

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 4 March 2010<sup>1</sup>

**I – Introduction**

1. The references for a preliminary ruling from the Belgian Conseil d'État (Council of State) concern the scope 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<sup>2</sup> ('the SEA Directive', SEA standing for strategic environmental assessment). What has to be considered is whether the action programmes referred to in Article 5 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources<sup>3</sup> ('the Nitrates Directive') require an environmental assessment.

2. The SEA Directive, together with Directive 85/337/EEC of 27 June 1985 on the

assessment of the effects of certain public and private projects on the environment<sup>4</sup> ('the EIA Directive'), is intended to ensure that the competent authorities take into account any significant effects of projects on the environment when they take decisions affecting the implementation of projects. The EIA Directive introduced such assessments in the context of development consent of projects. The environmental assessment for which the SEA Directive provides is, on the other hand, carried out as part of decision-making procedures which precede the procedures for granting consent for individual projects, but may affect them.

3. The Nitrates Directive and the action programmes to be established on the basis thereof lay down rules on the fertilisation of agricultural land. Farmers fertilise their land not only to promote the growth of their crops but

1 — Original language: German.

2 — OJ 2001 L 197, p. 30.

3 — OJ 1991 L 375, p. 1, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1).

4 — OJ 1985 L 175, p. 40, as last amended by Directive 2003/35/EC (OJ 2003 L 156, p. 17).

also to dispose of manure. If a farm applies more manure than the crops can process, the result is overfertilisation, which regularly pollutes water.

4. In the present case the question therefore arises whether, in the context of action programmes pursuant to the Nitrates Directive, decisions are taken which so affect the subsequent development consent of projects that the action programmes require an environmental assessment. In this context the Court must consider for the first time some of the main aspects of the SEA Directive, especially the meaning of the terms ‘plan’ and ‘programme’ and the circumstances in which they set a framework for development consent of projects.

‘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.’

6. Plans and programmes are defined in Article 2(a):

‘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

## II – Legal context

### A – *The SEA Directive*

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

- which are required by legislative, regulatory or administrative provisions.’

7. Article 3 specifies the plans and programmes which require an assessment. Article 3(1) to (5) in particular are relevant:

an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

‘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.

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.

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

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.

(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

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) which, in view of the likely effect on sites, have been determined to require

6. ...’

8. Annex II sets out the criteria for determining the likely significance of environmental effects as referred to in Article 3(5). The first indent of point 1 is of particular relevance:

Protocol contains rules similar to those laid down in the SEA Directive and is transposed by that directive.<sup>7</sup>

1. The characteristics of plans and programmes, having regard, in particular, to

B – *The Nitrates Directive*

- the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,

10. Owing to the pollution of waters caused by nitrates from agricultural sources, the Member States designate certain areas as vulnerable, in accordance with Article 3 of the Nitrates Directive. For these areas they are required by Article 5 to establish ‘action programmes’:

...’

9. It should also be pointed out that since 2008 the European Union has been a contracting party to the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context<sup>5</sup> (‘the Protocol on Strategic Environmental Assessment’).<sup>6</sup> That

‘1. Within a two-year period following the initial designation referred to in Article 3(2) or within one year of each additional designation referred to in Article 3(4), Member States shall, for the purpose of realising the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.

2. ...

5 — OJ 2008 L 308, p. 35.

6 — Council Decision 2008/871/EC of 20 October 2008 on the approval, on behalf of the European Community, of the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 33).

7 — See the declaration by the European Community in accordance with Article 23(5) of the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 34).

3. Action programmes shall take into account:

- (a) available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources;
- (b) environmental conditions in the relevant regions of the Member State concerned.

4. Action programmes shall be implemented within four years of their establishment and shall consist of the following mandatory measures:

- (a) the measures in Annex III;
- (b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which have been superseded by the measures in Annex III.

5. Member States shall moreover take, in the framework of the action programmes, such

additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1. In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.

6. Member States shall draw up and implement suitable monitoring programmes to assess the effectiveness of action programmes established pursuant to this Article.

Member States which apply Article 5 throughout their national territory shall monitor the nitrate content of waters (surface waters and groundwater) at selected measuring points which make it possible to establish the extent of nitrate pollution in the waters from agricultural sources.

7. Member States shall review and if necessary revise their action programmes, including any additional measures taken pursuant to paragraph 5, at least every four years. They shall inform the Commission of any changes to the action programmes.'

C – *The EIA Directive*

significant environmental effects. Point 1 of Annex II refers inter alia to the following projects:

11. The EIA Directive forms the connecting link for the obligation to carry out assessments that is laid down in Article 3(2)(a) of the SEA Directive.

‘(b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;

12. Pursuant to Article 4(1) of the EIA Directive, projects of the classes listed in Annex I must be made subject to an assessment of their impact on the environment. Point 17 of Annex I refers to certain installations for raising livestock:

...

(e) Intensive livestock installations (projects not included in Annex I)’.  
‘17. Installations for the intensive rearing of poultry or pigs with more than:

‘17. Installations for the intensive rearing of poultry or pigs with more than:

14. Article 8 governs the use of the results of assessments:

(a) 85 000 places for broilers, 60 000 places for hens;

‘The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.’

(b) 3 000 places for production pigs (over 30 kg); or

(c) 900 places for sows.’

D – *Directive 2003/35*

13. Projects listed in Annex II must undergo an assessment if they are likely to have

15. Reference must also be made to Directive 2003/35/EC of the European Parliament

and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.<sup>8</sup> Article 2 lays down rules on public participation in relation to plans and programmes. Article 2(5), however, excludes from those rules plans and programmes set out in Annex I whose effects on the environment are already assessed under the SEA Directive. Plans and programmes under Article 5(1) of the Nitrates Directive are referred to in point (c) of Annex I to Directive 2003/35.

*E – The nature conservation directives*

16. The assessment required by Article 3(2)(b) of the SEA Directive relates to the nature conservation legislation laid down in Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora<sup>9</sup> ('the Habitats Directive') and in Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds<sup>10</sup> ('the Birds Directive'). Those directives provide for the designation of, respectively, areas of conservation and protection areas (collectively 'areas of conservation') for certain habitat types and species. Article 6(3) and (4) of the Habitats Directive, which,

pursuant to Article 7, also apply to bird protection areas, lay down rules on the assessment and authorisation of plans and projects which are likely to have a significant adverse effect on such areas:

'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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. ...'

<sup>8</sup> — Cited in footnote 4.

<sup>9</sup> — OJ 1992 L 206, p. 7, as last amended by Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 368).

<sup>10</sup> — OJ 1979 L 103, p. 1, as last amended by Directive 2006/105.

F – *Belgian law*

19. The Conseil d’État therefore referred the following questions to the Court:

17. According to information provided by the referring court, on 15 February 2007 the Région wallonne (Region of Wallonia) adopted the order amending Book II of the Environment Code, which forms the Water Code, as regards the sustainable management of nitrogen in agriculture.<sup>11</sup> That order sets out the region’s action programme under Article 5 of the Nitrates Directive.

1. Is a nitrogen management programme relating to designated vulnerable zones that is required to be established by Article 5(1) of the Nitrates Directive a plan or programme under Article 3(2)(a) of the SEA Directive, which is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and does it set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive?

### III – Main proceedings and reference for a preliminary ruling

18. The environmental organisations Terre wallonne and Inter-Environnement Wallonie each brought an action before the Conseil d’État challenging the order of the Region of Wallonia laying down the region’s action programme pursuant to Article 5 of the Nitrates Directive. They complained *inter alia* that the region should have carried out an environmental assessment in accordance with the SEA Directive.

2. Is a nitrogen management programme relating to designated vulnerable zones that is required to be established by Article 5(1) of the Nitrates Directive a plan or programme under Article 3(2)(b) of the SEA Directive which, in view of the likely effect on sites, requires an assessment pursuant to Article 6 or 7 of the Habitats Directive, in particular when the nitrogen management programme in question applies to all the vulnerable zones designated in the Region of Wallonia?

<sup>11</sup> — *Moniteur Belge* No 68 of 7 March 2007, p. 11118 et seq.



3. Is a nitrogen management programme relating to designated vulnerable zones that is required to be established by Article 5(1) of the Nitrates Directive a plan or programme, other than one of those referred to in Article 3(2) of the SEA Directive, which sets the framework for future development consent in regard to which the Member States must under Article 3(4) determine whether it is likely to have significant environmental effects in accordance with Article 3(5)?
- Article 3 of the SEA Directive, namely plans and programmes:
- which set the framework for future development consent of projects subject to the EIA Directive (Article 3(2)(a) of the SEA Directive; see B below),

20. Inter-Environnement Wallonie and the Region of Wallonia, which are parties to the main actions, the Kingdom of Belgium, the Czech Republic and the Commission participated in the written proceedings. With the exception of the Czech Republic, they also attended the hearing on 21 January 2010.

- whose likely effects on areas of conservation will require an assessment of the implications under the Habitats Directive (Article 3(2)(b) of the SEA Directive; see C below) or

- which set the framework for the future development consent of other projects likely to have significant environmental effects (Article 3(4) and (5) of the SEA Directive; see D below).

#### IV – Legal appraisal

21. The questions referred by the Conseil d'État concern three cases in which an environmental assessment is required by
22. The first question raised by all these cases is whether action programmes under Article 5 of the Nitrates Directive are in fact plans or programmes within the meaning of the SEA Directive (see A(1) below) and whether it is necessary to consider abstractly whether action programmes may have significant effects on the environment (see A(2) below).

A – *Preliminary observations*

(b) below), its systemic context (see (c) below) and the Protocol on Strategic Environmental Assessment with its objectives similar to those of the SEA Directive (see (d) below) also indicate that legislative measures cannot be excluded from the scope of the SEA Directive from the outset.

1. The terms ‘plans’ and ‘programmes’

a) Directive 2003/35

23. Belgium argues that the order of the Region of Wallonia at issue is legislation and not therefore a plan or programme within the meaning of the SEA Directive. That view is based on the correct premiss that an action programme pursuant to Article 5 of the Nitrates Directive, and thus the order, contain of necessity rules which might also be found in laws. Nor, if the meaning of the words is considered in isolation, does it seem impossible for the terms ‘plan’ and ‘programme’ to be understood as excluding laws. They might be used to indicate future intentions requiring further implementation, but not legislation which applies directly.

25. The most convincing argument that action programmes pursuant to Article 5 of the Nitrates Directive constitute plans or programmes within the meaning of the SEA Directive emerges from another directive, Directive 2003/35, to which the referring court has already alluded. That directive concerns *inter alia* public participation in respect of the drawing up of certain plans and programmes relating to the environment.

26. Action programmes pursuant to Article 5 of the Nitrates Directive are explicitly referred to as plans and programmes in Article 2(2) of Directive 2003/35 and point (c) of Annex I thereto.

24. The legislature did not, however, adopt this restrictive meaning. In the case of action programmes pursuant to Article 5 of the Nitrates Directive, and thus of the order at issue, this is evident from their very designation as programmes. The fact that that designation in the Nitrates Directive has no other substance than that under the SEA Directive is confirmed by Directive 2003/35 (see (a) below). Yet the objectives of the SEA Directive (see

27. The legislature was also aware that the SEA Directive likewise covers plans and programmes, since it laid down rules in Article 2(5) of Directive 2003/35 for situations in which both directives might otherwise apply: the public participation for which Directive 2003/35 provides is to take place only if the

plan or programme concerned has not been subject to an environmental assessment pursuant to the SEA Directive.

28. It would be inconsistent for the legislature to have designated action programmes explicitly as plans and programmes in Directive 2003/35, and even to have acknowledged the possibility of an environmental assessment pursuant to the SEA Directive, whilst action programmes cannot be plans or programmes within the meaning of the SEA Directive on the ground that they must contain legislation.

b) The objectives of the SEA Directive

29. The inclusion of legislative measures also corresponds to the aims of the SEA Directive. According to Article 1, the objective of the SEA 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 by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

30. The interpretation of the pair of terms 'plans' and 'projects' should consequently

ensure that measures likely to have significant effects on the environment undergo an environmental assessment. It is therefore advisable, as with the EIA Directive,<sup>12</sup> to focus primarily on whether the measures in question may have significant effects on the environment. Legislation may have such effects, especially if it permits damage to be done to the environment.

31. The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.

32. 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.<sup>13</sup> Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when

12 — See, for example, Case C-72/95 *Kraaijveld and Others* [1996] ECR I-5403, paragraphs 32 and 39; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52; Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 32; and Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 33.

13 — 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.

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.

33. An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included.

34. Various kinds of requirements concerning the approval of projects may have a significant effect on the environment. Area-related plans may specify with varying degrees of accuracy where the implementation of certain projects is permissible. But measures which stipulate how projects are to be implemented may similarly have significant effects on the environment. Thus a (fictitious) set of rules permitting the discharge of untreated manure from intensive livestock installations directly

into natural waters would have significant effects on the environment.

35. Significant effects on the environment can therefore be taken fully into account only if they are assessed in the case of all preparatory measures which may result in projects subsequently implemented having such effects. Accordingly, the interpretation of the terms 'plan' and 'programme' must be broad enough to include legislation.

c) The systemic context of the terms 'plan' and 'programme' within the SEA Directive

36. The rules laid down in the SEA Directive confirm this interpretation of the terms 'plan' and 'programme.'

37. According to Article 2(a) of the SEA Directive, 'plans and programmes' for the purposes of the directive means 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.

measures from its scope.<sup>14</sup> The SEA Directive does not provide for that exception, although it is far more likely to affect legislative proposals than the EIA Directive.

38. In that provision the pair of terms is not defined, but merely qualified: for the purposes of the directive 'plans and programmes' means plans and programmes which satisfy certain – additional – requirements.

41. The second requirement allays Belgium's fear that every possible law should be the subject of an environmental assessment. A comprehensive obligation to assess the environmental impact of laws is precluded if only because the second indent of Article 2(a) of the SEA Directive extends only to plans and programmes which are *required* by legislative, regulatory or administrative provisions. Freely taken political decisions on legislative proposals are not therefore subject to the obligation to carry out assessments.

39. However, the first of those requirements at least makes it clear that the legislative procedure by which the Region of Wallonia's order was adopted does not preclude the application of the SEA Directive, since the first indent explicitly provides for the possibility of plans and programmes being prepared through a legislative procedure. This, moreover, supports the view that measures which, in substance, are of a legislative nature may also be plans or programmes.

42. The Region of Wallonia's action programme is not, however, excluded from environmental assessment by that limitation. The action programme is based on a legislative obligation, namely Article 5 of the Nitrates Directive. It must include mandatory measures which result from the annexes to the directive, such as rules on

40. In this context Inter-Environnement Wallonie rightly emphasises a difference from the EIA Directive: Article 1(5) of the EIA Directive explicitly excludes legislative

14 — See *WWF and Others*, paragraph 55 et seq., and *Linster*, paragraph 41 et seq. (both cited in footnote 12).

the application of fertilisers (Article 5(4) and points 1 and 2 of Annex III).<sup>15</sup>

43. Finally, the rules on the obligation to carry out assessments that are laid down in Article 3(2)(a) and (4) of the SEA Directive also support the inclusion of laws. According to those provisions, plans and programmes may set the framework for development consent of projects. The first indent of the first point of Annex II indicates that the legislature's primary interest in this respect was the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources. Rules on those aspects may be classified as being of a legislative nature.

#### d) The Protocol on Strategic Environmental Assessment

44. The Protocol on Strategic Environmental Assessment,<sup>16</sup> an international agreement

of the European Union within the UN-ECE framework, similarly shows that the environmental assessment of legislative measures is not a distant prospect. Article 13(1) requires the contracting parties to endeavour to ensure that environmental, including health, concerns are considered and integrated to the extent appropriate in the preparation of their proposals for policies and legislation that are likely to have significant effects on the environment, including health. The aim in this context is not only to integrate the environment into the considerations in some form or other, but, according to Article 13(2), also to ensure that the appropriate principles and elements of the Protocol are considered.

45. Although no mandatory obligation to subject legislative proposals to environmental assessment can be inferred from that provision, the parties to the Protocol, including therefore the European Union, clearly consider such an assessment to be possible and appropriate.

#### e) Interim conclusion

46. To summarise, it can be said that action programmes pursuant to Article 5 of the

<sup>15</sup> — The judgments in Case C-266/00 *Commission v Luxembourg* [2001] ECR I-2073, Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267 and Case C-221/03 *Commission v Belgium* [2005] ECR I-8307 on the inadequate transposition of the Nitrates Directive illustrate the legislative nature of the action programmes.

<sup>16</sup> — See point 9 above.

Nitrates Directive are plans or programmes within the meaning of the SEA Directive although they are of a legislative nature.

terms, so that a separate assessment of this possibility is not necessary.<sup>17</sup>

2. The possibility of significant effects on the environment

47. The Commission takes the view that the obligation to carry out environmental assessments pursuant to Article 3(1) of the SEA Directive requires in each case that the plan or programme in question be likely to have significant effects on the environment. Article 3(1) of the SEA Directive might in fact be understood to mean that the possibility of significant effects on the environment is always a separate condition to which the obligation to carry out environmental assessments is subject. This would accord with the objective of the directive as defined in Article 1 of ensuring that environmental assessments are carried out of plans and programmes likely to have significant effects on the environment.

49. Article 3(2) of the SEA Directive gives clear expression to this by stipulating that an environmental assessment is to be carried out for *all* plans and programmes meeting the requirements laid down in subparagraph (a) or (b). A further requirement that significant effects on the environment are possible would not be compatible with this.

48. However, when the various rules on the obligation to carry out assessments are considered, it becomes apparent that they put the possibility of significant effects on the environment in concrete

50. The second case in which assessment is obligatory, Article 3(2)(b) of the SEA Directive, gives concrete expression to the requirement of significant effects on the environment. The determining factor is a specific form of the possibility of significant effects on the environment, namely whether an assessment of implications pursuant to Article 6 of the Habitats Directive is necessary. Such an assessment of plans or projects is required if it cannot be excluded, on the basis of objective information, that they will have a significant effect on an area of conservation, either individually or in combination with other

17 — This is presumably also what is meant by the Commission's guidance on the implementation of Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment (paragraph 3.21), which was drawn up by representatives of the Member States and the Commission's Directorate General for the Environment.

plans or projects.<sup>18</sup> What is important in this context is not the threat to the environment in abstract terms, but the conservation objectives set for the area.<sup>19</sup> It would therefore be inappropriate to carry out another, separate, examination based on a different standard to determine whether significant environmental effects are possible.

51. The obligations to carry out assessments laid down in Article 3(3) and (4) of the SEA Directive, on the other hand, eschew any specific form of the requirement. Instead, they explicitly demand the possibility of significant environmental effects. The Commission's view would therefore result in a double assessment of this characteristic in such cases.

52. Only Article 3(2)(a) of the SEA Directive does not refer to any requirements which would clearly call for an assessment of the possibility of significant environmental effects. It is precisely this difference from the other assessment obligations, however, which shows that the legislature did not in this case require a separate assessment of the possibility of significant environmental effects. Instead, it assumed that significant environmental

effects are to be expected in any event in the case of plans and programmes covered by Article 3(2)(a).

53. This approach to laying down rules was also adopted in the EIA Directive. Projects under Article 4(1) and Annex I always require an assessment of their environmental effects, whereas projects referred to in Annex II must be assessed only if they are likely to have significant effects on the environment.<sup>20</sup>

54. A separate assessment of the possibility of significant environmental effects is not therefore required.

## B – *The first question*

55. By the first question the Conseil d'État seeks to establish whether the Region of Wallonia's action programme requires an environmental assessment pursuant to Article 3(2)(a) of the SEA Directive. This provision requires, subject to Article 3(3), an environmental assessment to be carried out for

18 — Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 45, and Case C-418/04 *Commission v Ireland* [2007] ECR I-10947, paragraph 238.

19 — See *Commission v Ireland* (cited in footnote 18), paragraph 259.

20 — See the judgments cited in footnote 12.



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.

56. It is not disputed that the Region of Wallonia's order was prepared for agriculture, since it concerns the use of nitrogenous fertilisers in agriculture. It also affects water management, since its aim is to protect water quality. It is also clear that the action programme does not fall under the *de minimis* clause in Article 3(3) of the SEA Directive.

57. The parties are, however, in dispute over whether the order sets the framework for future development consent of projects listed in Annexes I and II to the EIA Directive.

58. In particular, Belgium contends that the application of fertilisers is not a project whose environmental impact has to be assessed. The Conseil d'État, on the other hand, considers it possible that the order sets the framework for the development consent of intensive

livestock installations under point 17 of Annex I or point 1(e) of Annex II to the EIA Directive and for projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes pursuant to point 1(b) of Annex II.

59. An action programme pursuant to Article 5 of the Nitrates Directive is undoubtedly relevant to such projects, since the rearing of livestock gives rise to manure, that is to say organic nitrogenous fertiliser, which has to be disposed of and can be used in the transformation of uncultivated land and semi-natural areas for intensive agricultural purposes. It is questionable, however, whether that relevance suffices for the setting of a *framework* for the future development consent of such projects.

#### 1. The term 'framework'

60. The term 'framework' must reflect the objective of taking into account the environmental effects of any decision laying down requirements for the future development consent of projects even as that decision is being taken.<sup>21</sup>

<sup>21</sup> — See point 29 et seq. above.

61. It is unclear, however, how strongly the requirements of plans and programmes must influence individual projects in order for those requirements to set a framework.

so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of ‘framework’.

62. During the legislative procedure the Netherlands and Austria proposed that it should be made clear that the framework must *determine* the location, nature or size of projects requiring environmental assessment.<sup>22</sup> In other words, very specific, conclusive requirements would have been needed to trigger an environmental assessment. As this proposal was not accepted, the concept of ‘framework’ is not restricted to the determination of those factors.

65. This becomes particularly clear in a criterion taken into account by the Member States when they appraise the likely significance of the environmental effects of plans or programmes in accordance with Article 3(5): they are to take account of the *degree* to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating<sup>23</sup> resources (first indent of point 1 of Annex II). The term ‘framework’ must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion.

63. The view of the Czech Republic is based on a similarly narrow understanding of the setting of a framework. It calls for certain projects to be explicitly or implicitly the subject of the plan or programme.

64. Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in

66. Contrary to the view expressed by Belgium, the listing of the various characteristics in the first indent of point 1 of Annex II is not to be understood cumulatively, or at least not in the sense that the framework should concern them all. When the significance of environmental effects is appraised, the characteristics referred to in all five indents of point 1 of Annex II are to be taken into account only ‘in particular’. If, however, the overall list is

22 — Council Document 12967/99 of 17 November 1999, footnote 10: ‘by determining their location, nature or size.’

23 — This footnote is not relevant to the English translation of the Opinion.

not exhaustive, the partial lists cannot claim to be so either. Furthermore, such cumulative applicability of the individual characteristics would be inconsistent with the use of the term 'degree' in point 1 of Annex II. The wording implies that the various characteristics may be concerned in varying intensity and, therefore, possibly not at all. This alone is consistent with the objective of making all preliminary decisions for the development consent of projects subject to an environmental assessment if they are likely to have significant effects on the environment.

may influence the development consent of intensive livestock projects under point 17 of Annex I or point 1(e) of Annex II to the EIA Directive or the development consent of projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes under point 1(b) of Annex I.

67. To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources.

69. Belgium considers that not to be the case on the ground that the content of action programmes is determined by the Nitrates Directive. This objection might be valid if the Nitrates Directive left the Member States with no discretion in the establishment of action programmes. An action programme would then merely reflect the framework which the Nitrates Directive sets. An environmental assessment cannot influence the transposition of such mandatory requirements laid down by the directive, but should precede its adoption.

## 2. Application to action programmes

68. Hence it must be considered whether the requirements of an action programme pursuant to Article 5 of the Nitrates Directive

70. As the Commission emphasises, however, the Nitrates Directive leaves the Member States some discretion, for example in the imposition of prohibitions of the application of fertilisers during certain periods. Environmental assessment can help to ensure optimum benefit is derived from such discretion by improving the information on the environmental effects of various options.

71. Moreover, it is not always enough for the Member States to restrict action programmes to the specific requirements laid down by the Nitrates Directive. Rather, pursuant to Article 5(5) of that directive, they must take such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in the Nitrates Directive will not be sufficient for reducing water pollution caused or induced by nitrates from agricultural sources and preventing further such pollution. An environmental assessment may reveal the need for such measures.

72. When adopting action programmes, Member States are finally free, pursuant to Article 176 EC (now Article 193 TFEU), to introduce more stringent protective measures.

73. The requirements to be satisfied by an action programme pursuant to the Nitrates Directive do not therefore exclude the possibility of that programme setting the framework for the development consent of projects.

74. The Region of Wallonia argues that, under the applicable domestic law, the application of fertilisers is not dealt with under development consent of intensive livestock

projects. Discrete administrative procedures which are not interdependent are involved. The action programme cannot therefore influence the intensive livestock projects.

75. I do not find this argument convincing.

76. An action programme is intended to prevent agriculture from using more nitrogenous fertiliser than plants consume, since surplus nitrogen pollutes water. It therefore lays down rules primarily on the application of nitrogenous fertilisers, especially the permissible quantities and the periods and manner of application. However, action programmes also require farms to have sufficient suitable storage capacity for the manure arising at times when its application in the fields is forbidden.

77. In the case of consent to use uncultivated land or semi-natural areas for intensive agricultural purposes under point 1(b) of Annex II to the EIA Directive, action programmes already set a framework under the Nitrates Directive with regard to operating conditions. The framework arises directly from the rules on the application of nitrogenous fertilisers which must be observed when such areas are used.

78. It must also be assumed that, even under the legislation applicable in the Region of Wallonia, the rules on storage capacities, if nothing else, will influence development consent of intensive livestock projects, as those installations must provide for sufficient storage capacity. That, however, is ultimately not what matters.

79. It is apparent from provisions of European Union law that action programmes set a framework for development consent of the projects referred to. The EIA Directive itself has a degree of influence, and for some of the project types concerned more extensive obligations arise from Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control<sup>24</sup> (‘the IPPC Directive’).

80. Article 8 of the EIA Directive provides that, in the case of projects requiring an environmental impact assessment, all the results of the assessment must be taken into

24 — OJ 1996 L 257, p. 26, as last amended by Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC (OJ 2006 L 33, p. 1). Directive 96/61 has meanwhile been replaced by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) (OJ 2008 L 24, p. 8).

consideration in the development consent procedure. An obligation to carry out an assessment applies in any event to projects referred to in Annex I, here to intensive livestock installations pursuant to point 17. In that assessment of a project, consideration must be given not only to the direct effects of the planned works themselves but also to the effects on the environment which may be caused by the use and operation of the installations arising from those works.<sup>25</sup> This includes, in particular, the effects on water quality that result from intensive livestock installations.<sup>26</sup> Consequently, when granting development consent for intensive livestock installations it must also be considered whether the manure arising can be appropriately stored and disposed of.

81. In the context of such consideration, the framework set by the action programme has at least the effect that it must be possible for the installation to be operated in accordance with the provisions of the programme. At the same time, however, development consent can hardly be refused on grounds of the pollution of waters by nitrate from agriculture if the project complies with the rules of the programme. Certain alternatives, which are harmful to the environment as gauged by the objectives of the action programme, are

25 — See *Abraham and Others*, paragraph 43, and *Ecologistas en Acción-CODA*, paragraph 39 (both cited in footnote 12).

26 — See Case C-121/03 *Commission v Spain* [2005] ECR I-7569, paragraph 88.

thus excluded and others, which possibly afford water greater protection, do not have to be examined and taken into consideration. In practice, this not only concerns the operating conditions, but may also have implications for the location. Intensive livestock installations should receive consent only in locations where sufficient land is available for the application of manure.

82. The framework-setting effect of the action programmes in the case of certain intensive livestock installations is even reinforced by another directive, the IPPC Directive. This directive concerns the same types of installation as point 17 of Annex I to the EIA Directive but, as the threshold values are somewhat lower (see point 6.6 of Annex I to the IPPC Directive), more installations are covered. Pursuant to Article 9(1) and Article 3(a) and (b) of the IPPC Directive, the development consent of such installations must ensure that they are so operated that all the appropriate preventive measures are taken against pollution and no significant pollution is caused. The application of the manure arising is attributable to the operation of those installations. Consequently, the action programme must not only be taken into account in this context: compliance with it is mandatory.

83. Action programmes thus set a framework for the development consent of intensive livestock installations as referred to in point 6.6 of Annex I to the IPPC Directive, which fall under either point 17 of Annex I or point 1(e) of Annex II to the EIA Directive.

84. The answer to the first question is, therefore, that under Article 3(2)(a) of the SEA Directive, an environmental assessment must be carried out for action programmes pursuant to Article 5 of the Nitrates Directive.

### *C – The second question*

85. As the environmental assessment of action programmes is already required by Article 3(2)(a) of the SEA Directive, it is of no longer of any relevance to the main proceedings whether an assessment is also required by Article 3(2)(b).<sup>27</sup> I will therefore answer the second question only in the alternative.

<sup>27</sup> — In practice, however, even in the case of an assessment pursuant to Article 3(2)(a) of the SEA Directive it will have to be considered whether the measure affects areas of conservation, since other standards may have to be applied to effects on those areas. The nature of the assessment is not, however, the subject of the current proceedings.

86. In asking this question, the Conseil d'État wishes to establish whether an environmental assessment of action programmes is necessary because of their effects on areas of conservation under the Habitats Directive or the Birds Directive.

87. Article 3(2)(b) of the SEA Directive provides for an environmental assessment to be carried out of all plans and programmes which, in view of their likely effect on areas of conservation, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive. Pursuant to those provisions, any plan or project not directly connected with or necessary to the management of the area of conservation, but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is subject to appropriate assessment of its implications for the area in view of the area's conservation objectives.

88. Action programmes pursuant to Article 5 of the Nitrates Directive are neither directly connected with or necessary to the management of areas of conservation under the Habitats or Birds Directive. An environmental assessment is therefore required where an action programme is likely to have a significant effect on areas of conservation, either individually or in combination with other plans or projects.

89. It must be considered in this respect whether there is a probability or risk that the measure in question will have a significant effect on the site concerned.<sup>28</sup> In the light, in particular, of the precautionary principle such a risk exists if it cannot be excluded on the basis of objective information that the plan or project in question will have significant effects on the site concerned.<sup>29</sup>

90. As regards measures constituting planning, Article 6(3) of the Habitats Directive therefore requires an assessment if the measures may have considerable influence on the development consent of projects which, in turn, are likely to have significant effects on the areas of conservation concerned.<sup>30</sup> Plans must, however, be distinguished from mere preliminary administrative reflection and carry a degree of precision which calls for an environmental assessment of their effects.<sup>31</sup>

91. Typically, an obligation to carry out an assessment pursuant to Article 3(2)(b) of the SEA Directive is likely to concern plans or programmes which include specific projects

28 — *Waddenvereniging and Vogelbeschermingsvereniging* (cited in footnote 18), paragraph 43; Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, paragraph 54; and Case C-179/06 *Commission v Italy* [2007] ECR I-8131, paragraph 34.

29 — *Waddenvereniging and Vogelbeschermingsvereniging* (cited in footnote 18), paragraph 44; *Commission v United Kingdom* (cited in footnote 28), paragraph 54; and *Commission v Ireland* (cited in footnote 18), paragraph 254.

30 — *Commission v United Kingdom* (cited in footnote 28), paragraph 55.

31 — *Commission v Italy* (cited in footnote 28), paragraph 41.

relating to certain areas of conservation, such as the planning of a corridor for the construction of a road which will affect an area of conservation.

such effects.<sup>32</sup> The criterion for this is the site's conservation objectives.<sup>33</sup>

92. It is not evident from the Nitrates Directive, on the other hand, that an action programme pursuant to Article 5 necessarily influences the development consent of projects likely to have significant effects on areas of conservation. The compatibility of a project with an action programme does not provide any indication as to whether it is permissible if it has effects on an area of conservation. That is determined by the Habitats Directive.

95. Where such adverse effects cannot be ruled out, development consent may be granted pursuant to Article 6(4) of the Habitats Directive in the absence of an alternative solution, if the project must be carried out for imperative reasons of overriding public interest and if the Member State has taken all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.<sup>34</sup> Action programmes pursuant to Article 5 of the Nitrates Directive play no part in this context.

93. Nor does the Habitats Directive indicate that action programmes are important for the development consent of projects relating to areas of conservation. The second sentence of Article 6(3) and Article 6(4) instead contain autonomous criteria for the development consent of plans and programmes, which are not directly connected with the objectives of action programmes.

96. None the less, it is not impossible that action programmes will contribute to significant harm to areas of conservation.

94. Pursuant to the second sentence of Article 6(3) of the Habitats Directive, the competent national authorities may agree to a project only if they are certain that it will not adversely affect the integrity of the site concerned. That is the case where no reasonable scientific doubt remains as to the absence of

97. *Firstly*, a Member State can include measures in an action programme over and above those required by the Nitrates Directive

32 — *Waddenvereniging and Vogelbeschermingsvereniging* (cited in footnote 18), paragraph 59.

33 — See *Commission v Ireland* (cited in footnote 18), paragraph 259.

34 — *Commission v Ireland* (cited in footnote 18), paragraph 260.



with the aim of influencing the development consent of projects relating to areas of conservation.

98. *Secondly*, a site's conservation objectives can explicitly or implicitly forge a link with an action programme, as when the eutrophication of water is to be prevented. An applicable action programme might be regarded as sufficient for achieving this objective. Whether such a link exists can be determined only by means of an assessment of the conservation objectives of the areas of conservation affected by the action programme.

99. *Thirdly*, other provisions of domestic law may result in consent for the purposes of Articles 6 and 7 of the Habitats Directive being influenced by an action programme. While such a link may be inconsistent with the requirements which the development consent of projects must satisfy pursuant to the Habitats Directive, the possibility of individuals nevertheless relying on such provisions cannot be excluded.

100. The question whether an action programme, the conservation objectives of areas of conservation or other provisions of domestic law attribute such an effect to action programmes must where necessary be determined by the national courts that have jurisdiction.

101. Should the Court adopt a position on the second question, its answer should therefore be that, under Article 3(2)(b) of the SEA Directive, an environmental assessment must be carried out for an action programme pursuant to Article 5 of the Nitrates Directive if it is likely to contribute to significant harm to areas of conservation on the basis of its own rules, because of the conservation objectives of the areas of conservation or under other provisions of domestic law.

#### D – *The third question*

102. The third question concerns the obligation to carry out an environmental assessment of plans and programmes pursuant to Article 3(4) of the SEA Directive. That provision requires Member States to determine whether plans and programmes, other than those referred to in Article 3(2), which set the framework for future development consent of projects, are likely to have significant environmental effects.

103. That provision is a mopping-up clause, which is not material where an obligation to carry out assessments already exists, as is the case here.

104. If, however, the Court should come to the conclusion that, although an action programme sets a framework for projects, none of the projects concerned is referred to in Annex I or II to the EIA Directive, and an assessment of the implications for a site pursuant to Article 6(3) of the Habitats Directive is not necessary, it would have to consider whether the action programme is likely to have significant environmental effects.

105. Belgium denies that the Region of Wallonia's action programme could have significant environmental effects: it is intended to reduce water pollution and so to improve the environment.

106. I have already expressed the view that exclusively favourable environmental effects of a project are, in principle, not significant within the meaning of the EIA Directive. The objectives of the directive – particularly the goal of a high level of environmental protection – do not require an assessment to be conducted solely because a project can significantly improve the state of the environment.<sup>35</sup> The Court has, however, rejected that

position.<sup>36</sup> In the context of the SEA Directive there is even more to be said for also regarding positive environmental effects as significant, since an environmental assessment – as Inter-Environnement Wallonie emphasises – is explicitly to include positive environmental effects (footnote 1 to point (f) of Annex I).

107. In the final analysis, this question can be left open, since action programmes may have significant adverse effects on the environment. While they may admittedly seek to improve the environment, they do not necessarily have only favourable effects on it. They determine the extent to which an activity which may have adverse effects on the environment, namely the use of nitrogenous fertilisers in agriculture, is permissible. Defective action programmes could therefore have significant adverse effects on the environment.

108. Thus action programmes pursuant to Article 5 of the Nitrates Directive may have significant environmental effects within the meaning of Article 3(4) of the SEA Directive.

35 — Opinion in *Ecologistas en Acción-CODA* (cited in footnote 12), point 50. This may also be what is meant by the judgment, unclear in this respect, of 6 November 2008 in Case C-247/06 *Commission v Germany*, paragraph 50.

36 — *Ecologistas en Acción-CODA* (cited in footnote 12), paragraph 41.

## **V – Conclusion**

109. I therefore propose that the Court give the following answer in response to the reference for a preliminary ruling:

Under 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, an environmental assessment must be carried out for action programmes pursuant to Article 5 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.