), points 4 and 5.

39 Paragraph 5(1), point 6.

40 Paragraph 5(1), points 8, 9 and 10.

41 According to Bund Naturschutz (p. 17 of the French-language version of its written observations), that same article could affect land use, and thereby impact on future construction work, inasmuch as it does not include a 'bar-to-opening clause' as interpreted by national case-law. The answer to that claim, however, will depend on the interpretation of domestic law.

42 Judgment of 8 May 2019, *'Verdi Ambiente e Società (VAS) – Aps Onlus' and Others* (C-305/18, EU:C:2019:384, paragraph 47), and judgment in *Wind turbines at Aalter and Nevele*, paragraph 65.

43 Judgments of 19 April 2012, *Pro-Braine and Others* (C-121/11, EU:C:2012:225, paragraph 31); of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 62); and of 9 September 2020, *Friends of the Irish Environment* (C-254/19, EU:C:2020:680, paragraph 32).

44 Judgments of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C-275/09, EU:C:2011:154, paragraph 25), and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 74).

73. A reading of Article 2(1) in conjunction with Article 4(1) of the EIA Directive makes it clear that the projects listed in Annex I thereto entail by their nature a risk of significant effects on the environment and must necessarily be the subject of an EIA. [45]

74. As regards the projects listed in Annex II, Member States must determine whether they are to be made subject to an EIA on the basis of either a case-by-case examination or pre-established thresholds or criteria.

75. The Inntal Süd Regulation includes provisions on activities that do not fall within the scope of the concept of 'project' under the EIA Directive, as well as on others that do.

76. For, as the Commission states, [46] the Inntal Süd Regulation covers some activities which, even though subject to the requirement to obtain prior administrative consent, fall outside the concept of project. [47] None of those activities entails the execution of construction works or of other installations or schemes, or of physical interventions in the natural surroundings or landscape either. Consequently, they are not consistent with the concept of 'project' under the EIA Directive and the legislation providing for them does not therefore require a prior SEA.

77. At the same time, however, the Inntal Süd Regulation lays down a requirement to obtain consent to carry on other activities in the conservation area which do fall within the scope of the projects listed in Annexes I and II to the EIA Directive. This is true of several of those described in Paragraphs 4 and 5 thereof. [48] It should be noted, moreover, that this is the assessment of the referring court too. [49]

78. The latter activities (subject to a requirement to obtain consent pursuant to Paragraph 5 of the Inntal Süd Regulation) fall full square, as I have said, within the projects listed in Annexes I and II to the EIA Directive. [50]

[45] Judgments of 24 November 2011, *Commission* v *Spain* (C-404/09, EU:C:2011:768, paragraph 74); of 11 February 2015, *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 20); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 75).

[46] Paragraph 22 of its written observations.

[47] These include: 'set[ting] up vending vans or … erect[ing], secur[ing] and operat[ing] sales kiosks and vending machines' (Paragraph 5(1), point 2(d); 'driv[ing] or park[ing] motor vehicles of any kind anywhere other than on roads, paths and spaces dedicated to public traffic or park[ing] them in such areas' (Paragraph 5(1), point 3); 'camp[ing] or park[ing] caravans (including folding trailers) or motorised dwelling vehicles anywhere other than on authorised sites, or allow[ing] others to do so' (Paragraph 5(1), point 12); 'allow[ing] aircraft within the meaning of the Luftverkehrgesetz (Law on Aviation) to take off or land anywhere other than at authorised aerodromes' (Paragraph 5(1), point 13).

[48] Paragraph 4 prohibits the carrying on 'in the landscape conservation area of any activity which alters the character of that area or which runs counter to the conservation objective pursued'. Paragraph 5 extends that prohibition to 'erect[ing], chang[ing] or changing the use of any kind of construction …' (subparagraph 1, point 1); 'lay[ing] overhead or underground wiring, cabling or piping and … erect[ing] masts' (subparagraph 1, point 2(b)); 'construct[ing] or substantially alter[ing] roads, paths or spaces, in particular campsites, sports fields, playgrounds and bathing areas or similar facilities' (subparagraph 1, point 2(c)); 'abstract[ing] water above ground or underground to an extent beyond that of permitted public use, … alter[ing] bodies of water, their banks or beds, the inflow or outflow of water or the piezometric level, … creat[ing] new bodies of water or … construct[ing] drainage systems' (subparagraph 1, point 4); 'clear[ing], fell[ing] or otherwise remov[ing], in the open countryside and anywhere other than in woodlands, individual trees, hedges, hedgerows or copses or field shrubs that characterise the landscape' (subparagraph 1, point 8); 'clear[ing] forest stands in full or in part, carry[ing] out initial afforestation or perform[ing] associated clear-cutting of more than 0.5 hectares, convert[ing] deciduous, mixed or alluvial forests into forests with a predominantly coniferous content or estasblish[ing] specialised crops (such as tree nurseries)' (subparagraph 1, point 9).

[49] Point 36 of this Opinion.

[50] Projects involving 'construction of motorways and express roads' (Annex I(7)(b)); 'construction of a new road of four or more lanes' (Annex I(7)(c)); 'water management projects for agriculture, including irrigation and land drainage projects' (Annex II(1)(c)) or 'initial afforestation and deforestation for the purposes of conversion to another type of land use' (Annex II(1)(d)).

79. Furthermore, Paragraph 5(1), point 1, of the Inntal Süd Regulation talks about the requirement to obtain consent to 'erect, change or change the use of *any kind of construction*),[51] even if these do not require consent under the building regulations'. Such construction forms part of several types of project listed in Annex I and II to the EIA Directive.

80. In short, the Inntal Süd Regulation could, in principle, be classified as a plan or programme which, for the purposes of the requirement to obtain a prior SEA, prescribes development consent for projects provided for in Annexes I and II to the EIA Directive.

81. The next step is to determine whether the Inntal Süd Regulation also contains a reference framework for the future preparation of projects covered by the EIA Directive.

*(b) Plan or programme which sets a framework for future development consent of projects*

82. Article 3(2)(a) of the SEA Directive states that the plan or programme must set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive.

83. It is this condition which presents the most difficulties when it comes to implementing the SEA Directive. As I have noted previously, '[the requirement] that the plans and programmes concerned must include the *legislative framework* for subsequent development consent for projects having significant effects on the environment … is key to the correct determination of the scope of the SEA Directive, without excessive interference in the legislative activities of the Member States'.[52]

84. The phrase 'which set the framework for future development consent' does not include any reference to national laws and therefore constitutes an autonomous concept of European Union law that must be interpreted uniformly throughout the territory thereof.[53]

85. Plans or programmes set a framework for future development consent of projects covered by the EIA Directive where they are 'measure[s] which establish …, 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'.[54]

86. This ensures that specifications likely to have significant environmental effects are subject to an environmental assessment[55] as part of a process laid down by legislation; conversely, it prevents criteria or detailed rules laid down in isolation from requiring an SEA.

87. The Court has stated that the 'significant body of criteria and detailed rules' must be construed qualitatively and not quantitatively. It is sufficient if that *body* is significant, rather than exhaustive, in order for the plan or programme establishing it to require an SEA. This also puts a

[51] My emphasis.

[52] Opinion in *Wind turbines at Aalter and Nevele*, point 74.

[53] Judgment in *Wind turbines at Aalter and Nevele*, paragraph 75.

[54] Judgments in *D'Oultremont and Others*, paragraph 49; in *Inter-Environnement Bruxelles and Others*, paragraph 53; in *CFE*, paragraph 61; and in *Wind turbines at Aalter and Nevele*, paragraph 67.

[55] Judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103; 'judgment in *Inter-Environnement Wallonie and Terre wallonne*'; paragraph 42); judgments in *Inter-Environnement Bruxelles and Others*, paragraph 54; and in *Wind turbines at Aalter and Nevele*, paragraph 68.

stop to strategies that may be designed to circumvent the obligations laid down in the SEA Directive, for example by splitting measures, thereby reducing the practical effect of that directive. [56]

88. National legislation sets a framework for the preparation of projects provided for in Annexes I and II to the EIA Directive only if that framework is suitable for shaping those projects. [57]

89. It is not necessary for the plan or programme to lay down express and detailed provisions governing projects, but it is essential, to my mind, for it to contain a sufficient number of criteria that must be taken into account in the determination of their content, preparation and implementation.

90. In other words, a plan or programme may have significant effects on the environment and will require a prior SEA if it introduces provisions on the location, characteristics, size and operating conditions of projects and the allocation of resources within them.

91. In accordance with that case-law, the following, inter alia, set a framework for future development consent of projects because they included a significant body of criteria and detailed rules for their preparation:

– Walloon legislation which concerned, in particular, 'technical standards, operating conditions (particularly shadow flicker), the prevention of accidents and fires (inter alia, the stopping of the wind turbine), noise level standards, restoration and financial collateral for wind turbines'; [58]

– rules enacted by the Region of Flanders (an order and a circular) containing provisions on the installation and operation of wind turbines, including measures relating to stroboscopic shadowing, safety and noise regulations;. [59]

– town planning regulations (of the Brussels Capital Region) containing certain requirements concerning the implementation of building projects and rules applicable to all buildings, that is to say to immovable property, of whatever nature, and to all their surroundings, including 'areas of open space' and 'areas on which building is permissible', whether public or private. [60]

92. Thus, the plans and programmes examined by the Court in *D'Oultremont and Others*, *Inter-Environnement Bruxelles and Others*, and *Wind turbines at Aalter and Nevele* set frameworks for development consent for projects and, for that reason, required an SEA prior to their adoption.

[56] Opinion in *Wind turbines at Aalter and Nevele*, point 90. See the judgments in *Inter-Environnement Bruxelles and Others*, paragraph 55; in *CFE*, paragraph 64; and in *Wind turbines at Aalter and Nevele*, paragraph 70.

[57] This idea is shared in their written observations by the Commission and by the Governments of Germany (paragraph 22 of its observations) and the Czech Republic (paragraphs 14, 19 and 23 of its observations), and Ireland (paragraphs 32 and 40 of its observations).

[58] Judgment in *D'Oultremont and Others*, paragraph 50, in which the Court went on to say that 'such standards have a sufficiently significant importance and scope in the determination of the conditions applicable to the sector concerned and the choices, in particular related to the environment, available under those standards must determine the conditions which actual projects for the installation and operation of wind turbine sites may be authorised in the future'.

[59] Judgment in *Wind turbines at Aalter and Nevele*.

[60] Judgment in *Inter-Environnement Bruxelles and Others*, paragraphs 48 to 50.

93. Is the same true of the Inntal Süd Regulation? It is for the referring court to analyse whether that is so and whether that regulation contains a significant number of criteria for determining the content, the procedure for preparing, and the implementation of projects provided for in Annexes I and II to Directive 2001/42. In its order for reference, it appears to say not, and, for the reasons I shall set out below, I am in essence of the same view.

94. The referring court doubts whether the Inntal Süd Regulation really does set a reference framework for the preparation of projects. In its view, that regulation 'does not contain any specific rules on development consent for projects [and] does not regulate (sector-specific) consent for projects, but serves primarily to prevent projects or, in any event, to ensure that they are ecologically sound'. [61]

95. The information provided to the Court in this case supports that assessment.

96. In the first place, the Inntal Süd Regulation lays down (Paragraph 4) a general prohibition, in the protected area, of any activity which alters the character of that area or runs counter to the conservation objective pursued. This general prohibition appears to be of a piece with that laid down at federal level by Paragraph 26(2) of the BNatSchG, and does not include any additional provisions which would enable the Inntal Süd Regulation to be classified as a plan or programme that sets a framework for the preparation of projects.

97. In the second place, it is true that Paragraph 5 of the Inntal Süd Regulation lays down a requirement to obtain consent for activities in the conservation area and sets precise limits in certain cases (Paragraph 5(1), point 1(a) and (c), Paragraph 5(2)(a), and Paragraph 5(1), point 9, for example). Nonetheless, most of the prohibitions and consents are of a general nature and further measures are required in order for those prohibitions and consents to have a direct bearing on the preparation and implementation of projects covered by the EIA Directive.

98. As the Commission states, [62] the vagueness of the provisions contained in the Inntal Süd Regulation means that the latter does not lay down criteria and detailed rules on development consent for projects. Since recourse must be had to other texts in order to prepare such projects, the Inntal Süd Regulation does not in and of itself offer a reference framework for development consent for projects covered by the SEA Directive.

99. The judgment in *CFE* is not at odds with what I have just explained, on the contrary in fact. The legislation at issue in that case was a decree of the Government of the Brussels Capital Region designating a Natura 2000 site. [63] In order to achieve the conservation and protection objectives it defined, that decree provided for preventive measures and laid down general and specific prohibitions. To that end, it reflected choices and formed part of a hierarchy of measures intended to protect the environment, including future management plans.

[61] Order for reference, paragraph 25.

[62] Written observations, paragraph 33.

[63] 'The Sonian forest, together with forest margins and surrounding wooded areas and the Woluwe valley – Sonian forest complex – Woluwe valley'.

100. Notwithstanding the referring court's assessment, [64] the Court of Justice held that, subject to those matters which are for the referring court to verify, 'a decree such as that at issue in the main proceedings, whereby a Member State designates a [special area of conservation (SAC)], and makes provision as to conservation objectives and certain preventive measures, is not among the "plans and programmes" in respect of which an environmental impact assessment is required'. [65]

101. The similarities between Paragraph 5 of the Inntal Süd Regulation and Article 15 of the Belgian Decree are many.

102. In short, I propose that the Court interpret Article 3(2)(a) of the SEA Directive as meaning that its scope does not extend to a regulation intended to protect nature and the landscape which lays down general prohibitions (with exceptions) and obligations to obtain consent, but does not contain sufficiently detailed rules on the content, preparation and implementation of projects listed in Annexes I and II to the SEA Directive, notwithstanding that it includes certain measures relating to activities forming part of those projects.

### *B. Third question referred*

103. The referring court wishes to ascertain whether Article 3(4) of the SEA Directive must be interpreted as meaning that a regulation such as that at issue here constitutes, at least, a plan or programme with a significant impact on the environment in sectors other than those provided for in paragraph 2 of that provision.

104. I would recall that Article 3(4) of the SEA Directive extends the scope of that directive. Unlike Article 3(2), it does not automatically assume that certain plans and programmes will have significant effects on the environment but requires the Member States to determine whether that is the case. The plans and programmes to which it extends the Directive are those that set a framework for future development consent of projects but which are not covered by Article 3(2).

105. The obligation laid down in Article 3(4) of the SEA Directive (in common with that laid down in Article 3(2)(a) thereof) depends on whether the plan or programme in question sets a framework for future development consent of projects. [66]

106. As I have proposed that the Court's answer to the first two questions referred should be that a regulation such as that at issue here does not set a framework for future development consent of projects, I am bound to conclude that it also does not fall within the scope of plans and programmes in other sectors for which Article 3(4) of the SEA Directive requires a prior SEA.

107. Both plans and programmes in sensitive sectors, under Article 3(2), and plans and programmes in non-sensitive sectors but having an impact on the environment, under Article 3(4) of the SEA Directive, must set a framework for development consent for, and the implementation of, specific projects.

[64] The referring court took the view that the designation of a site as an SAC has legal effects on the adoption of plans and on the consideration of applications for permits affecting the site, both procedurally and in terms of the criteria according to which decisions are made, and therefore contributed to setting the framework for activities that are, in principle, to be accepted, encouraged or prohibited, and thus is not unconnected with the concept of 'plan or programme' (judgment in *CFE*, paragraph 63).

[65] Judgment in *CFE*, paragraphs 62 and 74.

[66] Judgment in *CFE*, paragraph 60.

108. For that reason, there would be an inconsistency in dismissing the proposition that the Inntal Süd Regulation sets a framework for the implementation of projects in sensitive sectors, while, at the same time, accepting that it sets such a framework in the case of non-sensitive sectors.

### *C. Possible limitation of the effects of the judgment of the Court*

109. The Landesanwaltschaft Bayern and the German Government would like the Court to limit the effects of its judgment if it finds that the Inntal Süd Regulation required a prior SEA, claiming that the Court should restrict the temporal effects of the judgment or temporarily suspend the ousting effect of the primacy of the SEA Directive.

110. In the light of the foregoing, it is my view that there is no requirement to draw up an SEA before adopting legislation such as the Inntal Süd Regulation. This allays the fears of a legal vacuum expressed by the Landesanwaltschaft Bayern and the German Government.

111. There is therefore no need to consider limiting the effects of the interpretative judgment to be given by the Court or suspending the ousting effect of the primacy of the SEA Directive on a national provision that is contrary to it.

112. Nonetheless, in the event that the Court does not share my view, and decides that a provision such as the Inntal Süd Regulation requires a prior SEA, I shall, in the alternative, analyse the options for limiting the consequences of its judgment.

113. The referring court notes that, in the Federal Republic of Germany, the view has hitherto been taken that there is no need for nature and landscape conservation areas, including the special areas of conservation under Directive 92/43,[67] to be made subject to a prior SEA. It goes on to say that:

– if the Court were to establish the existence of an obligation under EU law to conduct an SEA or, in any event, a prior examination under national law, it is likely that many designations of protected areas made after the time limit for transposing the SEA Directive, that is to say after 21 July 2004, would be vitiated by procedural irregularities;

– in accordance with national law, such an irregularity would in principle render the corresponding regulatory provision ineffective.[68] In this way, the obligation to carry out an SEA or a prior examination could 'considerably lower the level of nature and landscape conservation achieved in Germany'.[69]

[67] This reference for a preliminary ruling does not contain a question concerning the natural habitats and wild flora and fauna of Community interest governed by Directive 92/43. The requirements relating to plans and programmes under the SEA Directive cannot be applied without further consideration to the legal rules governing those habitats and species.

[68] According to the referring court (paragraph 16 of the order for reference), the ineffectiveness [of the regulatory provision] could be relied on by anyone wishing to implement a project in the protected area. In that event, the competent court would be obliged to examine the validity of the Inntal Süd Regulation as an ancillary issue, and in the absence of any time limit for such a claim under national law, since regulations – unlike administrative measures – do not become final.

[69] Paragraph 16 of the order, *in fine*.

114. Those assertions do not, however, prompt the referring court to seek a limitation of the effects of the (future) judgment of the Court. Its silence in this regard is, in my opinion, a significant indication that there are insufficient grounds of justification for such a limitation. [70]

115. The Landesanwaltschaft Bayern and the German Government, on the other hand, laid emphasis at the hearing on the adverse consequences for the environment that would flow from invalidating the sites designated as nature and landscape conservation areas, reiterating the claim they had already asserted in the written procedure. [71]

116. In order to remedy that situation, Bund Naturschutz proposed at the hearing that the SEA Directive should not be applied to the *initial* designation of nature conservation areas, which would have a positive impact. Only *subsequent* amendments to [the designation of] those areas would be subject to the Directive, inasmuch as they reduce environmental protection.

117. I do not concur with that approach. The SEA does not distinguish between initial consent for plans and programmes and their subsequent amendment, for the purposes of the requirement for a prior SEA. What is more, the Court has stated that an SEA is also required for plans and programmes having a positive impact on the environment. [72]

118. I would recall that, according to the Court, 'in the absence of provisions in [Directive 2001/42] on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all "plans" or "programmes" likely to have "significant environmental effects" within the meaning of Directive 2001/42 are subject to an environmental assessment prior to their adoption in accordance with the procedural requirements and the criteria laid down by that directive'. [73]

119. It is also settled case-law that, under the principle of sincere cooperation (Article 4(3) TEU), Member States are required to eliminate the unlawful consequences of such a breach of EU law. Accordingly, competent national authorities, including national courts hearing an action brought against an act of domestic law that is contrary to EU law, have an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an SEA. [74]

120. In accordance with that general obligation, a plan or programme adopted without an SEA, in breach of the SEA Directive, should be suspended, annulled or disapplied by the national court in order to give effect to the primacy of EU law. The same fate should certainly await development consents for projects based on such plans or programmes. [75]

[70] The referring court points up (in paragraph 16 of the order for reference) the importance of the issues raised but it does not, as I have said before, expressly ask the Court of Justice to limit the effects of any judgment declaring the Inntal Süd Regulation to be incompatible with the SEA Directive.

[71] They also drew attention to the administrative burden that would be associated with reopening proceedings for designating sites and conducting SEAs, if they were compulsory.

[72] Judgment in *CFE*, paragraph 41.

[73] Judgments in *Wind turbines at Aalter and Nevele*, paragraph 82; and of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603; 'judgment in *Association France Nature Environnement*'; paragraph 30).

[74] This consideration and those I shall set out in the points that follow are consistent with the ones contained in the Opinion in *Wind turbines at Aalter and Nevele*.

[75] See, to this effect, judgment in *Association France Nature Environnement*, paragraphs 31 and 32; judgment of 12 November 2019, *Commission* v *Ireland (Derrybrien Wind Farm)* (C-261/18, EU:C:2019:955, paragraph 75); and judgment in *Wind turbines at Aalter and Nevele*, paragraph 83.

*1. Temporal limitation of the effects of the judgment on the request for a preliminary ruling*

121. Judgments of the Court of Justice on requests for a preliminary ruling on interpretation are effective from the point at which the rule of EU law forming the subject of interpretation enters into force.[76]

122. It is only on a very restrictive basis that the Court permits exceptions to that rule, in application of the general principle of legal certainty inherent in the EU legal order. It does so only if the persons concerned have acted in good faith and if there is a risk of serious difficulties, the burden of proving the presence of those conditions falling to the State relying on them.[77]

123. The arguments put forward by the Landesanwaltschaft Bayern and the German Government with respect to the adoption of the Inntal Süd Regulation at issue do not strike me as being sufficient to justify their claim.

124. From the point at which the Court interpreted Articles 2 and 3 of the SEA Directive in its 2012 judgment in *Inter-Environnement Wallonie and Terre wallonne*, it was at least foreseeable that the German rules governing conservation areas were likely, depending on their content, to be classified as plans or programmes subject to the obligation to carry out a prior SEA, even though the national rules did not require one.

125. In the same way, it was foreseeable that the Court would take the view that the requirement to carry out an SEA applied not only to plans and programmes adversely affecting the environment but also to those having a positive impact on it (such as those providing for nature conservation areas).[78]

126. The fact that the Commission did not bring infringement proceedings against the Federal Republic of Germany (for having failed to carry out an SEA prior to the adoption of plans and programmes concerning nature and landscape conservation areas) is not, in itself, a sufficient ground on which to claim that the German authorities acted in good faith.

[76] In accordance with settled case-law, the interpretation which the Court gives to a rule of EU law, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (judgments of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 60, and of 16 September 2020, *Romenergo and Aris Capital*, C-339/19, EU:C:2020:709, paragraph 47).

[77] Judgments of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 61), and of 16 September 2020, *Romenergo and Aris Capital* (C-339/19, EU:C:2020:709, paragraphs 48 and 50). Paragraph 49 of the latter judgment explains that the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed (judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 62 and the case-law cited).

[78] Judgment in *CFE*, paragraph 41. It had already previously stated that this was the case with the environmental assessment of projects subject to the EIA Directive, in the judgment of 25 July 2008, *Ecologistas en Acción-CODA* (C-142/07, EU:C:2008:445, paragraph 41).

127. Neither do I consider to be compelling the reasons given by those authorities to support their argument that the annulment of the rules on nature and landscape conservation would *ipso facto* have 'catastrophic' consequences in Germany, as one of the interveners asserted at the hearing. Militating against those reasons is the fact:

– first, that the ineffectiveness of the Inntal Süd Regulation might even have a positive impact on the environment if, as Bund Naturschutz argues, this rendered the previous regulation applicable and thus increased the size of the conservation area formerly in place, which the latter regulation reduced; and

– secondly, that the continued applicability to that area and to all similar areas of the remaining sectoral rules allows administrative control to be exercised over many of the activities having a potential impact on the environment.

*2. Temporary suspension of the ousting effect of the primacy of Directive 2001/42 on national law contrary thereto*

128. The Court has recognised that the ousting effect which a rule of EU law has on national law that is contrary to it may, exceptionally and in the light of overriding considerations of legal certainty, be temporarily suspended. [79]

129. The Court reserves that right exclusively for itself, and it follows from its case-law that:

– if national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily, the uniform application of EU law would be undermined; [80]

– if national law permits it, a national court may, by way of exception and following a case-by-case examination, limit the temporal effectiveness of a declaration as to the illegality of a provision of national law adopted in breach of the obligations under the SEA Directive.

130. There is disagreement between the parties to the dispute as to whether German law allows the rules on nature conservation areas to be temporarily maintained after they have been annulled. The Landesanwaltschaft Bayern says not, [81] but, according to Bund Naturschutz, the referring court's case-law tolerates such temporary application in the event of annulment on formal grounds. [82]

131. It is for the referring court to determine whether it has available to it the procedural mechanisms that would enable it to maintain the rules on nature and landscape conservation temporarily in force notwithstanding their invalidity [83]. If not, the case-law of the Court of Justice on the temporal limitation of the ousting effect of primacy could not be applied.

[79] Judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 66 and 67), and judgment in *Association France Nature Environnement*, paragraph 33.

[80] Judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 177), and judgment in *Wind turbines at Aalter and Nevele*, paragraph 84.

[81] Paragraph 50 of its written observations.

[82] Written observations of Bund Naturschutz, p. 25, which cites the judgment of the Bundesverwaltungsgericht (Federal Administrative Court) of 25 October 1979 – 2 N 1/78 – BVerwGE 59, 48-56, paragraph 11. At the hearing, the German Government and the Landesanwaltschaft Bayern denied that that case-law was transposable to the case at issue.

[83] After the hearing, the Court has been informed of the introduction in Paragraph 22 BNatschGH of subparagraphs 2a and 2b, which allow the maintenance of conservation areas.

132. In the event that German domestic law permitted this, it would still have to be verified whether the temporary ousting of primacy is justified in the light of an overriding consideration relating to environmental protection and whether the remaining conditions laid down in the judgment in *Inter-Environnement Wallonie Terre wallonne* are met. [84]

133. The overriding requirement in the general interest on which the German authorities rely is that protection of the environment would be diminished if they had to repeal the Inntal Süd Regulation at issue and others like it.

134. In my opinion, it has not been fully demonstrated that the potential invalidity or ineffectiveness [85] of the regulations concerning nature and landscape conservation areas (on the ground that they had not been the subject of a prior SEA) would inevitably create a legal vacuum of such magnitude as to endanger environmental protection. There are a number of arguments that can be put forward to counter that proposition:

– the areas protected prior to the entry into force of the SEA Directive in 2004 would not be affected;

– in those areas granted protection after 2004, the loss of effectiveness (or, where appropriate, nullity) of regulations adopted without a prior SEA may be at least partially 'neutralised' by applying the previous protective provisions, as I have already explained;

– if, as the referring court notes, regulations which were adopted without a prior SEA but which were not directly contested at the time of their adoption may be challenged by an indirect mechanism (an objection of illegality or an ancillary action), it has not been shown that the judgment bringing such an action to an end is effective *erga omnes*; [86]

– the rules at federal and *Land* level transposing the content of the SEA Directive continue to be binding, enabling the implementation of projects detrimental to the environment to be halted;

– also still in place are the mechanisms available under sectoral legislation for controlling activities which are potentially harmful to the environment through the application of regulations relating to town planning, building, water management, mining, excavation and earth moving, agriculture, forestry, tourism and other similar activities.

[84] Paragraphs 59 to 63. To the same effect, judgment in *Association France Nature Environnement*, paragraph 43.

[85] It falls to the referring court to determine whether, under domestic law, the absence of an SEA prior to the Inntal Süd Regulation results in the invalidity (nullity) or ineffectiveness of that regulation.

[86] It is for the referring court to establish whether a judgment given in an action against a refusal to grant development consent for an individual project, following an assessment of the formal defect vitiating the regulation in question, is to be effective *erga omnes* or only in relation to the *indirect* action concerned. In this connection, I refer to points 125 to 130 of my Opinion in *Wind turbines at Aalter and Nevele*.

## IV. Conclusion

135. In the light of the foregoing, I suggest that the Court's answer to the Bundesverwaltungsgericht (Federal Administrative Court, Germany) should be as follows:

(1) Article 3(2)(a) 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 must be interpreted as meaning that its scope does not extend to a regulation intended to protect nature and the landscape which lays down prohibitions (with exceptions) and obligations to obtain consent but which does not contain sufficiently detailed rules on the content, preparation and implementation of projects listed in Annexes I and II to 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, notwithstanding that it provides for certain measures relating to activities forming part of those projects.

(2) Article 3(4) of Directive 2001/42 must be interpreted as meaning that it is not applicable to a regulation on nature and landscape conservation which does not constitute a plan or programme having a substantial impact on the environment in sectors other than those referred to in paragraph 2 of that article, because it does not contain sufficiently detailed rules on the content, preparation and implementation of projects listed in Annexes I and II to Directive 2011/92.