Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

28 February 2012 *

(Protection of the environment — Directive 2001/42/EC — Articles 2 and 3 — Assessment of the effects of certain plans and programmes on the environment — Protection of waters against pollution caused by nitrates from agricultural sources — Plan or programme — No prior environmental assessment — Annulment of a plan or programme — Possibility of maintaining the effects of the plan or programme — Conditions)

In Case C-41/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Belgium), made by decision of 18 January 2011, received at the Court on 26 January 2011, in the proceedings

Inter-Environnement Wallonie ASBL,

Terre wallonne ASBL

v

Région wallonne,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and U. Lõhmus, Presidents of Chambers, A. Rosas, E. Levits, A. Ó Caoimh, L. Bay Larsen, T. von Danwitz, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2011,

after considering the observations submitted on behalf of:

— Inter-Environnement Wallonie ASBL, by J. Sambon, avocat,

— Terre wallonne ASBL, by A. Lebrun, avocat,

— the Belgian Government, by T. Materne, acting as Agent, assisted by A. Gillain, avocat,

— the French Government, by G. de Bergues, A. Adam and S. Menez, acting as Agents,

* Language of the case: French.

— the European Commission, by P. Oliver, A. Marghelis and B.D. Simon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the circumstances in which a 'plan' or 'programme' within the meaning 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), which has not been the subject of an environmental assessment as required by that directive, may provisionally be kept in force.

2 The reference has been made in the course of proceedings brought by Inter-Environnement Wallonie ASBL ('Inter-Environnement Wallonie') and Terre wallonne ASBL ('Terre wallonne') 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 that the 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 the directive provides:

'1. Waters affected by pollution and waters which could be affected by pollution if action pursuant 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(1)(a) of the directive provides that '[w]ith 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 … 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 the directive reads:

‘1. … 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, relating to ‘[m]easures to be included in action programmes as referred to in Article 5(4)(a)’, provides, in particular, that those measures are to include rules relating to, inter alia, the capacity of storage vessels for livestock manure.

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 [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”)], 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 [Council] Directive 92/43/EEC [of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7)].

…

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

10 Under Article 4 of Directive 85/337, projects listed in Annex I to that directive are made subject to an assessment of their effects on the environment while those listed in Annex II are subject to such an assessment on the basis of thresholds set by the Member States or on the basis of a case-by-case examination.

11 Annex I to Directive 85/337 refers inter alia to ‘[i]nstallations for the intensive rearing of poultry or pigs with more than … 85 000 places for broilers, 60 000 places for hens; … 3 000 places for production pigs (over 30 kg) or … 900 places for sows’, whereas Annex II to that directive refers to

agricultural, silvicultural and aquacultural activities, in particular projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes and projects for intensive livestock installations not included in Annex I to that directive.

National law

Legislation transposing Directive 2001/42

12 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).

13 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, …, industry, …, water management, land, … 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.

…'

14 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.'

15 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.

Legislation relating to Directive 91/676

16 With regard specifically to the latter action programme, the relevant provisions of the law of the Region of Wallonia were contained in the contested order. That order lays down the conditions applicable to the management of nitrogen in agriculture throughout the Region of Wallonia. It also covers the management of nitrogen in vulnerable zones and, in that connection, constitutes the action programme required under Article 5 of Directive 91/676. Vulnerable zones represent 42% of the territory of that region and 54% of its productive agricultural land.

Legislating relating to proceedings before the Conseil d'État

17 Article 14ter of the consolidated laws on the Conseil d'État (Belgian Council of State) provides:

'Should the administrative litigation division deem it necessary, it shall indicate, by way of general provision, those effects of the annulled provisions of regulatory acts that are to be regarded as definitive or provisionally maintained for a period which that division shall determine.'

The dispute in the main proceedings and the reference for a preliminary ruling in Joined Cases C-105/09 and C-110/09

18 By judgment of 22 September 2005 in Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, the Court held inter alia that, by failing to adopt within the time-limit set the measures needed for the full and correct implementation of Articles 3(1) and (2), 5 and 10 of Directive 91/676 in the Region of Wallonia, the Kingdom of Belgium had failed to fulfil its obligations under that directive.

19 When complying with that judgment, the Walloon Government adopted the contested order pursuant to Article 5 of Directive 91/676. The order amends Book II of the Environment Code — the book which forms the Water Code — as regards the sustainable management of nitrogen in agriculture, and includes an express reference to the judgment in *Commission* v *Belgium*.

20 Terre wallonne and Inter-Environnement Wallonie applied to the Conseil d'État for annulment of that order, claiming in particular that it was a 'programme' within the meaning of Directive 2001/42 and that, on that basis, it should have been the subject of an environmental assessment in accordance with that directive. The Walloon Government maintained however that the programme for the management of nitrogen in agriculture did not fall within the scope of Directive 2001/42.

21 In addition, Terre wallonne made an interlocutory application for suspension of the contested order. However, by judgment of 7 August 2007, the referring court dismissed that application, finding that 'suspending the implementation of the contested measure would prolong the failure to act of the opposing party, predating that measure' and, moreover, that that association had failed to establish that it fulfilled the condition relating to a risk of serious damage which would be difficult to repair caused by the immediate implementation of the contested measure.

22 It was in those circumstances that the Conseil d'État, by decisions of 11 March 2009, decided to stay the proceedings and refer the following questions to the Court 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]?'

23 Those references for a preliminary ruling gave rise to the judgment of 17 June 2010 in Joined Cases C-105/09 and C-110/09 *Terre wallonne and Inter-Environnement Wallonie* [2010] ECR I-5611, in which the Court ruled:

'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…'

Developments in the dispute in the main proceedings and the question referred for a preliminary ruling in the present case

24 In its judgment of 11 March 2009, by which it referred questions to the Court of Justice for a preliminary ruling in *Inter-Environnement Wallonie* (Case C-110/09), the Conseil d'État also annulled certain articles of the contested order, while maintaining, in respect of certain of those articles, their effects as regards derogations granted and the effects in relation to earlier decisions. Therefore, the dispute in the main proceedings now primarily concerns the actions brought by Inter-Environnement Wallonie and Terre wallonne in so far as they seek the annulment of subsection 6 of section 3 of the contested order concerning 'the management of nitrogen in vulnerable zones'.

25 In that regard, it is apparent from the order for reference that Inter-Environnement Wallonie challenged the legality of the contested order only so far as concerned vulnerable zones, the subject-matter of subsection 6 of section 3 of that order. Considering however that the order, which formed a chapter of the Water Code, comprised a series of inseverable provisions, it claimed that all the provisions of the order had to be annulled, including those which might not fall under a 'programme' within the meaning of Directive 2001/42 or might not form such a programme. Terre Wallonne also called for the whole of the contested order to be annulled because the provisions contained in the order were inseverable. However, it accepted before the referring court that annulment could be ordered without retroactive effect provided that the maintenance of the effects of the contested measure was limited in time.

26 For its part, the Region of Wallonia considers that the majority of the provisions contained in the contested order do not fall within the definition of a programme adopted pursuant to Article 5 of Directive 91/676 and, consequently, within the definition of 'programme' within the meaning of Directive 2001/42, in particular because those provisions do not concern the implementation of projects listed in Annexes I and II to Directive 85/337. Therefore, according to the defendant in the main proceedings, only subsection 6 of section 3 of the contested order, in that it concerns the management of nitrogen in vulnerable zones, could fall within the definition of an action programme required by Article 5 of Directive 91/676 and, accordingly, of 'programme' within the meaning of Directive 2001/42. It follows that only that subsection should be annulled as a result of no environmental assessment being carried out in accordance with the requirements of Directive 2001/42, given that that subsection can be severed from the other provisions of the contested order which constitute the bulk of the measures transposing Directive 91/676.

27 Following the judgment in *Terre wallonne and Inter-Environnement Wallonie*, the Conseil d'État held that the contested order was a 'plan' or 'programme' within the meaning of Article 3(2)(a) of Directive 2001/42. Therefore, since the order was not subjected to an environmental assessment prior to its adoption as required by that directive and, moreover, the Court did not limit the temporal effects of its judgment in *Terre wallonne and Inter-Environnement Wallonie*, the order should be annulled.

28 However, the referring court states that annulling the contested order with retroactive effect would deprive the Belgian legal order of any measure transposing Directive 91/676 in the Region of Wallonia until such time as the annulled measure was redrafted and would thereby give rise to a situation in which the Kingdom of Belgium would be failing to comply with its obligations under that directive.

29 In those circumstances the Conseil d'État decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Can the Conseil d'État,

— seised of an action seeking the annulment of the [contested order],

— finding that that order was adopted without compliance with the procedure prescribed by Directive 2001/42 … and that it is, for that reason, contrary to the law of the European Union and must be annulled,

— but finding at the same time that the contested order provides for an appropriate implementation of … Directive 91/676 …,

defer in time the effects of the judicial annulment for a short period necessary for the redrafting of the annulled measure in order to maintain in European Union environmental law a degree of specific implementation without any break in continuity?'

Developments after the reference for a preliminary ruling was made

30 It is apparent from information provided in their written observations by Terre wallonne, the Belgian Government and the Commission, confirmed by the referring court, that on 31 March 2011 the Walloon Government adopted an order amending Book II of the Environment Code containing the Water Code as regards the sustainable management of nitrogen in agriculture ('the new order').

31 It is apparent from the legal bases cited in that order that it was adopted in particular on the basis of Part V of Book I of the Environment Code, concerning the assessment of effects on the environment, and following, first, an opinion on the strategic environmental assessment report delivered on 5 March 2009 by the Environmental Council of Wallonia for Sustainable Development and, second, a public inquiry which was conducted between 5 January and 19 February 2009 inclusive.

32 Article 1 of the new order states that it transposes Directive 91/676 while Article 4 provides that the contested order is repealed. On the other hand, Article 8 of the new order provides that the orders implementing the contested order are to be kept in force until they are repealed by their author. In addition, Article 3 of the new order replaces the content of Article R. 460 of the Environment Code, relating to the Water Code, with provisions requiring certain agricultural infrastructure to be rendered compliant, in particular as regards the storage of solid manure, on-farm poultry effluent, liquid manure and slurry. The dates on which that infrastructure must be rendered compliant are 31 December 2008, 31 December 2009 and 31 December 2010, that is to say dates prior to the date on which the new order was adopted, and they are determined primarily on the basis of certain thresholds of nitrogen production, in particular by livestock. However, those deadlines can be postponed in the case of *force majeure* or exceptional circumstances.

Admissibility of the reference for a preliminary ruling

33 The Commission's primary submission is that, in view of the adoption of the new order, the reference for a preliminary ruling has become devoid of purpose and must therefore be considered inadmissible.

34 In response to a request made by the Court of Justice, the Conseil d'État stated however that it was maintaining the question referred since the new order had no bearing on the action before it: the new order does not govern the period concerned by the action since, according to the Conseil d'État, it does not have retroactive effect.

35 According to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, most recently, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).

36 Moreover, according to settled case-law, it is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 31 and the case-law cited).

37 The information provided by the referring court indicates that the question referred by it is relevant to the dispute pending before it and that an answer to the question is necessary for it to rule on the dispute.

38 In those circumstances, the question referred by the Conseil d'État must be answered.

Consideration of the question referred for a preliminary ruling

39 By its question, and in view of the developments in the main proceedings, the referring court asks in essence whether, in circumstances such as those at issue in the main proceedings, where it has before it an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42 and it finds that the plan or programme was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, but finds that the contested measure implements Directive 91/676 appropriately, it may make use of a provision of its national law which would allow it to maintain some of the past effects of the measure until the date on which measures designed to remedy the irregularity which has been established entered into force.

40 At the outset, it should be recalled that, as is apparent from Article 1 of Directive 2001/42, the fundamental objective of that directive is to ensure that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment when they are prepared and prior to their adoption (*Terre wallonne and Inter-Environnement Wallonie*, paragraph 32, and Case C-295/10 *Valčiukienė and Others* [2011] ECR I-8819, paragraph 37).

41 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 (*Terre wallonne and Inter-Environnement Wallonie*, paragraph 33).

42 In the absence of provisions in that directive 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 (see, by analogy, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 70; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 65).

43 It is clear from settled case-law that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law (see, inter alia, Case 6/60 *Humblet* v *Belgian State* [1960] ECR 559, p. 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13, and *Wells*, paragraph 64 and the case-law cited).

44 It follows that where a 'plan' or 'programme' should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 2001/42, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (see, by analogy, *Wells*, paragraph 68).

45 National courts before which an action against such a national measure has been brought are also under such an obligation, and, in that regard, it should be recalled that the detailed procedural rules applicable to such actions which may be brought against such 'plans' or 'programmes' are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67 and the case-law cited).

46 Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment (see, by analogy, *Wells*, paragraph 65).

47 The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment.

48 In the main proceedings, it is not disputed that the referring court has an action of this kind before it. It must however be ascertained whether, in such an action and while annulling the contested order, it can, exceptionally and in the light of the specific circumstances of the main proceedings, use a national provision which would allow it to maintain the past effects of the order until the date of entry into force of the measures enabling the irregularity which has been established to be remedied.

49 According to the referring court, maintaining the effects of the contested order, adopted in breach of the requirements set out in Directive 2001/42, may be justified since annulling that order with retroactive effect would deprive the Belgian legal order of any measure designed to transpose Directive 91/676 in the Region of Wallonia. Moreover, those effects would be maintained for a relatively short time since this would cover only the period up to the date on which the new order entered into force.

50 Furthermore, the referring court considers that, while not established with certainty, the contested order seems to be in accordance with Directive 91/676, in particular by reason of Commission Decision 2008/96/EC of 20 December 2007 granting a derogation requested by Belgium [for] the Region of Wallonia pursuant to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 2008 L 32, p. 21). The Commission, in order to authorise that Member State to allow the application of a higher amount of livestock manure than that provided for in point (a) of the first sentence of the second subparagraph of paragraph 2 of Annex III to Directive 91/676, examined that order, which is mentioned in recital 6 in the preamble to and in Article 10 of the decision, without expressing any objection regarding the way in which that directive had been transposed in the Region of Wallonia by the order or regarding the fact that the action programme concerning nitrates in vulnerable zones, as required by Article 5 of the directive and formed by subsection 6 of section 3 of the order, had not been adopted following an environmental assessment within the meaning of Directive 2001/42.

51 The referring court also considers that the contested order, so far as concerns vulnerable zones, is a 'programme' within the meaning of Article 2 of Directive 2001/42, given that it is required by Article 5 of Directive 91/676 and was prepared by an authority at national or regional level.

52 Moreover, although the Court of Justice ruled in *Terre Wallonne and Inter-Environnement Wallonie* only on action programmes required by Article 5(1) of Directive 91/676, such as that formed by subsection 6 of section 3 of the contested order, the referring court is inclined to the view that, given that the contested order imposes in all areas, including in vulnerable zones, measures and actions of the type listed in Article 5 of and Annex III to Directive 91/676 intended to combat nitrate pollution, that order as a whole is a framework for future development consent of projects listed in Annexes I and II to Directive 85/337, so that it should be considered to be a 'plan' or 'programme' within the meaning of Article 3(2)(a) of Directive 2001/42 for which an environmental assessment is compulsory and does not depend on a prior finding of significant environmental effects.

53 Furthermore, the referring court finds that the contested order is an organised and inseverable scheme so that it would not be able to annul only the part of that order relating to the use of nitrogen in vulnerable zones, namely subsection 6 of section 3 of the order.

54 The Conseil d'État states therefore that it must, in circumstances such as those in the main proceedings, annul the contested order on the ground that, although it was the subject of a public inquiry in which the applicants in the main proceedings participated and they have not been able to prove that the Region of Wallonia did not take account of the submissions which they submitted in the course of the inquiry, it none the less was not the subject of an environmental assessment as required by Directive 2001/42. However, in so doing, it would create a legal vacuum in relation to the implementation of Directive 91/676 even though that directive, which was adopted in order to improve the quality of the environment, requires measures of transposition to exist in national law and, moreover, that order was adopted in order to comply with the judgment in *Commission* v *Belgium*.

55 According to that court, the possibility cannot be ruled out that the objective of a high level of protection of the environment, which, in accordance with Article 191 TFEU, is pursued by European Union policy in this area, may be better achieved, in the main proceedings, by maintaining the effects of the annulled order during a short period necessary for its redrafting rather than by retroactive annulment.

56 In view of the specific features of the present case as set out in paragraphs 50 to 55 of the present judgment, there is a risk that, in remedying the irregularity under Directive 2001/42 affecting the procedure by which the contested order was adopted by annulling that order, the referring court would create a legal vacuum incompatible with the obligation on the Member State concerned to adopt measures to transpose Directive 91/676 as well as the measures required of it in order to comply with the judgment in *Commission* v *Belgium*.

57 In that regard, it should be noted that the referring court does not rely on economic grounds in order to be authorised to maintain the effects of the contested order, but refers only to the objective of protecting the environment, which constitutes one of the essential objectives of the European Union and is both fundamental and cross-cutting in nature (see, to that effect, Case C-176/03 *Commission* v *Council* [2005] I-7879, paragraphs 41 and 42).

58 In view of that objective, the referring court can, given the existence of an overriding consideration relating to the protection of the environment, exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure, in so far as the following conditions are met.

59 First, the contested order must be a measure which correctly transposes Directive 91/676.

60 Secondly, the referring court must determine whether the adoption and entry into force of the new order providing, in particular in Article 8, for certain acts adopted on the basis of the contested order to be maintained do not enable the adverse effects on the environment resulting from the annulment of the contested order to be avoided.

61 Thirdly, annulment of the contested order must result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, a matter which is for the referring court to determine. That would be the case if annulling the order resulted in a lower level of protection of waters against pollution caused by nitrates from agricultural sources, given that this would run specifically counter to the fundamental objective of that directive, which is to prevent such pollution.

62 Fourthly and finally, the effects of such a national measure can be exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.

63 In the light of the foregoing, the answer to the question referred is that where a national court has before it, on the basis of its national law, an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42 and it finds that the 'plan' or 'programme' was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, that court is obliged to take all the general or particular measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested 'plan' or 'programme'. However, in view of the specific circumstances of the main proceedings, the referring court can exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure in so far as:

— that national measure is a measure which correctly transposes Directive 91/676;

— the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive do not enable the adverse effects on the environment resulting from the annulment of the contested measure to be avoided;

— annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run specifically counter to the fundamental objective of that directive; and

— the effects of such a measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber)

hereby rules:

Where a national court has before it, on the basis of its national law, an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning 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 and it finds that the 'plan' or 'programme' was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, that court is obliged to take all the general or particular measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested 'plan' or 'programme'. However, in view of the specific circumstances of the main proceedings, the referring court can exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure in so far as:

— **that national measure is a measure which correctly transposes Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;**

— **the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive do not enable the adverse effects on the environment resulting from the annulment of the contested measure to be avoided;**

— **annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run specifically counter to the fundamental objective of that directive; and**

— **the effects of such a measure are exceptionally maintained only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.**

[Signatures]