

JUDGMENT OF THE COURT (Fourth Chamber)

17 June 2010\*

In Joined Cases C-105/09 and C-110/09,

REFERENCES for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decisions of 11 March 2009, received at the Court on 20 and 23 March 2009, in the proceedings

**Terre wallonne ASBL (C-105/09),**

**Inter-Environnement Wallonie ASBL (C-110/09)**

v

**Région wallonne,**

\* Language of the case: French.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader (Rapporteur),  
K. Schiemann, P. Kūris, and L. Bay Larsen, Judges,

Advocate General: J. Kokott,  
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2010,

after considering the observations submitted on behalf of:

- Inter-Environnement Wallonie ASBL, by J. Sambon, avocat,
- Région wallonne, by A. Gillain, avocat,
- the Belgian Government, by T. Materne and C. Pochet, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,

— the European Commission, by S. Pardo Quintillán and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2010,

gives the following

### Judgment

- 1 These references for a preliminary ruling concern the interpretation of Article 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).
  
- 2 The references have been made in the course of proceedings brought by (i) Terre wallonne ASBL and (ii) Inter-Environnement Wallonie ASBL against Région wallonne (the Region of Wallonia) for annulment of the order of the Walloon Government of 15 February 2007 amending Book II of the Environment Code, which forms the Water Code, as regards the sustainable management of nitrogen in agriculture (*Moniteur belge* of 7 March 2007, p. 11118) ('the contested order').

## Legal context

### *European Union law*

#### Directive 91/676/EEC

- 3 Article 1 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1) provides:

‘This Directive has the objective of:

- reducing water pollution caused or induced by nitrates from agricultural sources and
  
- preventing further such pollution.’

- 4 Article 3(1) and (2) of that directive provides:

‘1. Waters affected by pollution and waters which could be affected by pollution if action pursuant [to] Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.

2. Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.'

5 Article 4 of that directive reads:

'1. With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:

(a) establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;

...'

6 Article 5 of that directive reads:

'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. An action programme may relate to all vulnerable zones in the territory of a Member State or, where the Member State considers it appropriate, different programmes may be established for different vulnerable zones or parts of zones.

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.

...'

7 Annex III to Directive 91/676, headed 'Measures to be included in action programmes as referred to in Article 5(4)(a)', reads:

'1. The measures shall include rules relating to:

...

2. the capacity of storage vessels for livestock manure; this capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment;

...'

Directive 2001/42

8 Article 2 of Directive 2001/42 provides:

‘For the purposes of this Directive:

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

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

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

(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;

...’

9 Article 3 of that directive reads:

‘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.

...'

Directive 85/337/EEC

<sup>10</sup> Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175,

p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337'), provides:

'For the purposes of this Directive:

"project" means:

- 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;

...'

<sup>11</sup> Article 4(1) of Directive 85/337 provides that projects listed in Annex I to that directive are to be made subject to an environmental impact assessment.

<sup>12</sup> Article 8 of that directive reads:

'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.'

13 Annex I to Directive 85/337, headed 'Projects subject to Article 4(1)', provides:

'...

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

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

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

or

(c) 900 places for sows.

...'

<sup>14</sup> Annex II to that directive, headed ‘Projects subject to Article 4(2)’, lists:

‘1. Agriculture, silviculture and aquaculture

...

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

...

(e) Intensive livestock installations (projects not included in Annex I);

...’

Directive 2003/35/EC

<sup>15</sup> Recital 10 in the preamble 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 (OJ 2003 L 156, p. 17) states:

‘Provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Aarhus Convention [on access to information, public participation in decision-making and access to justice in environmental matters, concluded on behalf of the Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; “the Aarhus Convention”)], in particular Article 7 thereof. Other relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset.’

<sup>16</sup> Article 2 of that directive, headed ‘Public participation concerning plans and programmes’, provides:

‘...

2. Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I.

...

5. This Article shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under [Directive 2001/42] or under Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy’

- <sup>17</sup> Annex I to Directive 2003/35, headed ‘Provisions for plans and programmes referred to in Article 2’, lists:

‘...

(c) Article 5(1) of [Directive 91/676].

...’

*National law*

- <sup>18</sup> Directive 2001/42 was transposed into the law of the Region of Wallonia by Article D. 52 et seq. of Book I of the Environment Code (*Moniteur belge* of 9 July 2004, p. 54654).

19 Article D. 53 of that code provides:

‘1. An environmental impact assessment shall be carried out, in accordance with Articles 52 to 61, for plans and programmes, and any modifications thereto, appearing in List I drawn up by the Government:

- (1) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, land, telecommunications or tourism and set the framework for future development consent of projects appearing in the list drawn up under Article 66(2);
  
- (2) which are subject to an assessment under Article 29 of the Law of 12 July 1973 on nature conservation.

...

3. The Government may require an environmental impact assessment to be carried out under this chapter of plans or programmes that are likely to have a not insignificant impact on the environment and are not provided for by decree, regulation or administrative provisions.

...’

20 Article R. 47 of that code provides:

‘The list of plans and programmes referred to in Article 53(1) of the decretal part is set out in Annex V.’

21 Annex V, adopted by the order of the Walloon Government of 17 March 2005 relating to Book I of the Environment Code (*Moniteur belge* of 4 May 2005, p. 21184), contains in particular the action programmes concerning air quality and land quality and the action programme for nature protection. The annex does not, however, include the action programme for the management of nitrogen in agriculture in vulnerable zones, which was introduced into the law of the Region of Wallonia for the first time by an order of 10 October 2002.

22 With regard to the latter action programme specifically, the relevant provisions of the law of the Region of Wallonia currently in force are contained in the contested order.

23 That order lays down the conditions applying to the management of nitrogen in agriculture throughout the Region of Wallonia. It also covers the management of nitrogen in vulnerable zones, where it constitutes the action programme required under Article 5 of Directive 91/676. Vulnerable zones represent 42% of the land in that region and 54% of its productive agricultural land.

24 Chapter IV of the contested order includes Section 3, headed ‘Conditions applicable to the management of nitrogen in agriculture throughout the Region of Wallonia’. That section contains Subsections 1 to 5, which apply throughout the region, including the vulnerable zones, and Subsections 6 and 7, which apply only to the vulnerable zones. All those subsections together form the action programme required under Article 5(1) of Directive 91/676.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 25 By judgment of 22 September 2005 in Case C-221/03 *Commission v Belgium* [2005] ECR I-8307, the Court held that, by failing to adopt within the relevant time-limit the measures needed for the full and correct implementation of Directive 91/676, the Kingdom of Belgium had failed to fulfil its obligations under that directive.
- 26 In order to comply with that judgment, the Walloon Government adopted the contested order in pursuance of Article 5 of Directive 91/676. That order amends Book II of the Environment Code, which forms the Water Code, as regards the sustainable management of nitrogen in agriculture.
- 27 Terre wallonne ASBL and Inter-Environnement Wallonie ASBL applied to the Conseil d'État (Council of State) for annulment of that order, claiming in particular that the programme which it contains was not subjected to an environmental assessment in accordance with Directive 2001/42.
- 28 The Walloon Government maintained that the programme for the management of nitrogen in agriculture does not fall within the scope of Directive 2001/42.
- 29 The referring court is of the view that the possibility cannot be ruled out that action programmes such as the one referred to by Directive 91/676 are plans or programmes within the meaning of Directive 2001/42. It also observes that no provision of the law of the Region of Wallonia applicable at the date of adoption of the contested order made nitrogen management plans subject to an environmental impact assessment, that it is not necessarily established that that situation contravenes Directive 2001/42 and that the correct application of European Union law is not so obvious as to leave no room for reasonable doubt.

30 The Conseil d'État therefore decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Is a nitrogen management programme relating to designated vulnerable zones that is required to be established by Article 5(1) of [Directive 91/676] a plan or programme under Article 3(2)(a) of [Directive 2001/42], 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 [Directive 85/337]?
  
2. Is a nitrogen management programme relating to designated vulnerable zones that is required to be established by Article 5(1) of [Directive 91/676] a plan or programme under Article 3(2)(b) of [Directive 2001/42] which, in view of the likely effect on sites, requires an assessment pursuant to Article 6 or 7 of [Directive 92/43], in particular when the nitrogen management programme in question applies to all the vulnerable zones designated in the Region of Wallonia?
  
3. Is a nitrogen management programme relating to designated vulnerable zones that is required to be established by Article 5(1) of [Directive 91/676] a plan or programme, other than one of those referred to in Article 3(2) of [Directive 2001/42], which sets the framework for future development consent in regard to which the Member States must under Article 3(4) [of Directive 2001/42] determine whether they are likely to have significant environmental effects in accordance with [Article 3(5) of that directive]?

## Consideration of the questions referred

### *First question*

- <sup>31</sup> By its first question, the referring court is, in essence, asking the Court whether a programme for the management of nitrogen in agriculture such as the one at issue in the main proceedings is liable to constitute a plan or programme covered by Article 3(2)(a) of Directive 2001/42.
- <sup>32</sup> First of all, as is apparent from Article 1 of Directive 2001/42, the fundamental objective of that directive is, where plans and programmes are likely to have significant effects on the environment, to require an environmental assessment to be carried out at the time they are prepared and before they are adopted.
- <sup>33</sup> Where such an environmental assessment is required by Directive 2001/42, the directive lays down minimum rules concerning the preparation of the environmental report, the carrying out of consultations, the taking into account of the results of the environmental assessment and the communication of information on the decision adopted at the end of the assessment.
- <sup>34</sup> In order to establish whether action programmes drawn up under Article 5(1) of Directive 91/676 ('action programmes') fall within the scope of Article 3(2)(a) of Directive 2001/42, it is necessary to consider, first, whether they are 'plans and programmes' within the meaning of Article 2(a) of that directive and, second, whether they fulfil the conditions laid down in Article 3(2)(a).

Application of Article 2 of Directive 2001/42

- 35 The Court finds first of all that action programmes are (i) subject to preparation by an authority at national, regional or local level or prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and (ii) required by legislative, regulatory or administrative provisions.
- 36 It is also to be noted that Directive 91/676 requires such action programmes to be established for all ‘vulnerable zones’ designated by Member States in pursuance of its provisions and that those programmes must include measures and actions of the type listed in Article 5, which are designed to combat nitrate pollution and which Member States are required to implement and monitor. The competent authorities must also periodically review whether measures and actions are appropriate and, where necessary, revise action programmes.
- 37 Moreover, as the Advocate General has stated in points 25 to 28 of her Opinion, such a finding is supported by recital 2 in the preamble to Directive 2003/35, and by Article 2(5) of that directive and Annex I thereto.
- 38 In that regard, Directive 2003/35 requires public participation in the drawing up of certain plans and programmes relating to the environment in order to align European Union legislation with the Aarhus Convention.

- 39 It is apparent from recital 10 in the preamble to Directive 2003/35 that some Community legislation already contained provisions relating to public participation in the preparation of plans and programmes in line with the Aarhus Convention. Therefore Article 2(5) of that directive excludes from the scope of Article 2 'plans and programmes' referred to in Annex I to the directive in respect of which such provisions were introduced under Directive 2001/42. Among those plans and programmes are action programmes referred to in Article 5(1) of Directive 91/676.
- 40 It is true that Article 2(5) of Directive 2003/35 was adopted in the context of provisions concerning public participation in the preparation of certain plans and programmes relating to the environment. It would be inconsistent, however, to accept that action programmes fall within the scope of Article 2 of Directive 2001/42 in relation to provisions concerning public participation in respect of the adoption of the plan or programme, but that the same action programmes no longer fall within the scope of that provision where they touch upon environmental impact assessment.
- 41 Lastly, whilst not every legislative measure concerning the protection of water from nitrate pollution from agricultural sources constitutes a plan or a programme within the meaning of Directive 2001/42, the mere fact that such a measure is adopted by legislative means does not exclude it from the scope of that directive if it has the characteristics mentioned in paragraph 36 above.
- 42 It is clear from all the foregoing that, as a result both of the characteristics they display and of the actual intention of the European Union legislature, action programmes are 'plans and programmes' within the meaning of Directive 2001/42.

Application of Article 3(2)(a) of Directive 2001/42

- <sup>43</sup> Article 3(2)(a) of Directive 2001/42 provides that a systematic environmental assessment is to be carried out for all plans and programmes which (i) are prepared for certain sectors and (ii) set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337.
- <sup>44</sup> With regard to the first condition contained in Article 3(2)(a) of Directive 2001/42, suffice it to say that it is apparent from the very title of Directive 91/676 that action programmes are prepared for the agricultural sector.
- <sup>45</sup> With regard to the second condition, in order to establish whether action programmes set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337, it is necessary to examine the content and purpose of those programmes, taking into account the scope of the environmental assessment of projects as provided for by that directive.
- <sup>46</sup> Thus, so far as the purpose of action programmes is concerned, it is apparent from Directive 91/676, in particular the 9th to 11th recitals in the preamble, Articles 1 and 3 to 5 and the annexes, that those programmes involve a global examination, at the level of vulnerable zones, of the environmental issues linked to nitrate pollution from agricultural sources, and that they put in place an organised system designed to provide a general level of protection against such pollution.

- 47 The specific nature of those programmes lies in the fact that they embody a comprehensive and coherent approach, providing practical and coordinated arrangements covering vulnerable zones and, where appropriate, the entire territory, for the reduction and prevention of pollution caused by nitrates from agricultural sources.
- 48 As regards the content of action programmes, it is apparent from Article 5 of Directive 91/676, in conjunction with Annex III thereto, that those programmes are to contain specific, mandatory measures that cover, in particular, periods during which the spreading of certain types of fertiliser is prohibited, the capacity of storage vessels for livestock manure, spreading methods and the maximum quantity of livestock manure containing nitrogen which can be spread (see, to that effect, Case C-416/02 *Commission v Spain* [2005] ECR I-7487, paragraph 34). Those measures are to ensure in particular, as point 2 of Annex III to Directive 91/676 provides, that for each farm or livestock unit the amount of livestock manure applied to the land each year, including by the animals themselves, does not exceed a specified amount per hectare, which is the amount of manure containing 170 kilograms of nitrogen.
- 49 So far as the scope of environmental assessment provided for by Directive 85/337 is concerned, it should be noted first of all that the measures set out in action programmes concern intensive rearing installations listed in point 17 of Annex I and point 1(e) of Annex II to Directive 85/337.
- 50 In the context of environmental assessment provided for by Directive 85/337, the national authorities must take into account not only the direct effects of the planned works, but also the environmental impact liable to result from the use and exploitation of the end product of those works (Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 43, and Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 39).

- 51 In particular, in the case of installations for intensive rearing, such an environmental assessment must envisage the impact of the installations on water quality (see, to that effect, Case C-121/03 *Commission v Spain* [2005] ECR I-7569, paragraph 88).
- 52 As the Advocate General has rightly stated in point 80 of her Opinion, Article 8 of Directive 85/337 requires the environmental aspects which action programmes are intended to regulate to be taken into account when consent is given for projects to operate such installations.
- 53 Also, it is clear from Article 5(4) of Directive 91/676 that action programmes adopted under Article 5(1) must provide for a set of measures compliance with which can be a requirement for issue of the consent that may be granted for projects listed in Annexes I and II to Directive 85/337, and in respect of the definition of which Directive 91/676 gives Member States a certain discretion. That is so in particular in the case of measures concerning the storage of livestock manure provided for in Annex III to Directive 91/676 as regards the intensive rearing installation projects listed in Annexes I and II to Directive 85/337.
- 54 In such a situation, the existence and scope of which it is nevertheless for the national court to assess in the light of the action programme concerned, it must be held that the action programme is to be regarded, in respect of those measures, as setting the framework for future development consent of projects listed in Annexes I and II to Directive 85/337 within the meaning of Article 3(2)(a) of Directive 2001/42.

55 In the light of all of the above considerations, the answer to the first question is that an action programme adopted pursuant to Article 5(1) of Directive 91/676 is in principle a plan or programme covered by Article 3(2)(a) of Directive 2001/42 since it constitutes a 'plan' or 'programme' within the meaning of Article 2(a) of the latter directive and contains measures compliance with which is a requirement for issue of the consent that may be granted for carrying out projects listed in Annexes I and II to Directive 85/337.

*Second and third questions*

56 In the light of the answer given to the first question, it is not necessary, in order to resolve the dispute in the main proceedings, to give a ruling on whether Article 3(2)(b) of Directive 2001/42 also requires an environmental impact assessment of action programmes.

57 There is therefore no need to answer the second question.

58 Since Article 3(4) of Directive 2001/42 applies only where Article 3(2) is not applicable, there is no need to answer the third question.

## Costs

- <sup>59</sup> Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**An action programme adopted pursuant to Article 5(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources is in principle a plan or programme covered by 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 since it constitutes a ‘plan’ or ‘programme’ within the meaning of Article 2(a) of the latter directive and contains measures compliance with which is a requirement for issue of the consent that may be granted for carrying out projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997.**

[Signatures]