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## REVIEW

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Strategic Environmental Assessment: The Term “Plans and Programmes” as Interpreted by the European Court of Justice

*Thomas Bunge*

Strategic Environmental Assessment in Air Quality Planning in Germany

*Ulrike Weiland*

Remedying Failures to Conduct EIA, Should Not Result in a Game of Snakes and Ladders.

Comment on CJEU Case C-261/18 of 12 November 2019

*Attracta Uí Bhroin*

Compliance Challenges of the Automotive Industry Concerning Obligations of Article 33 REACH

*Simon Johannes Winkler-Portmann*

Recent Developments

Market Opportunities for “More Sustainable Chemistry” Through the REACH Regulation

Tricky Relationships: Chemicals, Waste and Product Legislation

International Conference on Green Chemistry

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## Editorial

Already the founding conference of elni in 1990 discussed the potential benefits of the ‘Environmental Impact Assessment’ (EIA). The ‘Strategic Environmental Assessment’ (SEA) might be seen as the younger sister of EIA; however in terms of scope bigger. The European Directive on SEA has been subject to a REFIT-process by the European Commission. The results were published at the end of November this year. The conclusion in general terms: The SEA Directive is fit for purpose. However, some Member States expressed their concerns with regard to the recent decisions of the CJEU. *Thomas Bunge* assesses the Term ‘Plans and Programmes’ as interpreted by the highest EU court. Air quality is also a neuralgic point in many cities throughout Europe. In this respect, *Ulrike Weiland* reports on SEA in Air Quality Planning in Germany.

*Attracta Uí Bhroin* from Dublin based Irish Environmental Network comments on a November 2019 CJEU ruling following the ‘Derrybrien case’ concerning EIA in Ireland. According to *Attracta*, the judgement has profound implications for several legal questions concerning, i.a., obligations to remedy and state liability.

Besides, the current issue of the *elni Review*, once more, features several contributions on the governance of chemical substances. *Simon Johannes Winkler-Portmann* analyses the compliance challenges of the automotive industry concerning obligations of REACH on the communication of ‘substances of very high concern’ (SVHCs). He thus assesses the effectiveness in terms of compliance of the sector’s governance approach to control chemical substances used in every single part of a vehicle, and develops options to overcome existing deficits.

The *Recent Developments* section starts off with *Silke Kleihauer* and *Leonie Lennartz* reporting on the results of a research project aiming to support ‘more sustainable chemistry’ in the textile supply chain, i.a. by broadening the view from the ‘reactive’ compliance position to a ‘proactive’ beyond compliance perspective. Thereby outlining, in addition, the highlights of a ‘Scenario Process’ together with actors from the textile chains, the piece also provides relevant methodological perspectives with a view to supporting transitions of industry sectors in the direction of sustainable development. The contributions by *Winkler-Portmann* and *Kleihauer / Lennartz* are also to be seen in the context of the

pervasive goal of creating more ‘Circular Economies’, which is pushed recently by normative impulses (e.g. recast of the Waste Framework Directive – WFD) and which increasingly is reflected in strategic approaches of companies. Against this background, *Henning Friege* et al. comment on the ‘tricky relationships’ of chemicals, waste and product legislation. Considering the interfaces and intersections of these frameworks they formulate eminent policy recommendations aimed to ensure that ‘Circular Economies’ are capable of avoiding the ‘recycling’ of problematic chemical substances present in (waste) raw materials. Finally, *Martin Wimmer* from the Austrian Ministry for Sustainability and Tourism outlines key findings of an ‘International Conference on Green Chemistry’ during the Austrian EU Presidency. The event discussed perspectives how to foster and better integrate into the legal frameworks the principles of ‘Green Chemistry’, which guide the design of chemical substances, products and processes to avoid hazards and reduce resource use – thus offering potentials for industries to ensure their compliance and also for ‘Circular Economies’.

*Claudia Schreider, Julian Schenten and Martin Führ*  
December 2019

## Strategic Environmental Assessment: The Term “Plans and Programmes” as Interpreted by the European Court of Justice

Thomas Bunge

### 1 Introduction

One of the key terms of the SEA Directive<sup>1</sup> is ‘Plans and Programmes’, defining the range of application of strategic environmental assessment. Although this notion has a high degree of relevance, the Directive itself abstains from a clear-cut definition. It rather presupposes what is meant and only lays down for which specific plans and programmes SEA is mandatory.<sup>2</sup> Two provisions deal with the matter: Article 2 (Definitions) states in lit. (a) that

“(a) ‘Plans and programmes’ shall mean plans and programmes, including those co-financed by the [European] Union, 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”.

Article 3 (“Scope”) requires in its first four paragraphs:

“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<sup>3</sup>, 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.<sup>4</sup>

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.”

The European Court of Justice interprets these provisions broadly, as it has pointed out several times.<sup>5</sup> This view is based on the general intention of the SEA Directive to provide for a high level of protection of the environment, as laid down in its Article 1, and on its objective to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment.<sup>6</sup> Thus, the Court extends its general understanding of the EIA Directive (2011/92/EU) also to the SEA Directive – an argument which, in view of the close relationship and far-reaching similarities of these directives, certainly seems adequate, since Article 3(1) of the SEA Directive makes it clear that SEA is required for plans and programmes due to the effects on the environment they have when implemented. A parallel provision exists in Article 2(1) of the EIA Directive.

The following text outlines the main elements of these provisions as interpreted by the Court. It begins by briefly addressing the Court’s views regarding Article 2 lit. (a), and then deals with the various components of Article 3(1) to (4).

1 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 L 197 of 21 July 2001, p. 30–37).

2 It is generally understood that the SEA Directive does not distinguish between a “plan” and a “programme” but stipulates identical requirements for both of these planning instruments. Cf. European Community, Implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, 2003 (Guidance document), p. 5

<[http://ec.europa.eu/environment/archives/eia/pdf/030923\\_sea\\_guidance.pdf](http://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf)>, accessed 29 June 2019.

3 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), now replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26

of 28 January 2012, p. 1–21), as amended by Directive 2014/52/EU of 16 April 2014 (OJ L 124 of 25 April 2014, p. 1–18).

4 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206 of 22 July 1992, p. 7–50), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ L 158 of 10 June 2013, p. 193–229).

5 See, for instance, ECJ, judgment of 22 March 2012 – C-567/10 (Inter-Environnement Bruxelles et al.), ECLI:EU:C:2012:159, par. 37; judgment of 10 September 2015 – C-473/14 (Dimas Kropias Attikis), ECLI:EU:C:2015:582, par. 50; judgment of 27 October 2016 – C-290/15 – C-290/15 (D’Oultremont et al.), ECLI:EU:C:2016:816, par. 40.

6 ECJ, judgment of 27 October 2016 – C-290/15 – C-290/15 (D’Oultremont et al.), ECLI:EU:C:2016:816, par. 39.

## 2 Article 2 (a): Scope of application of the SEA Directive

### 2.1 SUP not only required for mandatory plans and programmes

Article 2(a) of the SEA Directive was at first understood by the European Commission, as well as by most member states, to include only *mandatory* plans and programmes, i.e. those which the authorities are obliged to develop under an act of Parliament, a regulation or administrative rules. For optional ones – plans and programmes which the authorities are only entitled, but not required to draw up – an SEA would thus not be necessary. The European Court of Justice, however, rejected this interpretation.<sup>7</sup> In its view, the phrase “*which are required by legislative, regulatory or administrative provisions*” does not restrict the obligation to carry out an SEA to planning instruments which the competent authorities are *legally bound* to prepare in all or most cases. Rather, it only means that the planning process or the final planning decision must be governed by such rules. Thus, plans and programmes which the authorities may draw up *at their discretion* fall as well within the scope of Article 2(a) of the Directive. Consequently, SEA is in most cases a necessary part of the planning process in the fields described in Article 3 of the Directive. It is only plans and programmes prepared *without a sufficient legal or administrative basis* that will fall outside the scope of SEA. In practice, these are usually instruments at government level laying down high-level and broad ‘political’ concepts, e.g. an overall strategy for furthering sustainable development or a policy for an overall tax reform. These generally come in the form of cabinet resolutions and may, in their turn, contain administrative provisions for subsequent (more detailed) plans.

### 2.2 Repeal of plans and programmes

The wording of Article 2(a) deals only with (newly to be drawn up) plans and programmes and their modifications. Thus, it does not include the total repeal of a plan or programme. Consequently, a plan *modifying* a previous one by replacing some of its measures with others (and thus partially repealing the old plan) would require an SEA, while a decision to discontinue without substitution the previous plan’s rules would not be included within the scope of Article 2(a). This, however, would be inconsistent, as any repeal of the existing plan’s provisions will change the conditions, e.g. for development consent of projects, regardless of whether new planning rules will be adopted or not. The Court therefore holds that Article 2(a) also applies to the complete repeal of a plan or programme, founding its opinion again on

Article 1 of the Directive which states “[t]he objective of this Directive is to provide for a high level of protection of the environment”.<sup>8</sup>

## 3 Article 3: Range of application of SEA

### 3.1 Plans and programmes likely to have significant environmental effects

Under Article 3(1) of the SEA Directive, the plans and programmes outlined in the following paragraphs (2) to (4) shall require an SEA if they “*are likely to have significant environmental effects*”. That clause not only comprises negative impacts, but also those beneficial to the environment. The fact that a plan or a programme is intended to have exclusively beneficial environmental consequences is, thus, not relevant in determining whether it is necessary to carry out an SEA. The Court stressed this expressly in the *Terre wallonne* judgment of 2019<sup>9</sup>, which was the first case providing an opportunity for dealing with the question in the context of the SEA Directive. This point of view, however, was already developed previously in interpreting the EIA Directive and has now been transferred to the SEA Directive. The Court’s opinion in this matter is in line with that of the European Commission, which had stated its position already during the implementation period of the Directive.<sup>10</sup>

This result may also be relevant for other EU Member States. For instance, in Germany the question of whether or not SEA is mandatory for landscape planning has been discussed extensively, and not all relevant federal states have enacted legislation on the matter.<sup>11</sup>

### 3.2 Form and content of plans and programmes

#### 3.2.1 No special legal form required

Several other Court judgments describe the plans and programmes under Articles 2 and 3 of the SEA Directive as containing provisions of a certain kind that are relevant for subsequent decisions of authorities. In this respect, however, they have been translated differently: In some languages the judgments characterize a plan or programme as a “*rättsakt*” (in Swedish), “*retsakt*” (in Danish) or “*Rechtsakt*” (in German), which would imply that it

<sup>7</sup> ECJ, judgment of 22 March 2012 – C-567/10 (Inter-Environnement Bruxelles et al.), ECLI:EU:C:2012:159, par. 24 et seq.

<sup>8</sup> ECJ, judgment of 22 March 2012 – C-567/10 (Inter-Environnement Bruxelles et al.), ECLI:EU:C:2012:159, par. 36 et seq.; judgment of 10 September 2015 – C-473/14 (Dimas Kropias Attikis), ECLI:EU:C:2015:582, par. 44.

<sup>9</sup> ECJ, judgment of 12 June 2019 – C-321/18 (Terre wallonne), ECLI:EU:C:2019:484, par. 27, 28.

<sup>10</sup> Cf. Deutscher Bundestag, Drucksache 15/3441 of 29 June 2004: Gesetzentwurf der Fraktionen SPD und Bündnis 90/Die Grünen: Entwurf eines Gesetzes zur Einführung einer Strategischen Umweltprüfung und zur Umsetzung der Richtlinie 2001/42/EG (SUPG), p. 6, referring to a letter by the Commission of 19 July 2004 to the Federal Environmental Ministry.

<sup>11</sup> In this case, the German federal states (Länder), but not the Federation, are entitled to adopt provisions on SEA; cf. sec. 52 of the Federal Act on EIA (Gesetz über die Umweltverträglichkeitsprüfung).

must in each case be a *legal act* – for instance, an act of Parliament or a government regulation. However, other languages use more open terms: they speak, for instance, of “*measure*” (in English), “*acte*” (in French), “*atto*” (in Italian), and of “*handeling*” or “*besluit*” (in Dutch). Taking these differences into account it can be concluded that these descriptions are not meant to specify the notion of “*plans and programmes*” by a concise legal criterion (which would mean that the Directive only applied to acts issued in specific legal forms). Rather, the Court only uses the words as synonyms for the broad ‘normative’ nature of such instruments – i.e. the fact that each plan and programme intends to influence future developments in some way, and that the competent authorities are required to follow, or take note of, the plan content when dealing with matters covered by it. Thus, it is not necessary for a plan or programme to contain legal provisions *formally adopted* by a Parliament, government, ministry or other competent authority. Consequently, the Directive does not stipulate a special form of plan or programme that will qualify as the object of SEA.<sup>12</sup>

However, plans or programmes do not necessarily lay down ‘normative’ clauses in all cases. Rather, they may contain (exclusively or in part) non-binding suggestions only which will not qualify as planning clauses for the purposes of the Directive. Thus, in the *Terre wallonne* judgment of 2019, the Court pointed out that a Walloon decree did not require a SEA because the objectives it set out had only an “*indicative value*”, but not a statutory one.<sup>13</sup> Although this distinction between ‘normative’ and ‘non-normative’ clauses is basically clear, one has to bear in mind that the term ‘statutory requirement’ is broader than ‘coercive requirement’. It is not only mandatory rules (which the authorities must apply strictly without deviation) that have a ‘statutory’ nature, but also those that leave the authorities a greater or smaller margin of discretion. Indeed, at the planning and programme-making level, many provisions will allow for specification by authorities, and possibly the granting of exceptions in some cases, when deciding on development consents for individual projects.<sup>14</sup> Consequently, it may be difficult in practice to distinguish between a ‘normative’ rule and an ‘indicative’ statement in a plan or a programme.

### 3.2.2 Content of plans and programmes

Proceeding from these basic considerations – that a planning instrument must in each case lay down ‘normative’ rules, but that its legal form is irrelevant – the question of whether a particular plan or programme falls within the range of Article 3 of the Directive depends mainly on its content or substance. This has been an important result of the *Terre wallonne and Inter-Environnement Wallonie* case (2010) where the Court looked at nitrate programmes under the Nitrate Directive.<sup>15</sup> It sees the “*specific nature*” of those programmes

“*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*”.<sup>16</sup>

The Court reiterated and generalized this view in later judgments.<sup>17</sup>

The criterion “*comprehensive and coherent approach*” points out, in particular, the difference between a plan or programme and a permit granted to realize a single project. Such an approach, together with the feature of “*providing practical and coordinated arrangements*” may indeed be seen as the most important characteristics of planning instruments: It is common ground that their objective is to coordinate a considerable number of interests and concerns in a comprehensive manner, balancing them in a general way and laying down a pattern for subsequent permits or other decisions in the area they are concerned with. As a result of this coordinating and balancing process, a plan or a programme defines, in the words of the Court, “*the criteria and the detailed rules for the development of land and normally concern[s] a multiplicity of projects whose implementation is subject to compliance with the rules and procedures provided for by those measures*”.<sup>18</sup>

However, while each plan and programme to which the Directive applies must lay down such criteria and detailed rules, it is not always necessary that the instrument deals with several or many projects. Rather, a judgment of 2010<sup>19</sup> concludes that rules with a planning character that have been set up for a single project may also fall within the scope of the Directive. This interpretation is based on the argument that, if

12 See, in this context, also ECJ, judgment of 27 October 2016 – C-290/15 – C-290/15 (D’Oultremont et al.), ECLI:EU:C:2016:816, par. 51 and 52.

13 ECJ, judgment of 12 June 2019 – C-321/18 (*Terre wallonne*), ECLI:EU:C:2019:484, par. 42.

14 See in this context also the interpretation of the European Commission in its Report of 15 May 2017 to the Council and the European Parliament under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, Doc. COM(2017) 234 final, p. 4.

15 Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375 of 31 December 1991, p. 1.

16 ECJ, judgment of 17 June 2010 – C-105/09 and C-110/09 (*Terre wallonne and Inter-Environnement Wallonie*), ECLI:EU:C:2010:355, par. 47.

17 See, in more detail, section 3.3.2 of this paper.

18 ECJ, judgment of 22 March 2012 – C-567/10 (*Inter-Environnement Bruxelles et al.*), ECLI:EU:C:2012:159, par. 30; judgment of 7 June 2018 – C-160/17 (*Thybaud et al.*), ECLI:EU:C:2018:401, par. 43.

19 ECJ, judgment of 22 September 2011 – C-295 1 ECLI:EU:C:2011:608, par. 37 et seq.

such ‘single-project’ plans or programmes were excluded, the range of application of SEA would be narrowed down in a way contrary to the intention of the Directive.

### 3.3 Article 3(2)(a): Plans and programmes relevant for future development consent of projects listed in the EIA Directive

Under Article 3(2)(a) of the SEA Directive, an SEA is mandatory for plans and programmes that meet two requirements: They must deal with a *sector listed there* (agriculture, forestry, fisheries, energy, industry, transport, etc.), and *set the framework* for future development consent of projects listed in Annexes I and II to the EIA Directive.

#### 3.3.1 Plans and programmes concerning specific sectors

As to the first item, there seems to be little difficulty in practice. In *Inter-Environnement Bruxelles*, the Court describes the relevant plans and programmes comprehensively by stating that all of them concern “town and country planning” and the “development of land”.<sup>20</sup> These terms have, however, been translated differently in other EU languages; For instance, the French text uses the words “*l’aménagement du territoire*” and “*l’aménagement des sols*”, and the German version “*Raumordnung*” and “*Bodennutzung*”. In Italian, however, the passages read “*assetto del territorio*” and “*pianificazione del territorio*”, while the Dutch text refers in both cases to “*de ruimtelijke ordening*”. Again, this wording should not be understood in too strict a sense. The sectors mentioned in the Directive are not only directly concerned with soil or land management or use (like plans for town and country development, waste management, mining, or traffic infrastructure), but also refer to other topics like air quality improvement or noise reduction. The terms “town and country planning” and “development of land” used by the Court thus should not be interpreted as having a specific legal meaning which would restrict the range of application of the Directive, but as general ‘short formulas’ for all subjects laid down in Article 3(2)(a). Consequently it is not only comprehensive land-use plans but also special plans – like those laying down how many infrastructure projects of a certain kind (for instance, high-voltage power lines or highways) will be required in the next ten or fifteen years in the country – that potentially fall within the range of Article 3(2)(a) of the Directive.

#### 3.3.2 Framework for future development consent of projects

The second requirement – setting the framework for future development consent of projects – is more

difficult to define. Over the years, the Court has dealt with this wording in a number of cases and developed a definition which, by now, is settled case law. In the wording of the *D’Oultremont* judgment:

“the notion of ‘plans and programmes’ relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment”.<sup>21</sup>

In this case the Belgian *Conseil d’État* (Council of State) had asked for a preliminary ruling in order to clarify, *inter alia*, Article 3(2)(a) of the Directive. Although the phrase just quoted seems to suggest that the Court intends to explain the meaning of “plans and programmes” rather than “framework for development consent”, it deals with this latter notion, as is made clear by its context.<sup>22</sup>

The facts in the *D’Oultremont* case were somewhat complicated. The plaintiffs had challenged, before a Belgian court, an order of the Walloon Government of 2014, basing their action for annulment of this order on the complaint that the Government had not carried out an SEA before adopting it. The order laid down, in particular, technical standards and operating conditions for wind turbines, and rules for the prevention of accidents and fires, but did not define specific geographical areas where these turbines could be realized. Thus, it was valid for the whole Walloon region. However, the Walloon Government had, already in 2013, provisionally adopted a ‘Reference Framework’ which set out recommendations for the installation of wind turbines in this region, as well as a supplementing map specifying zones for the installation of wind turbines. Both of these latter instruments aimed at providing a framework for the planning and implementation of the Walloon wind-turbine programme. The map had been the subject of an SEA. Neither the Reference Framework nor the map were finally adopted by the Government, though. That meant that the order of 2014 was dissociated from the two latter instruments, and in itself did not determine the intended use or the protection scheme in respect of one or more zones or a site. It covered all wind farms irrespective of their site, except that the noise levels would have to correspond to the zoning in the relevant sector plan. Thus, it did not set out a *complete framework* for development consent, and did

<sup>21</sup> ECJ, judgment of 27 October 2016 – C-290/15 (*D’Oultremont et al.*), ECLI:EU:C:2016:816, par. 49; confirmed by judgment of 7 June 2018 – C-671/16 (*Inter-Environnement Bruxelles et al.*), ECLI:EU:C:2018:403, par. 53; judgment of 7 June 2018 – C-160/17 (*Thybaut et al.*), ECLI:EU:C:2018:401, par. 54; judgment of 8 May 2019 – C-305/18 (*Verdi Ambiente e Società [VAS] – Aps Onlus et al.*), ECLI:EU:C:2019:384, par. 50; judgment of 12 June 2019 – C-321/18 (*Terre wallonne*), ECLI:EU:C:2019:484, par. 41; and judgment of 12 June 2019 – C-43/18 (*CFE*), ECLI:EU:C:2019:483, par. 61.

<sup>22</sup> Case C-290/15 (*D’Oultremont*), par. 47 – 50.

<sup>20</sup> Case C-567/10, par. 29 and 30.

not delineate a *limited geographical area* where its rules would apply.

In the view of the Court, these special factors are irrelevant. The judgment points out that, while it is necessary for a plan or a programme to cover a specific area, the wording of Article 2(a) and of Article 3(2)(a) of the Directive does not require that such instruments concern planning for a “*given*” area (which probably means that the plan or programme itself need not define this area). Rather, it is sufficient if they “*cover, in the wider sense, regional and district planning in general*”.<sup>23</sup> Consequently, in the Court’s view, it did not matter that the contested order contained provisions for the Walloon region as a whole. That view had been already expressed earlier, if perhaps not quite as clear, in the *Terre wallonne and Inter-Environnement Wallonie* case of 2010.<sup>24</sup>

The Court also rejects the view that the order does not set out a sufficiently complete framework for future development consent of wind energy projects. It bases its opinion on two arguments: first, on the objective of the SEA Directive to require an SEA for plans and programmes likely to have significant environmental effects, and second, on the consideration that ‘salami’ strategies – to circumvent the Directive’s obligations by splitting intended measures – should be avoided.<sup>25</sup>

The Court concludes that the Walloon order of 2014 concerns, in particular, technical standards, operating conditions, the prevention of accidents and fires (inter alia, by stopping the wind turbine), noise level standards, restoration and financial collateral for wind turbines. In its opinion these standards

“*have a sufficiently significant importance and scope in the determination of the conditions applicable to the sector concerned [,] and the choices, in particular related to the environment, available under those standards must determine the conditions under which actual projects for the installation and operation of wind turbine sites may be authorised in the future*”.<sup>26</sup>

With this position the Court again interprets the Directive in a broad sense, so that SEA is required for a larger range of plans and programmes than may be obvious at first glance of Article 3(2)(a). A closer look, however, shows that the *D’Oultremont* judgment only reflects the ‘normal’ planning situation. No plan or programme lays out a complete framework for development consent. Rather, every such instrument is developed in the context of existing laws, regulations and possibly administrative rules applicable to the projects in question. Consequently, development consent for a specific project cannot be granted if it is based exclusively on the provisions of a plan or programme, but rather only if the

project also conforms to all relevant legal and administrative rules. Conversely, it is in each case sufficient if the plan or programme in question deals only with matters that have not been addressed in detail in those other rules, or if the latter leave the development consenting authorities a considerable amount of discretion.

From this starting point it is important what the Court means by requiring (development consent) standards of “*a sufficiently significant importance and scope*”, or by stating in more recent judgments<sup>27</sup> that the plan or programme in question must contain “*a significant body of criteria and detailed rules*”. These phrases are clarified a little in the *Thybaut* case where the Court mentions that this concept must be understood qualitatively and not quantitatively. The reason for this is again that in the Court’s view it is necessary to avoid strategies which may be designed to circumvent the obligations under the SEA Directive.<sup>28</sup>

However, this interpretation of Article (3)(2)(a) has an effect that was probably not expected when the Council and EU Parliament adopted the Directive in 2001: The order contested in the *D’Oultremont* case contains provisions for the whole of the Walloon region and thus might possibly have been classified alternatively as the *legal and administrative framework* for subsequent plans or programmes on wind energy, but not as a plan or programme in itself. In many or most EU Member States legal documents exist providing such a framework for the whole of their territories, and not laying down different rules for particular geographical areas. As an example, the German *Technical Guidance on Air Quality Control*<sup>29</sup> may be mentioned, an administrative regulation specifying the requirements for development consents of installations (*Genehmigungen von Anlagen*) under the Federal Immissions Control Act. From the point of view of the Court, this Guidance is likely to be covered by Article 3(2) (a) of the Directive, as its provisions relate in many cases to projects listed in the EIA Directive’s Annexes I or II. The same applies to government or ministerial regulations, i.e. provisions of a generally binding character, if they contain “*a significant body of criteria and detailed rules*” for projects listed in Annexes I and II of the EIA Directive. Such regulations, again, are quite common for Member States in the field of environment protection.

On the other hand, *legal acts formally adopted by parliament* will in many cases only lay down general principles for development consent, requiring for instance, that the projects in question must not cause harm or injury to others, or that each proponent will have

23 Case C-290/15 (*D’Oultremont*), par. 45 and 46.

24 ECJ, judgment of 17 June 2010 – C-105/09 and C-110/09 (*Terre wallonne and Inter-Environnement Wallonie*), ECLI:EU:C:2010:355, par. 47.

25 Case C-290/15 (*D’Oultremont*), par. 47 and 48.

26 Case C-290/15 (*D’Oultremont*), par. 50.

27 Cf. the judgments listed *supra*, note 21.

28 ECJ, judgment of 7 June 2018 – C-160/17 (*Thybaut et al.*), ECLI:EU:C:2018:401, par. 55.

29 Erste allgemeine Verwaltungsvorschrift zum Bundes-Immissionsschutzgesetz (Technische Anleitung zur Reinhaltung der Luft – TA Luft) of 24 July 2002 (Gemeinsames Ministerialblatt 2002, pp. 511 et seq.), presently being revised and brought up to date.



to apply “*all appropriate means*” to minimize environmental degradation. What is actually meant by this vague wording will then often be specified by ministerial orders or decrees, or by other rules below the level of a parliamentary act. Thus, the Court’s position in the *D’Oultremont* case would not require an SEA if such an act is being prepared by a ministry.

A recent Court case again addresses the subject of legal rules by stating “*that national legislation [...] comprising basic legislation and implementing legislation [...] comes under the notion of ‘plans and programmes’, within the meaning of [the SEA Directive]*”.<sup>30</sup> This wording suggests that “*basic legislation*” alone – containing only general or abstract provisions – will not be sufficient to constitute a plan or a programme. In the case mentioned, however, such provisions were accompanied by “*implementing legislation*”, i.e. specific substantial rules which revised upwards the capacity of existing waste incineration facilities in the country and provided for the construction of new installations of that kind. The Court points out that these rules also meet the requirement formulated several years earlier that they will have to consist of “*practical and coordinated arrangements covering vulnerable zones and, where appropriate, the entire territory, for the reduction and prevention of pollution [...]*”.<sup>31</sup>

On the other hand, the condition that the plan or programme in question must set the framework for future development consent of projects does not mean that very detailed or specific rules would be necessary. On the contrary, in the Court’s view, the notion of “*plans and programmes*” in Articles 2 and 3 of the SEA Directive also includes national legislation expressing “*some abstract ideas*” and pursuing “*an objective of transforming the existing framework*”, since such provisions are “*illustrative of its planning and programming aspect*”.<sup>32</sup>

### 3.4 Article 3(2)(b): Plans and programmes requiring an appropriate assessment under the Habitats Directive

#### 3.4.1 Obligation to carry out an SEA

Under Article 3(2)(b) of the SEA Directive an SEA is mandatory for plans and programmes requiring an assessment under Articles 6 or 7 of the Habitats Directive. The interpretation of this clause does not seem to be difficult. The Court has dealt with it only in a few judgments where the wording of none of these provisions seemed to be ambiguous. According to Article 6(3) of the Habitats Directive,

“*Any plan or project not directly connected with or necessary to the management of the [Natura 2000] 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. [...]*”

Article 7 of the Habitats Directive extends this obligation to a plan or a project likely to significantly affect a special bird protection area, unless this plan or project is connected with or necessary to the management of that area.

An appropriate assessment under these provisions will be necessary if there is a *probability or a risk* that the plan or project in question will have a significant effect on the site concerned, i.e. – in accordance with the precautionary principle – if such an effect *cannot be excluded* on the basis of objective information.<sup>33</sup> In a judgment of 2012, the Court confirmed that in such a case an SEA will be obligatory too. Therefore, the planning authority will at this stage in the planning process only have to examine whether it can be excluded, on the basis of objective information, that that plan or project will significantly affect the site concerned.<sup>34</sup> There is no need to consider other impacts of the plan or programme in question.

#### 3.4.2 Plans directly connected with or necessary to the management of a Natura 2000 site

A recent Court judgment<sup>35</sup> deals with the exemption clause of Article 6(3) of the Habitats Directive which limits also the obligation under Article 3(2)(b) of the SEA Directive. Under the Habitats Directive, an appropriate assessment is mandatory only for plans and projects “*not directly connected with or necessary to the management of a Natura 2000 site*”. Conversely, this clause could be understood to the effect that all plans which do have a direct connection with or are necessary to the management of the Natura 2000 site can be drawn up without subjecting them either to an appropriate or to a strategic assessment. If Article 6(1) of the Habitats Directive (describing these plans) is taken into account, it seems to follow that neither of these assessments would be necessary when preparing “*management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory [or] administrative measures*” as required under Article 6(1) of the Habitats Directive.

The Court, though, does not agree completely with this interpretation, although it finally concludes that Article 3(2)(b) of the SEA Directive does not demand an SEA for the Habitat management plans just mentioned. It

30 ECJ, judgment of 8 May 2018 – C-305/18 (*Verdi Ambiente e Società [VAS] Aps Onlus u. a.*), ECLI:EU:C:2019:384, par. 60 (emphasis added).

31 ECJ, judgment of 17 June 2010 – C-105/09 and C-110/09 (*Terre wallonne and Inter-Environnement Wallonie*), ECLI:EU:C:2010:355, par. 47.

32 ECJ, judgment of 12 June 2019 – C-321/18 (*Terre wallonne*), ECLI:EU:C:2019:484, par. 57.

33 Settled case law; cf., for instance, ECJ, judgment of 7 September 2004 – C-127/02 (*Waddenvereniging and Vogelbeschermingsvereniging*), ECLI:EU:C:2004:482, par. 43 and 44.

34 ECJ, judgment of 21 June 2012 – C-177/11 (*Sillogos Ellinon Poleodomon kai Khorotakton*), ECLI:EU:C:2012:378, par. 23 and 24.

35 ECJ, judgment of 12 June 2019 – C-43/18 (CFE), ECLI:EU:C:2019:483.

points out that the exemption clause of Article 6(3) of the Habitats Directive is valid only in the context of that Directive and has no bearing on the SEA Directive. In other words, it argues that a management plan, although not requiring an appropriate assessment under the Habitats Directive, will still fall under Article 3(2)(a) or Article 3(4) of the SEA Directive if it sets, at the same time, the framework for future development consent of projects.<sup>36</sup> The reason stated for this interpretation is quite cogent: The Habitats Directive of 1992 does not restrict any future EU legislation that may cover its subjects and require additional environmental assessments.<sup>37</sup> The Court's view may be supplemented by the argument that the SEA Directive here is phrased 'positively', describing only the plans and programmes for which an SEA is necessary. It does not state 'negatively' that a plan or a programme *not covered by Article 3(2)(b)* will be automatically exempt from the obligation to carry out an SEA.

From this position, however, many such management plans must indeed be subjected to an SEA. To avoid this consequence, the Court formulates a broad and general restriction, stating, as an overriding principle, that the reiterative assessments of one and the same plan under the SEA Directive must be prevented. Hence,

*"To that end, and provided that the assessment of their effects has already been carried out, a measure does not fall within the meaning of 'plans and programmes' if it is part of a hierarchy of measures which have themselves been the subject of an assessment of their environmental effects and it may reasonably be considered that the interests which the SEA Directive is designed to protect have been taken into account sufficiently within that framework".*<sup>38</sup>

Thus, a management plan under Article 6(1) of the Habitats Directive will be exempt from the SEA requirement if it deals *exclusively* with the subject matter specified in that provision, but not if it lays down additional rules pertaining to the development consent of projects. Such additional provisions will often be formulated in cases where the Habitat management rules are not being drawn up separately, but rather are „integrated into other development plans”.

#### 4 Article 3(3): Plans and programmes determining the use of small areas at local level

Article 3(3) of the SEA Directive limits the obligation to carry out an SEA in certain cases: first, for plans and programmes determining the use of *small areas at local level*, and second, for *minor modifications to plans and*

*programmes*. In such cases, an SEA is only necessary “where the Member States determine that the plans and programmes are likely to have significant environmental effects”. While the Court has not yet dealt with the category of “*minor modifications*”, it has slightly specified the phrase “*use of small areas at local level*”.<sup>39</sup> It interprets this formula as stating two separate requirements. The second one, “*at local level*” refers, according to the Court, to the competence of the planning authority, or, more precisely, to the territorial jurisdiction of the local authority which prepares and/or adopts the plan or programme in question.<sup>40</sup> Thus, only planning agencies at local level, in particular communities like towns and cities, are in a position to make use of this exemption. Authorities at regional or national level, on the other hand, may only dispense with an SEA in cases of minor modifications of a plan or programme already in existence, if such amendments will not affect the environment significantly.

The term “*small areas*” in Article 3(3) defines, in the view of the Court, a purely quantitative standard which is based only on the size of the area concerned by the plan, regardless of the potential effects on the environment. As both requirements – “*small areas*” and “*at local level*” – have to be met simultaneously, an area is “*small*” in the Court's understanding if it is “*small in size relative to that territorial jurisdiction*”.<sup>41</sup> This interpretation, which is based on the common meaning of the word “*small*”, remains, of course, rather vague. In addition, it may cause difficulties in actual practice, because an area which is small in a geographically large city could be taken as not being small if it lay within a town whose area of jurisdiction is of fairly limited size.

The Advocate General in this case went somewhat further. She suggested in her opinion that, in general, “*an area of up to 5% of the territory within which the relevant administrative authority at local level exercises competence seems to be an appropriate guideline for determining what can still be considered conventionally 'small'. In the case of particularly large municipalities, however, it cannot, as a rule, be permissible to accept as 'small' the maximum area implied by that guideline.*”<sup>42</sup> The Court, however, did not follow this proposal.

#### 5 Article 3(4): Framework for development consent for other projects than those listed in the EIA Directive

A plan or a programme setting the framework for development consent for other projects than those listed in Annexes I or II of the EIA Directive will require an SEA only if it is likely to have significant environmental

36 Case C-43/18 (CFE), par. 51.

37 Case C-43/18 (CFE), par. 51, 52.

38 Case C-43/18 (CFE), par. 73. The Court has formulated a similar limitation for the repeal of a plan which in principle also falls under Article (3) (2) (a) of the SEA Directive: ECJ, judgment of 22 March 2012 – C-567/10 (Inter-Environnement Bruxelles et al.), ECLI:EU:C:2012:159, par. 42.

39 ECJ, judgment of 21 December 2016 – C-444/15 (Associazione Italia Nostra Onlus et al.), ECLI:EU:C:2016:978, par. 65 et seq.

40 Case C-444/15 (Associazione Italia Nostra Onlus et al.), par. 69 and 70.

41 Case C-444/15 (Associazione Italia Nostra Onlus et al.), par. 73.

42 Opinion of Advocate General J. Kokott of 8 September 2016 in Case C-444/15, ECLI:EU:C:2016:665, par. 68.

effects (Article 3(4) of the SEA Directive). The Court criteria developed for Article 3(2) (a) are obviously equally relevant in these cases, except those referring to the specific sectors (agriculture, forestry, etc.) to which the planning instrument must belong. Article 3(4) is open as regards the subject matter of the planning instruments it mentions. However, if a specific plan or programme only concerns projects that, under national law, may be realised *without any development consent* by the competent authorities, it falls outside the scope of Article 3(4) of the Directive.<sup>43</sup>

## 6 Likelihood of significant environmental effects

In the cases described in Article 3(3) and 3(4) of the Directive, an SEA is only necessary if the plan or programme in question is “*likely to have significant environmental effects*”. It is the task of each Member State to determine whether this is the case, “*either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches*”. In all cases, the States have to “*take into account relevant criteria set out in Annex II of the Directive*” (Article 3(5) of the Directive). In view of the Court, the term “*likely to have significant effects*” is to be understood in an ambitious way in unison with the overall intention of the Directive. It takes up a result of the *Sillogos Ellinon Poleodomon kai Khorotakton* case (2012), which dealt with the conditions in which a plan mentioned in Article 6(3) of the Habitats Directive must be subject to an SEA.<sup>44</sup> In a judgment of 2015, it transfers this conclusion also to the cases of interest here, stating that the examination of whether a plan or a programme is likely to have significant environmental effects “*is necessarily limited to the question of whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned*”.<sup>45</sup> Thus, if doubts remain about the possibility of such effects, an SEA must be carried out.

## 7 Conclusion

To sum up, the Court’s judicature has obviously given clearer contours to many of the notions contained in Articles 2 and 3 of the SEA Directive. The Court understands these provisions (like others of the Directive) broadly and has in several cases rejected narrower views. As prominent examples the cases C-567/10 (*Inter-Environnement Bruxelles et al.*) and C-290/15 (*D’Oultremont*) may be mentioned. It seems that the phrase “*which sets the framework for future development consent of projects*” in Article 3(2)(a) and (4) is, in SEA practice, one of the most ambiguous

clauses since the Court had to concern itself with this wording in a number of judgments dealing with a considerable variety of planning subjects.

In spite of the different planning topics the Court had to deal with and the special questions submitted to it, all judgments mentioned here follow a similar approach. First and foremost, they are of course based on Article 1 of the SEA Directive which states that

*“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.”*

Second, the Court underlines – in accordance with recital clause 1 of the Directive – that SEA is an instrument for applying the precautionary principle as laid down in Article 191(2) TFEU. Third, it consistently interprets EU law provisions in general with a view to their *effet utile*, i.e. in a way that the intentions pursued can be met most effectively. That is reflected, in particular, by the argument recurring several times that a possible circumvention of the Directive’s requirements must be avoided. Consequently, proceeding from these three starting points, all judgments arrive at the result that SEA has a rather wide field of application, and that the SEA Directive’s clauses are to be understood in a broad rather than a narrow way.

It is remarkable as well that the Court, in interpreting the SEA Directive, draws on conclusions in other judgments that deal with the EIA and the Habitat Directives. Although from a methodological point of view these arguments may not always be quite stringent since there are distinctions in the wording of all three Directives, the Court has always employed them to make SEA more effective. By thus linking the instruments of strategic environmental assessment, environmental assessment, and appropriate assessment under Article 6(3) of the Habitats Directive, it becomes obvious that all of them are at base rather similar instruments following the same underlying concept. In spite of the various differences between the three Directives, it seems therefore appropriate to underline, in accordance with the Court, their common features. In future, that may also contribute to bringing the text of the SEA and EIA Directives more in line with each other.

At present, the SEA Directive is being revised in the European Commission’s REFIT process. It is not clear yet whether this will result in an amendment proposal by the Commission. If the Commission, however, decides to prepare such a proposal, it would certainly be useful to complement, inter alia, the present wording of Articles 2(a) and (3) to reflect the Court’s interpretation.

<sup>43</sup> ECJ, judgment of 12 June 2019 – C-43/18 (CFE), ECLI:EU:C:2019:483, par. 65 et seq.

<sup>44</sup> Cf. *supra*, section 3.4.1.

<sup>45</sup> ECJ, judgment of 10 September 2015 – C-473/14 (Dimos Kropias Attikis), ECLI:EU:C:2015:582, par. 47.

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