Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

18 April 2013 *

(Directive 2001/42/EC — Assessment of the effects of certain plans and programmes on the environment — Article 3(4) and (5) — Determination of the type of plans likely to have significant environmental effects — Building plan 'for development within an urban area' exempted from an environmental assessment under national legislation — Incorrect assessment of the qualitative condition of 'inner city development' — No effect on the legal validity of the building plan — Effectiveness of the directive undermined)

In Case C-463/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof Baden-Württemberg (Germany), made by decision of 27 July 2011, received at the Court on 6 September 2011, in the proceedings

L

v

M,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal, Judges

Advocate General: M. Wathelet,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 18 October 2012,

after considering the observations submitted on behalf of:

— L, by G. Rehmann, Rechtsanwalt,

— M, by D. Weiblen, Rechtsanwalt,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the Greek Government, by G. Karipsiades, acting as Agent,

— the European Commission, by F. Bulst and P. Oliver, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 19 December 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3(4) and (5) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30; 'the directive').

2 The request has been made in the course of proceedings between L and M, a municipality, concerning the legal validity of a building plan prepared by M without an environmental assessment, as required by the directive, having been carried out.

Legal context

European Union law

3 In accordance with Article 1 of the directive, its objective 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 the directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

4 Article 3 of the directive, which defines its scope, provides:

'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 … 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 [of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5)]; …

…

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level … shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose

Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

…'

5 Annex II to the directive sets out the criteria for determining the likely significance of environmental effects as referred to in Article 3(5) of that directive.

German law

6 The Planning Code (Baugesetzbuch), in the consolidated version published on 23 September 2004 (BGBl. 2004 I, p. 2414), as amended by the Law of 22 July 2011 (BGBl. 2011 I, p. 1509) ('the BauGB'), governs town planning.

7 Paragraph 1(6)(7) of the BauGB provides that, when urban development plans ('Bauleitpläne') are being drawn up, the municipalities, must take into account, in particular, environmental protection interests, including nature protection and preservation of the countryside.

8 Those urban development plans, which take the form of a site usage plan ('Flächennutzungsplan') or a building plan ('Bebauungsplan'), are drawn up, supplemented or amended under a 'standard procedure' (Paragraph 2 et seq. of the BauGB), unless it is possible to use the 'simplified procedure' (Paragraph 13 of the BauGB) or, in the case of building plans for development within an urban area, an 'accelerated procedure' (Paragraph 13a of the BauGB).

9 The Law on the adaptation of town-planning law to European Union law (Europarechtsanpassungsgesetz Bau) of 24 June 2004 (BGBl. 2004 I, p. 1359) is intended to transpose the directive into German law. That law integrated environmental assessment into the standard procedure for preparing urban development plans.

10 As regards that standard procedure, Paragraph 2(3) and (4) of the BauGB provides:

'(3) When drawing up urban development plans, it is necessary to identify and assess the interests which it is material to weigh up [inter alia public and private interests].

(4) For the environmental protection interests referred to in Paragraph 1(6)(7) …, an environmental assessment shall be carried out, in which the likely significant environmental effects shall be identified, and described and assessed in an environmental report. …'

11 As regards the simplified procedure, Paragraph 13(3), first sentence, of the BauGB provides that in this procedure 'there shall be no environmental assessment under Paragraph 2(4) …'.

12 As regards the accelerated procedure, Paragraph 13a of the BauGB provides:

'(1) A building plan for site remediation, more intensive development, or other development measures within an urban area ("Bebauungsplan der Innenentwicklung"; "building plan for development within an urban area") may be drawn up under the accelerated procedure. The building plan may be drawn up under the accelerated procedure only where it specifies … a surface area, comprising in total

1. less than 20 000 m^2 ...

… The accelerated procedure cannot be used where the building plan makes projects which must themselves compulsorily be subject to an environmental assessment under the Law on environmental impact assessments or the law of the Land legally valid. Nor can the accelerated procedure be used where there are grounds for believing that interests protected under Paragraph 1(6)(7)(b) are harmed.

(2) Under the accelerated procedure

1. The provisions relating to the simplified procedure which are laid down in Paragraph 13(2) and Paragraph 13(3), first sentence, shall apply by analogy;

…'

13 Paragraph 214 of the BauGB, which is in the section entitled 'Maintaining plans in force', provides:

'(1) Infringement of procedural and formal provisions of the present code shall be irrelevant for the legal validity of the land-use plan and the municipal regulations adopted in pursuance of this code save where:

1. in breach of Paragraph 2(3), essential aspects of the interests affected by the planning, being interests of which the municipality was or ought to have been aware, were not properly identified or assessed, and that failure is evident and has influenced the outcome of the procedure;

…

(2a) For building plans that have been drawn up under the accelerated procedure in accordance with Paragraph 13a, the following provisions shall apply in addition to those of subparagraphs 1 and 2 above:

1. Infringement of procedural and formal provisions and of the provisions concerning the relationship between the building plan and the land-use plan shall also be irrelevant for the legal validity of the building plan where the infringement stems from the fact that the condition in Paragraph 13a(1), first sentence, has been incorrectly assessed.

…'

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

14 On 14 September 2005, M decided to prepare a building plan, under the standard procedure provided for in Paragraph 2(4) of the BauGB, for an area of 37 806 m^2, with a view to planning on the basis of the existing urban development and the addition to it of new residential areas on the outskirts.

15 In the course of the public consultation which followed that decision, L and others raised objections to that plan, in particular on environmental protection grounds.

16 On 23 April 2008, M decided upon a project for a smaller area. It decided to prepare the building plan relating to it under the accelerated procedure provided for in Paragraph 13a of the BauGB.

17 According to the statement of reasons for M's decision, the plan is not likely to have lasting negative effects on the environment and it provides for authorised building land totalling approximately 11 800 m^2, which is below the threshold set in Paragraph 13a(1), second sentence, point 1, of the BauGB.

18 On 26 April 2008, M made the building plan available to the public for one month, giving an opportunity to submit comments. While it was available to the public, L and others repeated their objections and called for an environmental report in accordance with the directive.

19 Without carrying out such an assessment, on 23 July 2008, M adopted the building plan at issue in the main proceedings as a 'building plan for development within an urban area' in the form of a municipal regulation.

20 On 31 July 2009, L lodged an action challenging the lawfulness of that plan before the national court. He claimed, inter alia, that M had failed to take into account the fact that it was urbanising areas outside the built-up area, for which reason it could not be a 'building plan for development within an urban area' within the meaning of Paragraph 13a of the BauGB. M argues, however, that the use of the accelerated procedure instituted by Paragraph 13a was lawful.

21 The referring court is of the opinion that the contested building plan is not a building plan 'for development within an urban area' within the meaning of Paragraph 13a of the BauGB and that it was not therefore permissible to adopt it by means of an accelerated procedure without an environmental assessment, because the land included in the plan falls partly outside the area already built upon.

22 It therefore believes that that plan was incorrectly assessed in respect of the qualitative condition in Paragraph 13a(1), first sentence, of the BauGB, pursuant to which a building plan for site remediation, more intensive development, or other development measures within an urban area may be drawn up under the accelerated procedure. Under Paragraph 214(2a)(1) of the BauGB, that assessment is, however, irrelevant for the legal validity of the plan.

23 In that regard, the referring court states, firstly, that by exempting building plans 'for development within an urban area' from an environmental assessment within the meaning of Paragraph 13a of the BauGB, the national legislature has used the facility provided for in Article 3(5) of the directive and established that exception by specifying a particular type of plan while taking account of the relevant criteria laid down in Annex II to that directive. Secondly, the legislature provided in Article 214(2a)(1) of the BauGB that a breach of procedural provisions due to the fact that the municipality incorrectly assessed the qualitative condition does not affect the legal validity of the plan in question.

24 On the basis of those considerations, the referring court asks whether the national legislature, by combining the accelerated procedure under Paragraph 13a of the BauGB with the maintenance in force of plans under Paragraph 214(2a)(1) of the BauGB, exceeded the limits of its discretion under Article 3(5) of the directive.

25 In those circumstances, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a Member State exceed the limits of its discretion under Article 3(4) and (5) of [the directive] if, in respect of a municipality's building plans which determine the use of small areas at local level and set the framework for future development consent of projects but do not fall within the scope of Article 3(2) of [the directive], it determines – having regard to the relevant criteria of Annex II to the directive – by specifying a particular type of building plan which is characterised by a threshold based on surface area and by a qualitative condition, that when drawing up such a building plan the procedural provisions on environmental assessment otherwise applicable to building plans are to be waived and also provides that an infringement of those procedural provisions which stems from the fact that the municipality has incorrectly assessed the qualitative condition is irrelevant for the legal validity of a building plan of that particular type?'

Consideration of the question referred

Admissibility

26 The German Government, without expressly raising an objection as to admissibility, has expressed doubts as to the relevance of the question referred for the resolution of the dispute in the main proceedings.

27 In its observations, that Government submits, in essence, that Paragraph 214(2a)(1) of the BauGB must be interpreted strictly and that, in circumstances such as those surrounding the adoption of the building plan at issue in the main proceedings, that provision is probably not applicable.

28 In that regard, it is sufficient to recall that, in accordance with settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 33 and the case-law cited).

29 In the present case, the question referred concerns the interpretation of Article 3(4) and (5) of the directive. It is not for the Court but solely for the national court to rule on the interpretation of national law (Case C-7/11 *Caronna* [2012] ECR, paragraph 54), and to ascertain to what extent Paragraph 214(2a)(1) of the BauGB is likely to apply to the main proceedings. Furthermore, there is nothing in the decision for reference to suggest that that national provision could not apply in this case.

30 In those circumstances, the request for a preliminary ruling must be held to be admissible.

Substance

31 At the outset, it should be recalled that, as is apparent from Article 1 of the directive, the fundamental objective of that directive is to ensure that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment when they are prepared and prior to their adoption (Case C-295/10 *Valčiukienė and Others* [2011] ECR I-8819, paragraph 37, and Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne* [2012] ECR, paragraph 40).

32 As is apparent from the decision for reference, the building plan at issue in the main proceedings falls within the scope of Article 3(4) of the directive or, possibly, Article 3(3) thereof. Under those provisions, Member States are to determine whether the plans and programmes covered by that article are likely to have significant environmental effects.

33 Under Article 3(5) of the directive, determination of plans or programmes likely to have significant environmental effects and, accordingly, requiring an assessment pursuant to that directive is to be carried out through case-by-case examination or by specifying types of plans and programmes or by combining both approaches.

34 As regards the building plans in question, the German legislature made that determination by establishing that the preparation of such plans is in principle subject to an environmental assessment, but that the particular type of building plans for development within an urban area which meets the conditions laid down in Paragraph 13a(1) of the BauGB is exempt from that obligation.

35 In that regard, it must be specified that the question referred relates, as the Advocate General noted in point 45 of his Opinion, to the consequence which the combined application of two national provisions such as those in Paragraphs 13a and 214(2a)(1) of the BauGB could have for the effectiveness of the directive.

36 By its question, the referring court asks, in essence, whether Article 3(5) of the directive, read in conjunction with Article 3(4) thereof, must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which breach of a qualitative condition, imposed by the implementing provision of that directive to exempt the adoption of a particular type of building plan from an environmental assessment under that directive, is irrelevant to the legal validity of that plan.

37 In that regard, it must be noted that a provision such as Paragraph 214(2a)(1) of the BauGB means that building plans in respect of the preparation of which an environmental assessment ought to have been carried out under the national legislation which transposed Article 3(5) of the directive remain valid even if they were prepared without an environmental assessment thereunder.

38 Such a system effectively deprives of its effectiveness Article 3(1) of the directive, which requires an environmental assessment to be carried out in respect of the plans referred to in Article 3(3) and (4) thereof which are likely to have significant effects on the environment.

39 Although it is possible to envisage that a particular type of plan which meets the qualitative condition laid down in Paragraph 13a(1) of the BauGB is not necessarily likely to have significant effects on the environment, since that condition is such as to ensure that such a plan meets the relevant criteria laid down in Annex II to the directive, to which the second sentence of Article 3(5) refers, it appears, however, that such a condition is deprived of its effectiveness when it is combined with a provision such as Paragraph 214(2a)(1) of the BauGB.

40 By maintaining in force building plans which, within the meaning of the directive as transposed into national law, are likely to have significant effects on the environment, that provision of the BauGB definitively enables municipalities to prepare such plans without carrying out an environmental assessment, provided they meet the quantitative condition laid down in the second sentence of Paragraph 13a(1) of the BauGB and do not fall within the scope of the grounds for exclusion set out in the fourth and fifth sentences of that Paragraph.

41 In those circumstances, it is not guaranteed to the requisite legal standard that the municipality will in any event meet the relevant criteria laid down in Annex II to the directive, which criteria, however, the national legislature intended should be met, as is demonstrated by the introduction of the concept of urban development in the legislation designed to use the discretion conferred on the legislature in Article 3(5) of the directive.

42 Clearly, then, a national provision such as Paragraph 214(2a)(1) of the BauGB, adopted as part of the implementation of Article 3(5) of the directive, has the effect of exempting from an environmental assessment building plans which should not have been so exempted, which is contrary to the objective pursued by the directive and, more particularly by Article 3(1), (4) and (5) thereof.

43 Moreover, it is clear from the case-law of the Court that, where a plan, within the meaning of the directive, should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of the directive, the national courts hearing an action for annulment of such a plan are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (see, to that effect, *Inter-Environnement Wallonie and Terre wallonne*, paragraphs 44 to 46).

44 Consequently, in the main proceedings, it is for the referring court, within the exercise of its jurisdiction, to apply the provisions of European Union law and to give full effect to those provisions, refusing to apply any provision of the BauGB, in particular Paragraph 214(2a)(1) thereof, which would lead that court to deliver a decision contrary to the directive (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24, and Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraph 45).

45 In the light of the above considerations, the answer to the question referred is that Article 3(5) of the directive, read in conjunction with Article 3(4) thereof, must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which breach of a qualitative condition, imposed by the implementing provision of that directive to exempt the adoption of a particular type of building plan from an environmental assessment under that directive, is irrelevant to the legal validity of that plan.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 3(5) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, read in conjunction with Article 3(4) thereof, must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which breach of a qualitative condition, imposed by the implementing provision of that directive to exempt the adoption of a particular type of building plan from an environmental assessment under that directive, is irrelevant to the legal validity of that plan.

[Signatures]