M en R 2024/126

Hof van Justitie van de Europese Unie 4 oktober 2024, nr. C-727/22
(Prechal, Lenaerts, Wahl, Passer, Arastey Sahún)
m.nt. M.A.A. Soppe & T. Rötscheid

(Art. 3 SMB-richtlijn)

Bepaling in Ierse Grondwet waarin uitsluitend is vastgelegd dat de uitvoerende macht van de Ierse staat over het algemeen wordt uitgeoefend door of onder gezag van de regering is geen wettelijk voorschrift op basis waarvan een daarop gebaseerd document moet worden aangemerkt als een plan of programma in de zin van de SMB-richtlijn.

Thus, far from regulating the adoption of plans or programmes by providing for the competent authorities to adopt them as well as the procedure for drawing them up, the said provision merely establishes, in accordance with the constitutional principle of the separation of powers, that, unlike the legislative and judicial powers, the executive of the State is generally exercised by or on the authority of the government.
It is true that, given the intended purpose of Directive 2001/42, which, in accordance with Article 1 thereof, is to provide for such a high level of protection of the environment, the provisions which delimit the scope of the directive, in particular those setting out the definitions of the measures envisaged by that directive, must be interpreted broadly (judgment of 22 February 2022, Bund Naturschutz in Bayern, C-300/20, EU:C:2022:102, paragraph 44 and the case-law cited).
However, an interpretation of Directive 2001/42 according to which a measure meeting the conditions for adoption of the NPF would fall within the scope of that directive would go beyond interpreting that directive broadly. Such an interpretation would be tantamount to rendering meaningless the second of the two cumulative conditions set out in Article 2(a) of the same directive. Consequently, a measure, such as the NPF, adopted solely on the basis of a provision of the Constitution of a Member State cannot, therefore, be regarded as falling within the scope of Directive 2001/42, even if that measure satisfies the second condition of Article 3(2)(a) of that directive, recalled in paragraph 21 above.
Such an interpretation is not, moreover, called into question by the fact, noted by the referring court, that Article 2(1) of the 2000 Act provided that the 'National Spatial Strategy' or any amendment thereto was to be published. It must be pointed out that that provision merely laid down a publication requirement without, however, determining the procedure for drawing up the NPF. Thus, even taking that provision into account, its adoption, on the basis of Article 28.2 of the Irish Constitution, cannot be considered to have been 'regulated' within the meaning of the case-law cited in paragraph 25 above.
It follows that a measure meeting the conditions for adoption of the NPF does not satisfy the second of the two conditions set out in Article 2(a) of Directive 2001/42 and, consequently, does not constitute a 'plan or programme' for the purposes of that provision.

In Case C-727/22,*
REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 24 November 2022, received at the Court on 25 November 2022, in the proceedings
Friends of the Irish Environment CLG
v
Government of Ireland,
Minister for Housing, Planning and Local Government, Ireland,
Attorney General,

THE COURT (Second Chamber),
composed of A. Prechal, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, N. Wahl, J. Passer (Rapporteur) and M.L. Arastey Sahún, Judges,
Advocate General: J. Kokott,
Registrar: L. Carrasco Marco, Administrator,
having regard to the written procedure and further to the hearing on 8 November 2023,
after considering the observations submitted on behalf of:
— Friends of the Irish Environment CLG, by N. Steen, Senior Counsel, J. Kenny, Barrister-at-Law, and F. Logue, Solicitor,
— Ireland, by M. Browne, Chief State Solicitor, A. Joyce and M. Tierney, acting as Agents, and by M. Gray, Senior Counsel, F. Valentine, Senior Counsel, and E. Synnott, Barrister-at-Law,
— the Czech Government, by A. Edelmannová, L. Langrová, M. Smolek and J. Vláčil, acting as Agents,
— the European Commission, by C. Hermes and M. Noll-Ehlers, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 21 March 2024,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).
2 The request has been made in proceedings between Friends of the Irish Environment CLG, an environmental non-governmental organisation, and the Government of Ireland, the Minister for Housing, Planning and Local Government (Ireland), Ireland and the Attorney General (Ireland) concerning a decision taken by the Irish Government adopting a national planning framework and a national development plan.

* Language of the case: English.

Legal context

European Union law

3 Under Article 1 of Directive 2001/42, entitled 'Objectives':

'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.'

4 Article 2 of that directive, entitled 'Definitions', is worded as follows:

'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;

…'

5 Article 3 of that directive, entitled '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 agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [Council] Directive 85/337/EEC [of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40)], …

…

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.

…

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 [of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1)] and (EC) No 1257/1999 [of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80)].'

6 Article 4(3) of the same directive is worded as follows:

'Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3).'

7 Under Article 5 of Directive 2001/42, entitled 'Environmental report':

'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. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.

…'

8 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), which entered into force on 17 February 2012, repealed and replaced Directive 85/337.

Irish law

9 Under Article 28.2 of the Irish Constitution:

> 'The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.'

10 Section 2(1) of the Planning and Development Act, 2000, in the version applicable to the dispute in the main proceedings ('the 2000 Act'), provided:

> ''National Spatial Strategy' means the 'National Spatial Strategy: 2002–2020' published by the Government on 28 November 2002, or any document published by the Government which amends or replaces that Strategy'.

11 Following the entry into force, on 22 October 2018, of the Planning and Development (Amendment) Act 2018 ('the 2018 Act'), Chapter IIA of Part II of the 2000 Act is worded as follows:

> 'National Planning Framework
>
> 20A. The National Spatial Strategy, as amended having regard to the provisions of this Chapter including any document published by the Government which amends or replaces that Strategy or such subsequent document, shall be known as the National Planning Framework.
>
> …
>
> Matters to be addressed in National Planning Framework
>
> 20C. …
>
> (4) The Government shall prepare and publish the National Planning Framework and keep its implementation under review.
>
> (5) Every 6 years after the date of publication of the National Planning Framework, the Government shall either—
>
> (a) revise the Framework or replace it with a new one, or
>
> (b) publish a statement explaining why the Government has decided not to revise the Framework and include in the statement an indication of a date by which it will be revised or a new National Planning Framework will be published.
>
> (6) Provision shall be made by the Minister for public consultation in the preparation of a new or revised National Planning Framework
>
> …
>
> (7) The preparation of the National Planning Framework shall be subject to the provisions of relevant EU Environmental Directives …
>
> (8) The Government shall submit the draft of the revised or new National Planning Framework, together with the Environmental Report and Appropriate Assessment Report for the approval of each House of the Oireachtas [(Irish Parliament)] before it is published.
>
> (9) In preparing or revising the National Planning Framework, the Government shall have regard to any resolution or report of, or of any committee of, the Oireachtas [(Irish Parliament)] that is made, during the period for consideration, as regards the proposed strategy or, as the case may be, the Framework as proposed to be revised.
>
> …'

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

12 By decision of 16 February 2018, the Irish Government adopted the National Planning Framework ('the NPF') and the National Development Plan ('the NDP'), two strands of Project Ireland 2040. That decision was 'reaffirmed' by a decision of that government, of 29 May 2018.

13 Project Ireland 2040 aims to create a unified and coherent plan for land use and development within the country. The NPF establishes a planning framework to guide development investment over the coming years and, according to its foreword, sets 'national objectives and key principles from which more detailed and refined plans will follow'. Thus, it 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'. The NPF is accompanied by the NDP, which is described as a 10-year strategy for public capital investment of up to EUR 116 billion, setting out how funding will be made available for the implementation of certain projects considered essential to the achievement of the strategic outcomes identified in the NPF and identifying major infrastructure works it proposes to fund without concerning itself with any planning or development considerations.

14 By a judgment and an order of 24 April 2020 and by an order of 13 May 2020, the High Court (Ireland) dismissed the application made by the applicant in the main proceedings for the adoption of orders of *certiorari* to quash the decision of 16 February 2018, as reaffirmed by the decision of 29 May 2018.

15 By a judgment of 26 November 2021 and an order of 7 December 2021, the Court of Appeal (Ireland) dismissed the appeal brought by the applicant in the main proceedings against those decisions of the High Court.

16 On 4 January 2022, the applicant in the main proceedings brought an appeal against those decisions of the Court of Appeal before the Supreme Court (Ireland), which is the referring court, by which it is challenging the validity of the NPF and the NDP. It submits, in essence, that the requirements of Directive 2001/42 were not met when they were adopted and that, as regards the NPF specifically, reasonable alternatives were not sufficiently described and

evaluated on a correct basis to the analysis carried out in regard to the preferred option.

17 Before the referring court, the defendants in the main proceedings claim that, although the NPF was the subject of an assessment under Directive 2001/42, that assessment was not required by that directive, since the NPF is not a plan or programme referred to in Article 2(a) of that directive, that NPF not being 'required by legislative, regulatory or administrative provisions' within the meaning of that provision. The same is true of the NDP, which, moreover, is excluded from the scope of the same directive by virtue of Article 3(8) thereof.

18 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 2(a) of [Directive 2001/42], read in conjunction with Article 3(2)(a) [thereof], 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 th[at d]irective 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 th[at d]irective?

(2) (a) Must Article 3(1) read in conjunction with Article 3(8) and (9) of [Directive 2001/42] 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 [Directive 2001/42]?

(b) If the answer to 2(a) 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 with the meaning of [A]rticle 3(8)?

(3) (a) Must Article 5 [of], and Annex 1 [to, Directive 2001/42] 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?

(b) If the answer to question (a) is yes, is the requirement of the [d]irective 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 [strategic environmental assessment (SEA)] then carried out in regard to the preferred option only?'

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Article 2(a) of Directive 2001/42 must be interpreted as meaning that a measure adopted by the government of a Member State solely on the basis of a provision of the Constitution of that Member State providing that the executive power of the State is to be exercised by or on the authority of that government is capable of constituting a 'plan' or a 'programme', within the meaning of that Article 2(a), where that measure sets a framework for future development consent or refusal of certain projects.

20 Article 3 of Directive 2001/42 provides that an environmental assessment must be carried out for certain plans and programmes which are likely to have significant environmental effects.

21 In particular, under Article 3(2)(a) of Directive 2001/42, an environmental assessment must be carried out for all plans and programmes which satisfy two cumulative conditions, namely that (i) they are prepared for the sectors referred to in that provision and (ii) they set the framework for future development consent of projects listed in Annexes I and II to Directive 2011/92 (judgment of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)*, C-9/22, EU:C:2023:176, paragraph 36).

22 In the case at hand, according to the referring court, the NPF satisfies the second condition of Article 3(2)(a) of that directive.

23 However, it must be pointed out that only 'plans and programmes' which meet the definition of that concept set out in Article 2(a) of Directive 2001/42 fall within the scope of that directive, and thus within that of Article 3 thereof.

24 In that regard, Article 2(a) of Directive 2001/42 defines 'plans and programmes', within the meaning of that directive, as being those which satisfy the two cumulative conditions set out in that provision, namely that they are subject to preparation and/or adoption by an authority at national, regional or local level or are prepared by an authority for adoption, through a legislative procedure by Parliament or Government (the first condition) and that they are required by legislative, regulatory or administrative provisions (the second condition) (judgment of 9 March 2023, *An Bord Pleanála and Others (Site of St Teresa's Gardens)*, C-9/22, EU:C:2023:176, paragraph 27 and the case-law cited).

25 As regards the second of the conditions referred to in the preceding paragraph of the present judgment, it is apparent from the settled case-law of the Court that plans and programmes the adoption of which is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42 and, accordingly, be subject to an assessment of their environmental effects in the circumstances which it lays down. Thus, the Court has held that, in view of the intended

purpose of Article 2(a) of Directive 2001/42, which is to provide for a high level of protection of the environment, and in order to preserve the effectiveness of that provision, a measure must be regarded as 'required' where there exists, in national law, a particular legal basis authorising the competent authorities to adopt that plan or programme, even if such adoption is not mandatory (judgment of 22 February 2022, *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102, paragraph 37 and the case-law cited).

26 In the present case, however, it does not appear, having regard to the information before the Court, that the NPF was adopted by reference to such a particular legal basis.

27 According to the referring court, the NPF was adopted by a decision of the government acting exclusively pursuant to the power vested in it by Article 28.2 of the Irish Constitution.

28 In accordance with that provision, 'the executive power of the State [is], subject to the provisions of th[e Irish] Constitution, [to] be exercised by or on the authority of the Government'.

29 Thus, far from regulating the adoption of plans or programmes by providing for the competent authorities to adopt them as well as the procedure for drawing them up, the said provision merely establishes, in accordance with the constitutional principle of the separation of powers, that, unlike the legislative and judicial powers, the executive of the State is generally exercised by or on the authority of the government.

30 It is true that, given the intended purpose of Directive 2001/42, which, in accordance with Article 1 thereof, is to provide for such a high level of protection of the environment, the provisions which delimit the scope of the directive, in particular those setting out the definitions of the measures envisaged by that directive, must be interpreted broadly (judgment of 22 February 2022, *Bund Naturschutz in Bayern*, C-300/20, EU:C:2022:102, paragraph 44 and the case-law cited).

31 However, an interpretation of Directive 2001/42 according to which a measure meeting the conditions for adoption of the NPF would fall within the scope of that directive would go beyond interpreting that directive broadly. Such an interpretation would be tantamount to rendering meaningless the second of the two cumulative conditions set out in Article 2(a) of the same directive.

32 Consequently, a measure, such as the NPF, adopted solely on the basis of a provision of the Constitution of a Member State such as that referred to in paragraph 27 above, cannot, therefore, be regarded as falling within the scope of Directive 2001/42, even if that measure satisfies the second condition of Article 3(2)(a) of that directive, recalled in paragraph 21 above.

33 Such an interpretation is not, moreover, called into question by the fact, noted by the referring court, that Article 2(1) of the 2000 Act provided that the 'National Spatial Strategy' or any amendment thereto was to be published. It must be pointed out that that provision merely laid down a publication requirement without, however, determining the procedure for drawing up the NPF. Thus, even taking that provision into account, its adoption, on the basis of Article 28.2 of the Irish Constitution, cannot be considered to have been 'regulated' within the meaning of the case-law cited in paragraph 25 above.

34 It follows that a measure meeting the conditions for adoption of the NPF does not satisfy the second of the two conditions set out in Article 2(a) of Directive 2001/42 and, consequently, does not constitute a 'plan or programme' for the purposes of that provision.

35 That conclusion is without prejudice to the assessment, in the light of Directive 2001/42, of the plans or programmes that will, where appropriate, be adopted in order to implement the NPF.

36 In that regard, as regards such plans or programmes which fulfil the conditions laid down by Directive 2001/42 in order to be subject to the obligation to carry out an environmental assessment, it is important to note, in particular, that as the NPF is not a 'plan' or a 'programme', within the meaning of Article 2(a) of that directive, and therefore does not form part of a 'hierarchy', within the meaning of Article 4(3) thereof, there is no provision of that directive authorising the national authorities to justify any effects on the environment of those plans or programmes on the ground that such effects would result from guidelines decided in a measure such as the NPF.

37 The conclusion in paragraph 34 above is also without prejudice to the assessment, in the light of the same directive, of the plans or programmes which, depending on the case, will be adopted under the relevant provisions of the 2000 Act, as amended by the 2018 Act, including, in particular, any amendment or replacement of the NPF effected in accordance with the procedure laid down by those provisions.

38 In the light of all the foregoing considerations, the answer to the first question is that Article 2(a) of Directive 2001/42 must be interpreted as meaning that a measure adopted by the government of a Member State solely on the basis of a provision of the Constitution of that Member State providing that the executive power of the State is to be exercised by or on the authority of that government does not meet the condition of being 'required by legislative, regulatory or administrative provisions' and, consequently, cannot constitute a 'plan' or a 'programme' for the purposes of that Article 2(a).

The second question

39 By its second question, the referring court asks, in essence, whether Article 3(1) of Directive 2001/42, read in conjunction with Article 3(8) and (9) thereof, must be interpreted as meaning that:

— a measure 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 measure, is capable of constituting a plan or programme within the meaning of Directive 2001/42;

— such a measure is nevertheless excluded from the scope of Directive 2001/42 under Article 3(8) thereof owing to the fact that it has as its objective the allocation of resources.

40 It is apparent from the request for a preliminary ruling that that question concerns the NDP.

41 However, it is also apparent from that request that the NDP, which is one of the two strands of the Ireland 2040 project, was adopted by the Irish Government on the same legal basis as the NPF.

42 Accordingly, having regard to the considerations set out in paragraphs 26 to 34 above and to the answer given to the first question, there is no need to answer the second question.

The third question

43 It follows from the answer given to the first question that a measure such as the NPF does not constitute a 'plan' or a 'programme' for the purposes of Article 2(a) of Directive 2001/42 and, consequently, does not fall within the scope of that directive.

44 In those circumstances, there is no need to examine the third question, concerning Article 5 of Directive 2001/42 and the methodology applicable for the purposes of assessing the plans and programmes subject to that directive.

Costs

45 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 (Second Chamber) hereby rules:

Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment

must be interpreted as meaning that a measure adopted by the government of a Member State solely on the basis of a provision of the Constitution of that Member State providing that the executive power of the State is to be exercised by or on the authority of that government does not meet the condition of being 'required by legislative, regulatory or administrative provisions' and, consequently, cannot constitute a 'plan' or a 'programme' for the purposes of that Article 2(a).

Noot

1. Er moet een plan-MER worden gemaakt voor plannen en programma's die het kader vormen voor mer-(beoordelings)plichtige besluiten over projecten als bedoeld in art. 16.43 lid 1 Ow of als voor dat plan of programma op grond van art. 16.53c Ow een passende beoordeling moet worden gemaakt (art. 16.36 lid 1 en 2 Ow). In art. 16.34 lid 1 Ow is gedefinieerd wat wordt verstaan onder 'plannen en programma's'. Hierbij wordt verwezen naar art. 2 onder a SMB-richtlijn. Daaruit volgt dat dat van een plan of programma kan worden gesproken wanneer:

a) het betreffende document is opgesteld en/of vastgesteld door een instantie op nationaal, regionaal of lokaal niveau of die door een instantie wordt opgesteld om middels een wetgevingsprocedure door het parlement of de regering te worden vastgesteld; en
b) het betreffende document door wettelijke of bestuursrechtelijke bepalingen is voorgeschreven.

2. Uit jurisprudentie van het Hof van Justitie EU (hierna: 'Hof') volgt dat de term 'voorgeschreven' niet impliceert dat de wettelijke of bestuursrechtelijke bepaling ertoe verplicht om een plan of programma vast te stellen. Waar het om gaat is dat in de wettelijke of bestuursrechtelijke bepalingen de procedure van totstandkoming van het plan of programma en het voor de vaststelling daarvan bevoegde gezag zijn vastgelegd. Zie o.a. HvJ EU 25 juni 2020, ECLI:EU:C:2020:503, punten 50-52 (hierna: 'Nevele-arrest') en HvJ EU 9 maart 2023, ECLI:EU:C:2023:176, punt 30. Omdat de jurisprudentie van het Hof niet zonder meer uit de redactie van art. 2 onder a SMB-richtlijn volgt, heeft de wetgever er verstandig aan gedaan om in art. 16.34 lid 1 Ow de strekking van deze jurisprudentie expliciet weer te geven naast de verwijzing naar art. 2 onder a SMB-richtlijn.

3. Wij zijn van mening dat wetgeving vaak als plan of programma heeft te gelden. Wat betreft wetten in formele zin is bijvoorbeeld in art. 81 e.v. GW vastgelegd wie het bevoegd gezag is en zijn de belangrijkste elementen van de totstandkomingsprocedure beschreven. Een wet in formele zin is volgens ons dan ook een plan of programma in de zin van art. 2 onder a SMB-richtlijn alsmede in de zin van art. 16.34 lid 1 Ow (zie onder meer punt 3 van onze noot bij Rb. Oost-Brabant 16 juni 2023, ECLI:NL:RBOBR:2023:2931, *M en R* 2023/84). Die conclusie wordt echter niet door iedereen gedeeld, onder meer niet door de regering. In *Kamerstukken I* 2023/24, 34287, Y, p. 4, is door de Staatssecretaris van IenW aangegeven dat wetten in formele zin nimmer onder de reikwijdte van de SMB-richtlijn vallen, omdat deze niet door wettelijke of bestuursrechtelijke bepalingen zijn voorgeschreven. Zie in soortgelijke zin ook de medio dit jaar gepubliceerde concept-memorie van toelichting bij het ontwerp van het wetsvoorstel tot wijziging van de Kernenergiewet ten behoeve van bedrijfsduurverlenging van kerncentrale Borssele (p. 3) (https://www.commissiemer.nl/projectdocumenten/014485_3723_Bijlage_1_Concept_Memorie_van_Toelichting_art_15a_Kew.pdf).

4. De genoemde artikelen in de GW zijn voor de regering niet toereikend om op basis daarvan te concluderen dat wetten in formele zin plannen of programma's zijn waarvoor een plan-mer(beoordelings)plicht kan bestaan. Dat heeft te maken met punt 35 van het Nevele-arrest. Daarin overweegt het Hof dat een document moet worden beschouwd als 'voorgeschreven' in de zin van art. 2 onder a SMB-richtlijn zodra de bevoegdheid om dat document vast te stellen haar rechtsgrondslag vindt in een 'specifieke bepaling' (zie bijvoorbeeld ook HvJ EU 22 februari

2022, ECLI:EU:C:2022:102 (punt 37)). Anders dan de regering vinden wij dat art. 81 e.v. GW een dergelijke specifieke bepaling is. Ons komt het voor dat het Hof met het woord 'specifieke bepaling' tot uitdrukking wil brengen dat in die desbetreffende wettelijke of bestuursrechtelijke bepaling(en) de procedure van totstandkoming van het document en het ter zake van de vaststelling daarvan bevoegde gezag zijn geregeld. Dat blijkt volgens ons ook uit het eerste deel van punt 35 van het Nevele-arrest, waarbij het Hof de beide aan de wettelijke of bestuursrechtelijke bepaling(en) te stellen eisen nogmaals benoemt. Als aan die eisen wordt voldaan, is er sprake van een specifieke wettelijke of bestuursrechtelijke bepaling.

5. Het aan de orde zijnde arrest, waarvan (nog) geen Nederlandse taalversie is verschenen, lijkt onze visie te onderschrijven.

6. In art. 28.2 van de Ierse Grondwet is vastgelegd dat de uitvoerende macht van de Staat wordt uitgeoefend door de regering (zie punt 9 van het arrest). De Ierse regering heeft op basis van deze bevoegdheidsgrondslag twee plannen vastgesteld, het 'National Planning Framework' en het 'National Development Plan'. Het Ierse Supreme Court wilde van het Hof vernemen of die grondslag maakt dat beide plannen moeten worden gezien als een plan of programma ex art. 2 onder a SMB-richtlijn (zie punt 19 van het arrest). Het Hof komt in punt 26 tot de conclusie dat onder meer het 'National Planning Framework' niet is gebaseerd op een specifieke bepaling c.q. op een specifieke rechtsgrondslag. In punt 29 wordt door het Hof overwogen dat art. 28.2 van de Ierse Grondwet niet handelt over welke autoriteiten bevoegd zijn om die plannen of programma's vast te stellen, alsmede over de procedure voor de vaststelling ervan. De betreffende Grondwetbepaling stelt volgens het Hof enkel vast dat de uitvoerende macht van de Ierse staat over het algemeen wordt uitgeoefend door of onder gezag van de regering. Het Hof concludeert dat wanneer het 'National Planning Framework' op grond van art. 28.2 van de Ierse Grondwet geacht zou moeten worden binnen de werkingssfeer van de SMB-richtlijn te vallen, dit zou betekenen dat de tweede van de twee cumulatieve voorwaarden van art. 2 sub a SMB-richtlijn zinledig wordt gemaakt (aldus punt 31). Die tweede voorwaarde houdt in dat er alleen sprake is van een plan of programma als die is voorgeschreven door wettelijke of bestuursrechtelijke bepalingen, aldus punt 24 van het arrest. In punt 25 wordt die tweede voorwaarde nader toegelicht op een vergelijkbare wijze als in punt 35 van het Nevele-arrest. Ook in dat verband wordt weer gesproken over een specifieke rechtsgrondslag ('particular legal basis'). Gezien de overwegingen in punt 29 lijkt dat geen afzonderlijk criterium te zijn dat geldt in aanvulling op de voorwaarden dat de desbetreffende bestuursrechtelijke of wettelijke bepaling de procedure van totstandkoming van het document en het ter zake van de vaststelling daarvan bevoegde gezag moet vastleggen wil er sprake zijn van een plan of programma in de zin van de SMB-richtlijn. Uit punt 33 vloeit overigens voort dat de verplichting om het document bekend te maken niet toereikend is om te kunnen stellen dat daarmee de procedure van totstandkoming is geregeld.

7. Nergens in het arrest wordt gesuggereerd dat art. 28.2 van de Ierse Grondwet vanwege het algemene karakter sec reeds niet kan worden gezien als een wettelijke bepaling die een plan of programma voorschrijft. Als het Hof dat zou hebben gevonden was dit bij uitstek een zaak geweest om dat te oordelen. In plaats daarvan acht het Hof ook in deze zaak nadrukkelijk bepalend dat er in die Grondwet(bepaling) niets is vastgelegd over het bevoegd gezag en de procedure van totstandkoming van een document.

Marcel Soppe & Tessa Rötscheid

M en R 2024/127

Afdeling bestuursrechtspraak van de Raad van State 9 oktober 2024, nr. 202203444/1/A3
(Borman, Niederer, Blomberg)
m.nt. H.J.A. van Ham

(Art. 3 lid 1 en 5, art. 4 Wet Bibob; art. 5.19 lid 4 onder b Wabo)

NJB 2024/2268
ECLI:NL:RVS:2024:4077

Intrekking van een omgevingsvergunning (voor o.a. het aanbrengen van brandwerende voorzieningen) op grond van art. 5.19 Wabo jo. art. 3 lid 1 en art. 4 Wet Bibob doorstaat de evenredigheidstoets van art. 3 lid 5 Wet Bibob.

Toepassing van artikel 4, eerste lid, van de Wet Bibob in relatie tot het evenredigheidsbeginsel. Anders dan de rechtbank heeft geoordeeld, heeft het college de intrekking niet enkel gebaseerd op de weigering de Bibob-formulieren in te vullen (artikel 4 Wet Bibob). Het college heeft (ook) de resultaten van het openbronnenonderzoek aan de besluitvorming ten grondslag gelegd en de mate van het gevaar beoordeeld. Intrekking van de omgevingsvergunning was hier een geschikt en noodzakelijk middel om te voorkomen dat de vergunning mede zou worden gebruikt om uit gepleegde strafbare feiten verkregen of te verkrijgen, op geld waardeerbare voordelen te benutten, of strafbare feiten te plegen.

Uitspraak op de hoger beroepen van:
1. Het college van burgemeester en wethouders van Breda,
2. [stichting] (hierna: de Stichting), gevestigd in [plaats],
appellanten,
tegen de uitspraak van de rechtbank Zeeland-West-Brabant van 25 april 2022 in zaak nr. 21/1382 in het geding tussen:
de Stichting
en
het college.