Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 21 March 2024[1]

Case C-727/22

Friends of the Irish Environment CLG
v
Government of Ireland and Others

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Reference for a preliminary ruling – Environment – Directive 2001/42/EC – Strategic environmental assessment – *Project Ireland 2040* – National Planning Framework – National Development Plan – Financial or budget plans and programmes – Identification, description and evaluation of reasonable alternatives – Effects on the environment of the alternatives dealt with)

I. Introduction

1. The SEA Directive (SEA stands for strategic environmental assessment)[2] governs the environmental assessment in the procedure for the adoption of plans and programmes. Although the Court has considered the SEA Directive on many occasions, there are still unresolved questions of considerable importance. The present request for a preliminary ruling concerns two of them: first, the purport of an exemption from the scope of the directive for financial or budget plans and programmes and, second, the assessment of the effects on the environment of alternatives to the plan or programme ultimately adopted. In particular, the question of the assessment of alternatives is also of interest in connection with other rules of EU environmental law which similarly provide for the consideration of alternatives.

2. Those questions arise in the context of an action brought by an environmental association against two measures forming part of Ireland's national development planning. It is disputed whether one of these measures falls under the abovementioned exemption and whether, in the environmental assessment carried out in respect of the second measure, the effects on the environment of the alternatives were examined sufficiently.

[1] Original language: German.

[2] 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).

II. Legal framework

3. The European Union adopted the SEA Directive even before the conclusion of the negotiations on the 2003 Kyiv Protocol on Strategic Environmental Assessment.[3] Nevertheless, that directive implements the Protocol, according to the declaration made by the European Union upon the approval of that protocol, and recital 7 of the SEA Directive anticipates the Protocol.

4. The objectives of the SEA Directive are set out in particular in Article 1:

'The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.'

5. Plans and programmes are defined in Article 2(a) of the SEA Directive:

'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'.

6. The obligation to carry out a strategic environmental assessment is governed by Article 3 of the SEA Directive:

'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 [the EIA Directive[4]], or

[3] Protocol to the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 35, approved by Council Decision 2008/871/EC of 20 October 2008, OJ 2008 L 308, p. 33). The Council approved the Espoo Convention by decision of 15 October 1996 (Council document 8931/96 of 17 July 1996). It is reproduced in OJ 1992 C 104, p. 7.

[4] 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 2012 L 26, p. 1), last amended by Directive 2014/52/EU (OJ 2014 L 124, p. 1).

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of [the Habitats Directive [5]].

…

8. The following plans and programmes are not subject to this Directive:

– plans and programmes the sole purpose of which is to serve national defence or civil emergency;

– financial or budget plans and programmes.

9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods for Council Regulations (EC) No 1260/1999 and (EC) No 1257/1999.'

7. Article 5 of the SEA Directive concerns the content of the environmental assessment and the consideration of alternatives:

'1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. …'

8. Annex I of the SEA Directive clarifies what information is to be provided under Article 5:

'The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

…

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

…'

[5] 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), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

III. Facts and request for a preliminary ruling

9. The request arises in an appeal before the Supreme Court (Ireland) in a challenge to the two strands of *Project Ireland 2040* adopted by the Government of Ireland on 16 February 2018 and 'reaffirmed' by a subsequent decision of 29 May 2018. It comprises two measures: the National Planning Framework ('the NPF'), which describes Ireland's development goals in very abstract terms, and the National Development Plan ('the NDP'), which sets out how State funding will be made available for certain schemes within that context.

10. The publication of *Project Ireland 2040* was described in the foreword as creating a unified and coherent plan for the land use and development within the country. The High Court (Ireland) described it as 'a macro-spatial strategy which maps out general development goals for the country for the period up to 2040'.

11. The draft NPF, accompanied by the SEA Environmental Report, was published on 26 September 2017. The foreword to the NPF describes it as 'a planning framework to guide development investment over the coming years' which contains a 'set of national objectives and key principles from which more details and refined plans will follow'. The NPF does not explicitly provide every detail for every part of the country but rather 'empowers each region to lead in the planning and development of their communities'.

12. The foreword to the NPF also states that a 'companion' to that document is the NDP, which was published with it and is described as a 'ten-year strategy for public capital investment of almost [EUR] 116 billion'. The NDP is an investment plan which is intended to ensure and support implementation by the provision of capital investment, setting out how funding will be made available for certain projects considered essential to the achievement of the strategic outcomes identified in the NPF. The NDP identifies major infrastructure works it proposes to fund, such as railway, road and airport infrastructure. It does not concern itself with any planning or development considerations.

13. Friends of the Irish Environment are challenging the validity of the adoption of both plans on account of the alleged failure to meet the requirements of the SEA Directive. In regard to the NPF, it was contended that the treatment of reasonable alternatives, as required by the directive, was insufficient.

14. According to the Supreme Court, a logically prior question arises as to whether the NPF and/or the NDP is a 'plan or programme' within the meaning of the directive. The respondents argue that whilst the NPF was assessed for the purposes of the SEA Directive, this was not done by reason of a legal obligation. Separately, they contend that the NDP at least is exempted from the scope of the SEA Directive because it is a 'budgetary policy'.

15. These proceedings are now pending at third instance before the Supreme Court, which has referred the following questions to the Court of Justice:

'(1) Must Article 2(a) of the SEA Directive, read in conjunction with Article 3(2)(a), be interpreted to mean that a measure adopted by the executive arm of a Member State, other than by reason of a legislative or administrative compulsion, and not on the authority of any regulatory, administrative or legislative measure, is capable of being a

plan or programme to which the Directive applies, if the plan or programme so adopted sets a framework for downstream grant or refusal of development consent and thus satisfies the test from Article 3(2) of the Directive?

(2)(a) Must Article 3(1) read in conjunction with Article 3(8) and (9) of the SEA Directive be interpreted to mean that a plan or programme which makes specific, albeit described as 'indicative', provision for the allocation of funds to build certain infrastructure projects with a view to supporting the spatial development strategy of another plan, itself forming the basis of downstream spatial development strategy, could itself be a plan or programme within the meaning of the SEA Directive?

(2)(b) If the answer to part (a) of the second question is yes, does the fact that a plan which has as its objective the allocation of resources, mean that it must be treated as a budgetary plan within the meaning of Article 3(8)?

(3)(a) Must Article 5, and Annex 1, of the SEA Directive be interpreted to mean that where an environmental assessment is required under Article 3(1), the environmental report for which provision is made therein should, once reasonable alternatives to a preferred option are identified, carry out an assessment of the preferred option and the reasonable alternatives on a comparable basis?

(3)(b) If the answer to part (a) of the third question is yes, is the requirement of the Directive met if the reasonable alternatives are assessed on a comparable basis prior to the selection of the preferred option, and thereafter the draft plan or programme is assessed and a more complete SEA assessment then carried out in regard to the preferred option only?'

16. Friends of the Irish Environment, Ireland, the Czech Republic and the European Commission submitted written observations and presented oral argument at the hearing on 8 November 2023.

IV. Legal assessment

17. In the following, I will concentrate on the second and third questions, since the answer to the first question is now clear from the case-law.[6] According to that case-law, measures whose adoption is not compulsory can also fulfil the condition that they 'are required by legislative, regulatory or administrative provisions', as prescribed in the second indent of Article 2(a) of the SEA Directive.

18. By the second question, it is to be clarified whether one of the two measures in question, the NDP, fulfils the conditions for a mandatory assessment under Article 3(2)(a) of the SEA Directive (A). The third question concerns the assessment of alternatives pursuant to Article 5(1) in respect of the other measure, the NPF (B).

[6] See, in particular, judgment of 25 June 2020, *A and Others (Wind turbines in Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraphs 35 to 52).

A. Second question – allocation of financial resources

19. The second question concerns the classification of the NDP. The Supreme Court wishes to know whether it is actually a plan or programme within the meaning of Article 3(2)(a) of the SEA Directive (1) and whether, in that case, it falls under the exemption from the scope of the SEA Directive for 'financial or budget plans and programmes' under the second indent of Article 3(8) of the SEA Directive (2).

1. The NDP as a framework for future development consent of projects

20. Question 2(a) refers to Article 3(1) read in conjunction with Article 3(8) and (9) of the SEA Directive. According to the reasoning for the question,[7] however, the Supreme Court in fact wishes to ascertain whether the exemption under Article 3(8) is actually relevant or whether the obligation to carry out an assessment of the NDP does not apply in any case because it does not set a framework for future development consent of projects within the meaning of Article 3(2)(a).

21. Under the latter provision, an environmental assessment must be carried out for plans and programmes in certain sectors if they set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive.

22. In that regard, the Supreme Court refers in particular to the path dependency[8] of infrastructure development, for which the allocation of financial resources by the NDP is earmarked. The financing of certain infrastructure measures may be a condition for further infrastructure schemes that are contingent on the former measures, while other infrastructure schemes are thereby effectively ruled out.

23. If, for example, a motorway between two locations is financed, but no railway line, this facilitates or supports certain further road connections, increasing the density of the road network. The conditions for certain other rail projects may not be met, on the other hand, because without the railway line there is no connection to the rail network. Furthermore, other measures such as decisions by undertakings on where to locate or the expansion of housing developments will be influenced by infrastructure schemes.

24. Although the allocation of financial resources can thus influence projects, it is questionable, for two reasons, whether the NDP sets a framework for future development consent of projects through such allocation. First, there are doubts as to the binding nature of the NDP and, second, the allocation of financial resources is not as such an arrangement that can be attributed to the framework for future development consent of projects.

[7] See, in particular, paragraphs 32 to 35 of the request for a preliminary ruling.

[8] See the use of this term in Section 3.1 of Annex I to the Commission Annual Growth Survey 2012 (COM(2011) 815 final) and Annex I, ESRS E4, Appendix A, AR1(d) of Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards (OJ L 2023/2772, p. 142).

(a) Binding nature of plans and programmes

25. As Ireland rightly emphasises, the Court has ruled that only measures which are binding at least for the authorities with competence to grant development consent set a framework for such consent. [9] Only acts of a mandatory nature are capable of limiting the discretion enjoyed by those authorities and thus of excluding certain modalities of implementation of projects which might prove to be more favourable to the environment, which is why such acts must be subject to an environmental assessment. [10] Provisions of purely indicative value [11] or with merely a certain influence on the location of projects, [12] on the other hand, do not set a framework for development consent.

26. Ireland therefore takes the view that the NDP is not sufficiently binding to set a framework for development consent of projects.

27. This view is supported by the fact that in its question the Supreme Court characterises the NDP as a measure which makes provision, described as 'indicative', for the allocation of funds to build certain infrastructure projects. Although the NDP does in fact refer to a large number of schemes and the financial resources to be allocated to them, this is for illustrative purposes only. In all cases the allocation of financial resources is subject to planning approval and compliance with all other applicable environmental law. [13]

28. It is true that even a non-binding allocation of financial resources to certain infrastructure measures along the lines described above can influence the development of further infrastructure measures and other schemes, which is the basis for the position taken by Friends of the Irish Environment. Depending on whether or not necessary infrastructure measures are to be expected thereafter, work will also be done on further infrastructure and development measures which are contingent on them.

29. It would therefore also be consistent with the objective of the SEA Directive to make such effects subject to an environmental assessment, which is intended to ensure that the effects of measures on the environment are examined and taken into account before a decision is taken. [14]

30. However, the effect of non-binding statements on the allocation of financial resources is no different from the effect of other *non-binding* planning or programming statements which do not require an environmental assessment.

31. If, for example, a government announces that it intends to create the conditions for certain infrastructure measures, but that announcement is not yet binding on the authorities, it does not constitute a stipulation which might already require an environmental assessment. The environmental assessment would instead form part of the procedure resulting in the creation of those conditions.

9 Judgments of 25 June 2020, *A and Others (Wind turbines in Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraph 77), and of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraph 49).

10 Judgment of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraph 50).

11 Judgments of 12 June 2019, *Terre wallonne* (C-321/18, EU:C:2019:484, paragraph 44); of 25 June 2020, *A and Others (Wind turbines in Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraph 76); and of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraph 49).

12 Judgment of 22 February 2022, *Bund Naturschutz in Bayern* (C-300/20, EU:C:2022:102, paragraph 69).

13 Government of Ireland, National Development Plan 2021-2030, last updated: 12 October 2021 (https://www.gov.ie/en/publication/774e2-national-development-plan-2021-2030/), p. 50.

14 See judgment of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraph 58).

32. Such statements give rise to doubt whether all options are still open at the time of the environmental assessment,[15] because they at least give the impression that the outcome has already been decided. Nevertheless, in a democratic society it must be possible to discuss intentions and goals without having to make such discussions subject to an environmental assessment. This is the difference between setting a framework and discussing the definition of the framework.

33. If the impression that the allocation of financial resources is not binding were to be confirmed before the national courts, this alone would therefore rule out that the NDP sets a framework for future development consent of projects.

(b) Framework for development consent of projects

34. Furthermore, by its very nature, the allocation of financial resources – even if it were binding – does not as such set a framework for development consent of projects.

35. According to settled case-law, such a framework means measures which define rules and procedures for scrutiny applicable to the sector concerned and thereby establish a significant body of criteria and detailed rules for the grant and implementation of one or more projects that are likely to have significant effects on the environment.[16] The Court has recently clarified those criteria and detailed rules as covering the location, nature, size and operating conditions of such projects, or the allocation of resources connected with those projects.[17]

36. At first sight, it would appear that the allocation of financial resources could be part of the framework for future development consent of projects because it constitutes the allocation of resources. That reference made by the Court does not mean, however, that the allocation of financial resources is part of the framework within the meaning of Article 3(2)(a) of the SEA Directive.

37. As the Commission rightly explains, that reference uses the same wording as the first indent of point 1 of Annex II to the SEA Directive, setting out the criteria for determining the likely significance of effects. In that context, the criterion of the allocation of resources refers to the objective of prudent and rational utilisation of *natural* resources mentioned in recital 1 of the SEA Directive and the third indent of Article 191(1) TFEU. It therefore concerns resources such as water, land or raw materials,[18] the utilisation of which has a direct impact on the environment. The allocation of financial resources, on the other hand, is only indirectly associated with potentially significant effects on the environment.

[15] See Article 8(1) of the Kyiv Protocol, Article 6(4) and Article 7 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Union institutions and bodies (OJ 2005 L 124, p. 4), approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), and Article 6(4) of the EIA Directive.

[16] Judgments of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816, paragraph 49); of 25 June 2020, *A and Others (Wind turbines in Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraph 67); and of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraph 38).

[17] Judgment of 22 February 2022, *Bund Naturschutz in Bayern* (C-300/20, EU:C:2022:102, paragraph 62).

[18] The judgment of 26 September 2013, *IBV & Cie* (C-195/12, EU:C:2013:598, paragraph 74), thus regarded firewood as a natural resource.

38. Thus, rather than the financing of a scheme, it is necessary to assess only measures relating to its location, nature, size and operating conditions or the connected utilisation of natural resources. By contrast, no further knowledge can be gained from an additional assessment of the decision on financing, which should therefore be avoided as unnecessary duplication of the assessment [19] within the meaning of recital 9 and Article 5(2) of the SEA Directive.

39. Based on the available information, the NDP does not appear to define any separate rules and procedures for scrutiny which cover the location, nature, size and operating conditions of projects or the allocation of natural resources connected with those projects. Rather, the schemes mentioned therein are subject to their own planning and approval procedures [20] in which environmental effects can be assessed. Furthermore, according to the question referred, the NDP allocates the funds with a view to supporting the spatial development strategy *of another plan*, namely the NPF, which has been subject to an environmental assessment.

(c) Interim conclusion

40. The answer to Question 2(a) should therefore be that neither non-binding measures nor the allocation of financial resources for certain infrastructure projects set a framework for future development consent of projects within the meaning of Article 3(2)(a) of the SEA Directive; they therefore do not require a prior environmental assessment under that provision.

2. Scope of the exemption for financial or budget plans and programmes

41. Since, on the basis of the reasoning concerning Question 2(a), the allocation of financial resources does not as such set a framework for future development consent of projects within the meaning of Article 3(2)(a) of the SEA Directive, there is in principle no need to clarify whether a plan or programme which has as its objective the allocation of financial resources is excluded from the application of the directive as a financial or budget plan and programme within the meaning of the second indent of Article 3(8).

42. Consequently, it should merely be noted in that regard that the exemption covers only the content of a plan or programme which as such falls within the scope of that exemption. If the measure in question also contains other stipulations, they may, as the Commission rightly argues, be subject to an environmental assessment if they set the framework for development consent of projects. Otherwise Member States could easily circumvent the application of the environmental assessment [21] by combining plans or programmes which require an assessment with budget or financial measures.

B. Third question – assessment of reasonable alternatives to the NPF

43. The third question concerns the scope of the assessment of reasonable alternatives in connection with the other strand of *Project Ireland 2040*, the NPF. By Question 3(a), the Supreme Court wishes to know whether in the environmental report under Article 5 of the SEA

[19] See also my Opinions in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2011:755, point 42) and in *D'Oultremont and Others* (C-290/15, EU:C:2016:561, point 65).

[20] See footnote 13.

[21] See, with regard to the risk of circumvention, judgments of 25 June 2020, *A and Others (Wind turbines in Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraphs 48 and 70), and of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraph 32).

Directive an assessment of the preferred option and the reasonable alternatives is to be carried out on a comparable basis once the reasonable alternatives have been identified. If that is the case, Question 3(b) seeks to clarify whether a distinction can nevertheless be made between the comparison of the alternatives and an in-depth assessment of the selected option. I will answer these two parts of the question together.

44. Under Article 5(1) of the SEA Directive, an environmental report must be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated.

45. It is thus clear that the reasonable alternatives must be addressed in the environmental report. That provision could, however, be interpreted in the manner proposed by Ireland to the effect that likely significant effects on the environment must be identified, described and evaluated only in relation to the preferred option. That is also supported by the fact that the other provisions of the SEA Directive relate to the environmental assessment of the plan or programme concerned and not the assessment of reasonable alternatives.

46. However, the Commission submits that, at least according to the Dutch version of Article 5(1) of the SEA Directive, the significant effects on the environment of the alternatives must be identified, described and evaluated. In any case, the *evaluation* of alternatives provided for in all the language versions *can* also include their effects on the environment, which would in turn require those effects to be identified and described.

47. Such consideration of the effects on the environment of alternatives is consistent with the objective of the SEA Directive since, according to recital 4 and Article 1, the environmental assessment is intended to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes. An assessment of alternatives without taking into account their effects on the environment would run counter to that objective.

48. Moreover, in choosing between different alternatives, taking environmental considerations into account is of particular importance. As the Commission submits, the SEA Directive was adopted because it was found with development consent for projects under the EIA Directive that there were often already stipulations which excluded certain options, even though they were more favourable to the environment.[22] The environmental assessment must therefore at least ensure that such stipulations are adopted only if there is awareness of alternatives which are more favourable to the environment.

49. Consequently, the effects on the environment of the reasonable alternatives must also be identified, described and evaluated in the environmental report.

50. The necessary scope of that presentation is nevertheless restricted, under Article 5(2) of the SEA Directive, to information that may *reasonably* be required. In that respect, Article 5 refers to the concept of reason twice since, under Article 5(1), only reasonable alternatives must actually be assessed. That concept thus serves as a filter to prevent a disproportionate burden in carrying out the assessment.

[22] Judgment of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)* (C-9/22, EU:C:2023:176, paragraphs 57 and 58), and my Opinion in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120, point 32), each with further references.

51. The first step is to identify the reasonable alternatives which actually require a closer assessment. In that regard, Article 5(1) of the SEA Directive mentions the objectives and the geographical scope of the plan or programme as points of reference. Alternatives which cannot achieve the objectives or fall outside the geographical scope are generally not reasonable and do not require further assessment.

52. At the same time, the competent authorities may not, however, limit the scope of the assessment excessively by excluding potentially reasonable alternatives in defining the objectives or the geographical scope.

53. That idea is also enshrined in Article 5(2) of the SEA Directive, under which it is necessary to take into account the stage of the plan or programme in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment. For example, in a plan to construct a highway it could be asked whether a rail connection must be examined as a reasonable alternative. Such assessment is unnecessary, however, if the basic decision to implement the road construction project follows from a higher-level plan in which the two alternatives have already been compared.

54. As far as the information on the identification of reasonable alternatives is concerned, Annex I(h) of the SEA Directive makes clear that the information to be provided in the environmental report must include only an *outline* of the reasons for selecting the alternatives dealt with. It must show why the alternatives dealt with are considered reasonable, while other alternatives are not, and thus how the reasonable alternatives have been identified.

55. That notion of an outline does not, however, refer to the description and evaluation of reasonable alternatives. It cannot therefore be relied upon in order to limit the scope of that information.

56. Rather, Article 5(2) of the SEA Directive refers to the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme and the other factors mentioned in point 53 above.

57. One of the most important criteria in relation to the contents of the environmental report is missing, however: the presentation of the effects on the environment must in particular show that the plan or programme is compatible with the applicable substantive requirements of environmental law.[23] Effects on the environment which infringe environmental legislation would be significant in any case.[24]

58. In connection with the assessment of alternatives, Article 6(4) of the Habitats Directive, which may be applied if Natura 2000 sites are adversely affected, comes to mind for example. In that case the environmental report would have to show that there are no alternatives which affect those

[23] See, to that effect, with regard to the EIA Directive, judgments of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 81), and of 24 February 2022, *Namur-Est Environnement* (C-463/20, EU:C:2022:121, paragraph 52).

[24] See my Opinions in *Mellor* (C-75/08, EU:C:2009:32, points 54 and 55) and *Namur-Est Environnement* (C-463/20, EU:C:2021:868, point 45) and, to that effect, judgment of 9 March 2023, *Sdruzhenie 'Za Zemyata – dostap do pravosadie' and Others* (C-375/21, EU:C:2023:173, paragraph 50).

sites less adversely.[25] Similar assessments of alternatives are provided for, in particular, in Article 16(1) of the Habitats Directive, Article 9(1) of the Birds Directive[26] and Article 4(7)(d) of the Water Framework Directive.[27]

59. Conversely, the SEA Directive does not itself lay down any substantive criteria for selecting alternatives. It does not therefore require the competent authorities to select the option which has the least adverse effects on the environment. As has already been stated,[28] the environmental assessment is intended only to ensure that the selection is made *taking into account* possible significant effects on the environment.

60. In so far as the choice between different alternatives does not depend on substantive legal requirements under other rules, two further factors are therefore relevant, above all, in determining the information that may reasonably be required, in addition to the indications in Article 5(2) of the SEA Directive. First, that information must allow a comparison to be made between the preferred option and the alternatives in the light of the arguments that are relevant to the decision. Second, the information must allow the relevant environmental concerns to be taken into account in that comparison.

61. If the choice between the alternatives is based primarily on cost considerations, for example, the costs of all reasonable alternatives must therefore be identified and described at least to the extent that it is clear how the costs of the different options relate to one another. However, it must also be clear whether those cost advantages are associated with adverse effects on the environment which would be avoided with other options. Otherwise these environmental concerns might not be taken into account adequately in choosing between the alternatives dealt with.

62. These requirements do not prevent the environmental assessment of the preferred option being more detailed than the environmental assessment of the other alternatives dealt with. This is to be expected, in particular, where the advantages of the preferred option clearly outweigh those of the alternatives dealt with, even taking into account the effects on the environment. In that case, detailed information on the alternatives dealt with would have no intrinsic function, whereas information on the effects on the environment of the preferred option is important for the subsequent implementation of the plan or programme.

63. If, however, the advantages and disadvantages of the different options have similar weight, it becomes more difficult to justify the selection. In that case, it may become necessary to provide more detailed information on the reasonable alternatives in the environmental report, even if this involves considerable effort.

[25] See judgments of 26 October 2006, *Commission* v *Portugal* (C-239/04, EU:C:2006:665, paragraphs 36 to 39); of 14 January 2016, *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, paragraph 74); and of 16 July 2020, *WWF Italia Onlus and Others* (C-411/19, EU:C:2020:580, paragraph 40).

[26] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), last amended by Regulation (EU) 2019/1010 of the European Parliament and of the Council of 5 June 2019 on the alignment of reporting obligations in the field of legislation related to the environment (OJ 2019 L 170, p. 115).

[27] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), last amended by Commission Directive 2014/101/EU of 30 October 2014 (OJ 2014 L 311, p. 32).

[28] See point 47 above.

64. As far as the information in the contested environmental report is concerned, it is not clear whether substantive requirements under other rules were taken into account or were even relevant to the decision. Furthermore, it appears that, while the chapter of the environmental report concerning alternatives explains the alternatives dealt with and the decision to select the preferred option and contains information on their effects on the environment, this is essentially limited to a matrix with plus and minus indicators. [29] It is not explained how these indicators were derived or to what extent they were taken into account in making the selection.

65. The reason for taking this approach might be that the NPF is highly abstract and does not provide for any specific projects or that the public concerned already has prior knowledge.

66. It is for the national courts, however, to determine whether against this background – and contrary to the submission made by Friends of the Irish Environment – the reasons for selecting the preferred option and the effects on the environment of the alternatives dealt with were presented in a comprehensible manner.

67. The answer to the third question should therefore be that under Article 5(1) and (2) of the SEA Directive the environmental report must contain the information on the reasonable alternatives to the adopted plan or programme dealt with which is necessary

– to determine compliance with the requirements under other rules relating to the assessment of alternatives and

– to be able to understand how the effects on the environment have been taken into account in the decision to select the adopted plan or programme in comparison with the alternatives dealt with.

V. Conclusion

68. I therefore propose that the Court answer Questions 2 and 3 in the request for a preliminary ruling as follows:

(1) Neither non-binding measures nor the allocation of financial resources for certain infrastructure projects set a framework for future development consent of projects within the meaning of Article 3(2)(a) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment; they therefore do not require a prior environmental assessment under that provision.

(2) Under Article 5(1) and (2) of Directive 2001/42 the environmental report must contain the information on the reasonable alternatives to the adopted plan or programme dealt with which is necessary

– to determine compliance with the requirements under other rules relating to the assessment of alternatives and

[29] Chapter 7 of the Strategic Environmental Assessment, Environmental Report, Ireland 2040 – Our Plan, September 2017, p. 121 to 132 (https://www.npf.ie/wp-content/uploads/2017/09/Environmental-Report-%E2%80%93-Ireland-2040.pdf, visited on 22 February 2024).

– to be able to understand how the effects on the environment have been taken into account in the decision to select the adopted plan or programme in comparison with the alternatives dealt with.