ECLI:EU:C:2020:503

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

25 June 2020 (*)

(Reference for a preliminary ruling — Directive 2001/42/EC — Environmental impact assessment — Development consent for the installation of wind turbines — Article 2(a) — Concept of 'plans and programmes' — Conditions for granting consent laid down by an order and a circular — Article 3(2)(a) — National instruments setting the framework for future development consent of projects — Absence of environmental assessment — Maintenance of the effects of national instruments, and consents granted on the basis of those instruments, after those instruments have been declared not to comply with EU law — Conditions)

In Case C-24/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad voor Vergunningsbetwistingen (Council for consent disputes, Belgium), made by decision of 4 December 2018, received at the Court on 15 January 2019, in the proceedings

A and Others

against

Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen,

interested party:

Organisatie voor Duurzame Energie Vlaanderen VZW,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan, and I. Jarukaitis, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, C. Toader (Rapporteur), F. Biltgen, A. Kumin, N. Jääskinen and N. Wahl, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 December 2019,

having considered the observations submitted on behalf of:

– A and Others, by T. Swerts, W.-J. Ingels, and L. Nijs, advocaten,

– Organisatie voor Duurzame Energie Vlaanderen VZW, by T. Malfait and V. McClelland, advocaten,

– the Belgian Government, by C. Pochet, M. Jacobs and P. Cottin, acting as Agents, and by J. Vanpraet, advocaat,

– the Netherlands Government, by M. Bulterman, M. Gijzen and M. Noort, acting as Agents,

– the United Kingdom Government, by Z. Lavery, acting as Agent, and by R. Warren QC, and D. Blundell, Barrister,

– the European Commission, by E. Manhaeve and M. Noll-Ehlers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(a) and Article 3(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 (OJ 2001 L 197, p. 30).

2 The request has been made in proceedings between A and others and the Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen (regional town planning official of the Flanders Department of Land Planning, East Flanders Division, Belgium), concerning the decision to grant development consent to a generator and supplier of electricity for the purpose of the installation and operation of five wind turbines on a site that is near to A and others.

Legal context

International law

The Espoo Convention

3 The Convention on environmental impact assessment in a transboundary context, signed in Espoo (Finland) on 26 February 1991 (‘the Espoo Convention’) was approved on behalf of the European Community on 24 June 1997 and entered into force on 10 September of the same year.

4 Article 2(7) of the Espoo Convention provides:

‘Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.’

European Union law

5 According to recital 4 of Directive 2001/42:

‘Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.’

6 Article 1 of that directive, headed ‘Objectives’, provides:

‘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.’

7 Article 2 of the directive reads as follows:

‘For the purpose of this Directive:

(a) “plans and programmes” shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

– which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

– which are required by legislative, regulatory or administrative provisions;

(b) “environmental assessment” shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

…’

8 Under Article 3 of the same directive, headed ‘Scope’:

‘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)],

…'

9 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) repealed and replaced Directive 85/337.

10 Point 3(i) of Annex II to Directive 2011/92 refers to 'installations for the harnessing of wind power for energy production (wind farms)'.

Belgian law

The Vlarem II

11 The besluit van de Vlaamse regering houdende algemene en sectorale bepalingen inzake milieuhygiëne (Order of the Flemish Government on the general and sectoral provisions with regard to environmental health) of 1 June 1995 (*Belgisch Staatsblad* of 31 July 1995, p. 20526), in the version applicable to the dispute in the main proceedings ('the Vlarem II'), was adopted pursuant, in particular, to the decreet van de Vlaamse Raad betreffende de milieuvergunning (Decree of the Flemish Council concerning environmental consent) of 28 June 1985 (*Belgisch Staatsblad* of 17 September 1985, p. 13304), and the decreet van de Vlaamse Raad houdende algemene bepalingen inzake milieubeleid (Decree of the Flemish Council laying down general provisions on environmental policy) of 5 April 1995 (*Belgisch Staatsblad* of 3 June 1995, p. 15971). The Vlarem II lays down general and sectoral environmental conditions concerning, first, the nuisances and risks to which certain installations and activities can give rise and, second, the compensation for any damage to the environment by their exploitation.

12 By Article 99 of the besluit van de Vlaamse regering tot wijziging van het besluit van de Vlaamse regering houdende de vaststelling van het Vlaams reglement betreffende de milieuvergunning en van het [the Vlarem II], wat betreft de actualisatie van voormelde besluiten aan de evolutie van de techniek (Order of the Flemish Government amending the Order of the Flemish Government of 6 February 1991 on the adoption of regulations concerning environmental consents and amending [the Vlarem II], as regards updating the aforementioned orders in relation to technical developments), of 23 December 2011 (*Belgisch Staatsblad* of 21 March 2012, p. 16474), a Section 5.20.6 was added to the Vlarem II, regarding installations for the generation of electricity by means of wind turbines.

13 That section, entitled, 'Installations for the generation of electricity by means of wind turbines', includes, inter alia, provisions regarding the shadow cast by blades (limitation of the stroboscopic effects caused by that shade), the safety of wind turbines (presence of certain detection systems and an automatic stop) and noise (execution of noise measurements).

14 As regards shadow flicker, Article 5.20.6.2.1 of the Vlarem II provides:

'If an object sensitive to shade is within a perimeter of four hours' shade expected per year of the wind turbine, the latter shall be equipped with an automatic stop module.'

15 Article 5.20.6.2.2 of the Vlarem II requires the operator to keep a journal for each wind turbine, and to record therein certain data relating to shadow flicker, and to prepare a monitoring report for at least the first two years.

16 Article 5.20.6.2.3 of the Vlarem II provides:

‘A maximum of 30 hours of actual shadow per year, with a maximum of 30 minutes of actual shadow per day, shall apply for each relevant object sensitive to shadow in industrial zones, with the exception of dwellings.

A maximum of 8 hours of actual shadow per year, with a maximum of 30 minutes of actual shadow per day, shall apply for each relevant object sensitive to a projection of shadow in all other zones and for dwellings in an industrial zone.’

17 As regards safety, Article 5.20.6.3.1 of the Vlarem II provides that all wind turbines must be built in compliance with the safety requirements laid down in standard IEC61400 or equivalent and be certified. Article 5.20.6.3.2 of the Vlarem II provides that all wind turbines must be equipped with security devices comprised, inter alia, of the protection against the risks of frost and lightning, an auxiliary braking system, and an online system to detect anomalies, while also transmitting notice of them to the control unit for the wind turbine itself.

18 As regards noise, Article 5.20.6.4.2 of the Vlarem II lays down maximum values for outdoor noise near dwellings:

‘The specific outdoor noise of the wind turbine is, subject to contrary provisions in the environmental consent, limited by evaluation period and by the proximity of the other nearest dwelling or residential zone, to the guideline value referred to in Annex 5.20.6.1 or to the background noise referred to in Annex 4B, point F14, 3, of Chapter 1 of this order. Lsp ≤ MAX (Guideline value, LA 95).

Where background noise defines the standard, the distance between wind turbines and dwellings must be greater than three times the diameter of the rotor.’

19 Annex 5.20.6.1 of the Vlarem II contains the following indications:

‘Intended location of the zone, according to the permit’	Indicative value of specific outdoor noise in dB(A)		
	Day	Evening	Night
1° Agricultural zones and recreational	44	39	39

and holiday zones			
2a° Zones or parts of zones, with the exception of residential zones or parts of residential zones, situated less than 500 m from industrial zones	50	45	45
2b° Residential zones or parts of residential zones, situated less than 500 m from industrial zones	48	43	43
3a° Zones or parts of zones, with the exception of residential zones or parts of residential zones situated less than 500 m from zones for artisanal businesses and small and medium-sized	48	43	43

undertakings, service zones or mining zones during mining			
3b° Inhabited zones or parts of inhabited zones situated less than 500 m from zones for artisanal businesses and small and medium-sized undertakings, service zones or mining zones during mining	44	39	39
4° Inhabited zones	44	39	39
5° Industrial zones, service zones, zones intended for collective utilities and public amenities, and mining zones during mining	60	55	55
5ª° Agrarian	48	43	43

zones			
6° Leisure zones, with the exception of recreational and holiday zones	48	43	43
7° All other zones, with the exception of buffer zones, military zones, and zones that are subject to indicative values laid down in special orders.	44	39	39
8° Buffer zones	55	50	50
9° Zones or parts of zones situated less than 500 m from zones intended for gravel quarrying, during quarrying	48	43	43
10° Agricultural zones	48	43	43’

The Circular of 2006

20 The omzendbrief EME/2006/01-RO/2006/02 (Circular EME/2006/01-RO/2006/02), of 12 May 2006, entitled 'Assessment framework and conditions for the installation of wind turbines' (*Belgisch Staatsblad* of 24 October 2006, p. 56705), in the version applicable to the dispute in the main proceedings ('the Circular of 2006'), constitutes, as point 3 thereof states, the updating of a circular dated 17 July 2000.

21 According to point 3.1 of the Circular of 2006, that circular contains a certain number of elements to be taken into consideration when deciding to install a wind turbine. Points 3.1.1 to 3.1.14 include various considerations as regards grouping, land use, habitat, agriculture, industrial land, port, sport, and leisure zones, countryside, noise impact, shadow flicker, safety, nature, environmental impact assessment, and aviation.

22 In particular, point 3.1.9 of that circular, entitled 'Noise impact', is worded as follows:

'The extent to which the wind turbines can create nuisance depends on various factors, such as the wind turbines' power source, shape, height of the axis and the number of wind turbines. The type of land (water, earth), the distance from inhabitants in the surrounding area and the level of background noise are all relevant. Overall, background noise increases more with the wind than with the intensity of the wind turbine source.

Under Article 5.20(2) of Chapter II of the Vlarem [II], no noise level standard is applicable. The environmental consent may, nevertheless, impose limits on noise emission according to the environmental situation. The necessary measures to be taken at source must meet the current state of technology. Internationally recognised software may be used to evaluate the specific noise of turbines. The determination of background noise must be made by an approved environmental expert in the discipline of noise and vibrations.

When the nearest foreign dwelling, or the nearest inhabited zone is 250 metres from the mast of the turbine, it may be considered possible to restrict the nuisance caused by the wind turbine or wind farm to an acceptable level.

Where the distance is less than or equal to 250 meters, the following approach should be adopted.

The specific noise is determined in the vicinity of the nearest foreign dwelling or the nearest inhabited zone. In order to assess whether a wind turbine or wind farm in a specific place may be permitted, an evaluation shall be made, by derogation from Annex 2.2.1 of Chapter II of the Vlarem [II], of the specific noise in the light of the following environmental quality standards for outdoor noise:

Reference values in dB(A) outdoor

Zone	Environmental quality standards in dB(A) outdoor		
	Da	Evenin	Nigh

	y	g	t
1° Agricultural zones and recreational and holiday zones	49	44	39
2° Zones or parts of zones situated less than 500 meters from industrial zones not referred to in point 3° or zones intended for collective utilities or public amenities.	54	49	49
3° Zones or parts of zones situated less than 500 meters from zones for artisanal businesses and small and medium-sized undertakings, service zones or mining zones during mining	54	49	44

4° Inhabited zones	49	44	39
5° Industrial zones, service zones, zones intended for collective utilities and public amenities, and mining zones during mining	64	59	59
6° Amusement zones, with the exception of recreation and holiday zones	54	49	44
7° All other zones, with the exception of buffer zones, military zones, and zones that are subject to indicative values laid down in special orders	49	44	39
8° Buffer zones	59	54	54
9° Zones or parts of	59	54	49

zones situated less than 500 meters from zones intended for gravel quarrying, during quarrying			

The determination of the specific noise must be made at a windspeed of 8 meters/second and in the least favourable wind direction, that is to say when the noise impact of the wind turbines is at its maximum at the point under consideration.

If the specific noise meets the environmental quality standards referred to above, or if the specific noise in the vicinity of the nearest foreign dwelling or the nearest inhabited zone is less than 5 dB(A) as background noise, it may be considered possible to restrict the nuisance caused by the wind turbine or windfarm to an acceptable level.'

23 According to point 3.1.10 of the Circular of 2006, entitled 'Projection of shadow flickers':

'The moving blades of wind turbines can cause nuisance through the projection of shadow flickers for persons who live or work in the surrounding areas, as well as for crops (greenhouses).

The borders of the projection of shadow can be calculated using special software which is distributed worldwide. In the assessment of shadow projection nuisance, a maximum of 30 hours per year of shadow projection in an inhabited dwelling is considered acceptable. If the shadow effect is greater than that, it is necessary to examine to what extent corrective measures can be taken (for example, blinds, films on windows …). …

Any effects must be described in the site record.'

24 As regards the choice of location, the Circular of 2006 also addresses the principle for the approach to planning (point 3.2.1). It seeks to demarcate sites that are ideal from a land, environmental and wind turbine perspective, and gives an overview of territories that may be considered for granting consent for the location of wind turbines (point 3.2.2). Finally, that circular provides an overview as to the role of the wind energy working group (point 4).

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

25 On 30 November 2016, following a procedure that started in 2011, the regional town planning official of the Flanders Department of Land Planning, East Flanders Division, granted, subject to certain conditions, development consent ('the consent of 30 November 2016') to Electrobel SA, for the installation and operation of five wind turbines on the territory of the communes of Aalter (Belgium) and Nevele (Belgium) ('the wind farm project'). That consent

required, in particular, compliance with certain conditions laid down by the provisions of Section 5.20.6 of the Vlarem II and by the Circular of 2006 (together 'the Order and the Circular of 2006').

26 A and others, in their capacity as residents near to the site proposed for the wind farm project, brought an action before the referring court, namely the Raad voor Vergunningsbetwistingen (Council for consent disputes, Belgium), seeking the annulment of the consent of 30 November 2016. In support of their action, A and others submit that the Order and the Circular of 2006, on the basis of which the consent was granted, infringe Article 2(a) and Article 3(2)(a) of Directive 2001/42 on the ground that those national instruments were not subject to an environmental assessment, contrary to the provisions of that directive, as interpreted by the Court, inter alia in its judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816). According to A and others, it is clear from that judgment that a national regulatory act containing various provisions relating to the installation of wind turbines, which must be complied with in the context of granting administrative authorisations on the installation and operation of such installations, are covered by the concept of 'plans and programmes' within the meaning of that directive, and must, therefore, be subject to an environmental assessment.

27 For his or her part, the regional town planning official of the Flanders Department of Land Planning, East Flanders Division, considers, in essence, that the Order and the Circular of 2006 are not covered by the concept of 'plans and programmes', within the meaning of Directive 2001/42, in that those acts do not provide a sufficiently complete framework to be regarded as a coherent regime for the installation of wind turbines projects.

28 In view of the clarifications given in the judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816), the referring court is unsure whether the Order and the Circular of 2006 should have been the subject of an environmental assessment. Hence, it queries whether those instruments and the consent of 30 November 2016, which was adopted on the basis of those instruments, comply with Directive 2001/42.

29 Moreover, that court invites the Court of Justice to reconsider its constant line of case-law, which commenced with the judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159), and has since been confirmed in its judgments of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403), of 7 June 2018, *Thybaut and Others* (C-160/17, EU:C:2018:401), of 8 May 2019, *'Verdi Ambiente e Società (VAS) — Aps Onlus' and Others* (C-305/18, EU:C:2019:384), of 12 June 2019, *CFE* (C-43/18, EU:C:2019:483), and of 12 June 2019, *Terre wallonne* (C-321/18, EU:C:2019:484), according to which the phrase 'required by legislative, regulatory or administrative provisions' in Article 2(a) of Directive 2001/42, must be interpreted as meaning that plans and programmes adopted 'within the framework' of national legislative or regulatory provisions are 'required' within the meaning of, and for the application of, that provision, and are therefore subject to an environmental assessment under the conditions that it lays down.

30 The referring court, citing in that regard points 18 and 19 of the Opinion of Advocate General Kokott in the case *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2011:755), considers that the Court should favour an interpretation that is closer to the intention of the EU legislature and that would restrict the scope of Article 2(a) of Directive 2001/42 to those acts whose adoption is mandatory pursuant to legislative or regulatory provisions.

31 In those circumstances, the Raad voor Vergunningsbetwistingen (Council for consent disputes) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do Article 2(a) and Article 3(2)(a) of Directive [2001/42] mean that Article 99 of the Order of the Flemish Government amending the Order of the Flemish Government of 6 February 1991 on the adoption of Flemish regulations concerning environmental consent and amending [the Vlarem II] as regards the updating of the aforementioned orders in keeping with the evolution of technology, which introduces, into the Vlarem II, Section 5.20.6 on installations for the generation of electricity by means of wind energy, and [the Circular of 2006], both of which contain various provisions regarding the installation of wind turbines, including measures on safety, and standards relating to shadow flicker and noise levels, having regard to town and country planning zones, must be classified as a “plan or programme” within the meaning of the provisions of the Directive?

(2) If it appears that an environmental assessment should have been carried out before the adoption of [the Order and the Circular of 2006], can the Raad voor Vergunningsbetwistingen (Council for consent disputes) modulate the timing of the legal effects of the illegal nature of [the Order and the Circular of 2006]? To that end, a number of sub-questions must be asked:

(a) Can a policy instrument such as [the Circular of 2006], which the public authority concerned is competent to draw up on the basis of its discretionary and policy-making powers, meaning that the competent authority was not, strictly speaking, designated to draw up the “plan or programme”, and in respect of which there is also no provision for a formal drafting procedure, be regarded as a “plan or programme” within the meaning of Article 2(a) of the Directive [2001/42]?

(b) Is it sufficient that a policy instrument or general rule, such as [the Order and the Circular of 2006], partially curtails the margin of appreciation of a public authority responsible for granting development consent, in order to be considered a “plan or programme” within the meaning of Article 2(a) of Directive [2001/42], even if they do not represent a requirement, or a necessary condition, for the granting of consent or are not intended to constitute a framework for future development consent, notwithstanding the fact that the European legislature has indicated that that purpose is an element of the definition of “plan or programme”?

(c) Can a policy instrument such as the Circular [of 2006], the format of which is drawn up on grounds of legal certainty and thus constitutes a completely voluntary decision, be regarded as a “plan or programme” within the meaning of Article 2(a) of [Directive 2001/42], and does such an interpretation not run counter to the case-law of the Court of Justice to the effect that a purposive interpretation of a directive may not deviate fundamentally from the clearly expressed will of the EU legislature?

(d) Can Section 5.20.6 of the Vlarem II, in circumstances where there was no mandatory requirement to draw up the rules contained therein, be defined as a “plan or programme” within the meaning of Article 2(a) of Directive [2001/42], and does such an interpretation not run counter to the case-law of the Court of Justice to the effect that a purposive interpretation of a directive may not deviate fundamentally from the clearly expressed will of the EU legislature?

(e) Can a policy instrument and a normative government Order, such as the [Order and the Circular of 2006], which have a limited indicative value – or at least do not constitute a framework from which any right to execute a project may be derived and from which no right to any framework specifying to what extent projects can be approved may be derived – be regarded as a “plan or programme” that constitutes “the framework for future development consent of projects listed in Annexes I and II to Directive [85/337]” within the meaning of Article 2(a) and Article 3(2)(a) of [Directive 2001/42], and does such an interpretation not run counter to the case-law of the Court of Justice to the effect that a purposive interpretation of a directive may not deviate fundamentally from the clearly expressed will of the Union legislature?

(f) Can a policy instrument such as [the Circular of 2006], which has a purely indicative value, and/or a normative government order, such as Section 5.20.6 of the Vlarem II, which merely sets a minimum threshold for development consent and which, moreover, is a general rule that operates fully autonomously,

– both of which contain only a limited number of criteria and modalities, and

– neither of which is the only determinant for even a single criterion or modality, and in relation to which it could be argued that, on the basis of objective information, the possibility that they are likely to have significant effects on the environment can be ruled out,

be regarded as a "plan or programme" on a joint reading of Article 2(a) and Article 3(1) and (2) of [Directive 2001/42], and can they thus be regarded as acts which, by the adoption of rules and control procedures applicable to the sector concerned, establish a whole package of criteria and modalities for the approval and execution of one or more projects that are likely to have significant effects on the environment?

(g) If the answer to [question 2, sub-question (f)] is in the negative, can a court or tribunal determine this itself, after the Order or the quasi-legislation (such as the Order and the Circular of 2006) have been adopted?

(h) Can a court or tribunal, if it has only indirect jurisdiction through the commencement of an objection procedure, the result of which applies only to the parties, and if the answer to the questions referred for a preliminary ruling shows that [the Order and the Circular of 2006] are illegal, order that the effects of the unlawful order and/or the unlawful circular be maintained if the unlawful instruments contribute to an objective of environmental protection, that is also pursued by a Directive within the meaning of Article 288 TFEU and if the requirements laid down in European Union law for such maintenance (as laid down the judgment [of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603)] have been met?

(i) If the answer to [question 2, sub-question (h)] is in the negative, can a court or tribunal order that the effects of the contested project be maintained in order to comply indirectly with the requirements imposed by EU law (as laid down in the judgment [of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603)] for the continued maintenance of the legal effects of plans or programmes that do not conform to the [Directive 2001/42]?'

The questions referred

The first question and sub-questions(a) to (d) of the second question: the concept of 'plans and programmes' within the meaning of Article 2(a) of Directive 2001/42

32 By its first question and sub-questions (a) to (d) of its second question, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(a) of Directive 2001/42 must be interpreted as meaning that the concept of 'plans and programmes' covers an order and circular, adopted by the government of a federated entity of a Member State, both of which contain various provisions concerning the installation and operation of wind turbines.

33 Article 2(a) of Directive 2001/42 defines the 'plans and programmes' covered by that provision as being those which satisfy the two cumulative conditions set out in the two indents in that provision, namely, first, 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, and, second, that they are required by legislative, regulatory or administrative provisions.

34 As regards the first of those conditions, it is clear from the indications provided by the referring court that the Order and the Circular of 2006 were adopted by the Flemish government, which is a regional authority, and that this condition is therefore satisfied.

35 As regards the second of those conditions, which is set out in the second indent of Article 2(a) of Directive 2001/42, it is clear from the established case-law of the Court that plans and programmes whose adoption 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 (judgments of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 31; of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 43; and of 12 June 2019, *Terre wallonne*, C-321/18, EU:C:2019:484, paragraph 34). Thus the Court has held that, in order to ensure the effectiveness of that provision having regard to its objective, a measure must be regarded as 'required' where the legal basis of the power to adopt the measure is found in a particular provision, even if the adoption of that measure is not compulsory (see, to that effect, judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraphs 38 to 40).

36 It should be noted at the outset that, by its questions, the referring court, as well as the United Kingdom Government in its written observations, invites the Court to reconsider that line of case-law.

37 In that regard, it must be recalled that the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (see, to that effect, judgment of 9 October 2019, *BGL BNP Paribas*, C-548/18, EU:C:2019:848, paragraph 25 and the case-law cited).

38 As regards, first of all, the wording of Article 2(a) of Directive 2001/42, it must be noted, as the Advocate General stated in point 60 of his Opinion, that a comparison of the different language versions of the second indent of Article 2(a) of Directive 2001/42 highlights differences in meaning from one version to another. Whilst the term 'exigés' used in the French-language version and similarly, inter alia, the terms used in the Spanish- ('exigidos'), German- ('*erstellt werden müssen*'), English- ('*required'*), Dutch- ('*zijn voorgeschreven'*), Portuguese- ('*exigido*') and Romanian- ('*impuse'*) language versions refer to a form of requirement or obligation, the Italian-language version uses the less prescriptive term '*previsti*' ('provided').

39 All the official languages of the European Union are the authentic languages of the acts in which they are drafted and, therefore, all the language versions of an act of the European Union must, as a matter of principle, be recognised as having the same value (see, to that effect, judgments of 17 November 2011, *Homawoo*, C-412/10, EU:C:2011:747, paragraph 28 and the case-law cited, and of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 49 and the case-law cited).

40 It follows that an examination of the wording of Article 2(a), second indent, of Directive 2001/42 is inconclusive, since it does not make it possible to determine whether 'plans and programmes' referred to in that provision are exclusively those that national authorities are obliged to adopt under legislative, regulatory or administrative provisions.

41 Next, as regards the legislative history of the second indent of Article 2(a) of Directive 2001/42, that provision, which was not included in the original European Commission proposal for a directive, nor in the amended version of that proposal, was added by Common Position (EC) No 25/2000 of 30 March 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment (OJ 2000 C 137, p. 11). As the Advocate General observed in points 62 and 63 of his Opinion, by this addition the EU legislature intended to restrict the obligation to carry out an environmental assessment to certain plans and programmes only, but it is not possible to infer that its intention was to restrict such an assessment only to plans and programmes whose adoption is mandatory.

42 As regards the context of that provision, it must be noted, first, as the Advocate General observed in points 66 and 67 of his Opinion, that a binary concept which makes a distinction according to whether the adoption of a plan or a programme is compulsory or optional is not capable of covering, in a manner that is sufficiently precise and therefore satisfactory, the diversity of situations that arise or the wide-ranging practices of national authorities. The adoption of plans or programmes, which can occur in a great variety of situations, is often neither imposed as a general requirement, nor left entirely to the discretion of the competent authorities.

43 Secondly, Article 2(a) of Directive 2012/42 includes not only the preparation and adoption of 'plans and programmes', but also modifications to them (see, to that effect, judgments of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 36, and of 10 September 2015, *Dimos Kropias Attikis*, C-473/14, EU:C:2015:582, paragraph 44). As the Advocate General stated in point 68 of his Opinion, that latter case, in which the modification of the plan or programme concerned is also likely to have significant environmental effects, within the meaning of Article 3(1) of Directive 2001/42, most often arises when an authority decides of its own initiative to carry out such a modification, without being obliged to do so.

44 Those foregoing considerations are consistent with the purpose and objectives of Directive 2001/42, which itself comes within the framework established by Article 37 of the Charter of Fundamental Rights of the European Union, according to which a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the European Union and ensured in accordance with the principle of sustainable development.

45 The purpose of that directive is, as set out in Article 1, to provide for a high level of protection for 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.

46 To that end, as Article 1 states, the fundamental objective of Directive 2001/42 is to subject plans and programmes that are likely to have significant environmental effects to an environmental assessment during their preparation and before their adoption (judgments of 22 September 2011, *Valčiukienė and Others*, C-295/10, EU:C:2011:608, paragraph 37, and of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 61 and the case-law cited).

47 It must also be recalled that Directive 2001/42 was adopted on the basis of Article 175(1) EC, concerning environmental actions to be taken by the Community in order to achieve the objectives of Article 174 EC. Article 191 TFEU, which corresponds to Article 174 EC, provides, in paragraph 2 thereof, that the European Union's policy on the environment aims for a 'high level of

protection' taking into account the diversity of situations in the various regions of the Union. Article 191(1) TFEU authorises the adoption of measures covering, inter alia, certain specified aspects of the environment, such as the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources. In the same way, Article 3(3) TEU provides that the European Union works in particular for 'a high level of protection and improvement of the quality of the environment' (see, to that effect, judgment of 21 December 2016, *Associazione Italia Nostra Onlus*, C-444/15, EU:C:2016:978, paragraphs 41 to 43 and the case-law cited).

48 Those objectives would be likely to be compromised if Article 2(a) of Directive 2001/42 were interpreted as meaning that only those plans or programmes whose adoption is compulsory are covered by the obligation to carry out an environmental assessment laid down by that directive. First, as has been observed in paragraph 42 above, the adoption of those plans and programmes is often not imposed as a general requirement. Second, such an interpretation would allow a Member State to circumvent easily that requirement for an environmental assessment by deliberately refraining from providing that competent authorities are required to adopt such plans and programmes.

49 Moreover, a broad interpretation of the concept of 'plans and programmes' is consistent with the European Union's international undertakings, such as those resulting, inter alia, from Article 2(7) of the Espoo Convention.

50 It follows that, since a strict interpretation, which limits the second condition of Article 2(a) of Directive 2001/42 only to 'plans and programmes' whose adoption is compulsory, could render its scope marginal, the Court favoured the need to ensure the effectiveness of that condition by adopting a broader definition of the term 'required' (see, to that effect, judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 30).

51 Therefore, there is nothing to justify a reversal of the case-law of the Court of Justice in that regard.

52 It follows that the second indent of Article 2(a) of Directive 2001/42 must be interpreted as meaning that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the authorities competent to adopt them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of that directive.

53 As regards the question whether the Order and the Circular of 2006 satisfy that condition, it is clear from the order for reference that the Vlarem II is an order adopted by the executive authority of a federated Belgian entity, namely the Flemish government, in implementation of hierarchically superior rules emanating from the legislative authority of that entity, namely the Flemish Parliament. It follows from the explanations provided by the referring court regarding the Decree of the Flemish Council concerning environmental consent and the Decree of the Flemish Council laying down general provisions on environmental policy that they were the framework for the adoption of Vlarem II by the Flemish government, inter alia by conferring on that government the competence to adopt such an act and by indicating that the sectoral conditions laid down by it sought to prevent and to limit unacceptable nuisance and risks for the environment caused by the installations and activities concerned.

54 As regards the Circular of 2006, it follows from the order for reference that that circular emanates, in this case, from the Flemish government and was signed by the Minister-President and two ministers responsible for the matter.

55 In that regard the referring court states that the legal basis for the Circular of 2006, which, like the Vlarem II, contributes to the attainment of objectives and standards to be achieved under Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), lies in the competence that authorities have, pursuant to the relevant national legislation, for management and assessment for the purpose of granting 'environmental' consents, within the meaning of that legislation.

56 Thus, the raison d'être for the Circular of 2006 is the decision by the ministerial authorities of that federated entity to restrict their own discretion by requiring themselves to follow the rules that they laid down on that matter. It therefore appears that the Circular of 2006 was adopted under prerogatives that such ministerial authorities have available to them under Belgian law, subject to verification which it is for the referring court, in the present case, to carry out as to the precise legal nature of such a circular in the legal order of that Member State.

57 In that regard, it should be recalled that the concept of 'plans and programmes' includes not only their preparation, but also their modification (see, to that effect, judgment of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraph 71 and the case-law cited).

58 In particular, the Court has already held that although such a measure does not, and cannot, lay down positive rules, the possibility which it creates of allowing a derogation from the rules in force to be obtained more easily changes the legal process and consequently brings such a measure within the scope of Article 2(a) of Directive 2001/42 (see, to that effect, judgment of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 58).

59 As the Advocate General observed in points 108 and 109 of his Opinion, and as is clear from the case file before the Court, first, point 3 of the Circular of 2006 appears to allow the inclusion of zones that were not initially under consideration for the generation of wind energy. Second, the annex to that circular appears to contain values that are less stringent compared with those set out in the annex to Section 5.20.6.1 of the Vlarem II on the subject of the quality of the environment as regards noise levels and shadow flicker in inhabited zones, which it is nevertheless for the referring court to verify.

60 Therefore, as the Advocate General in essence observed in point 80 of his Opinion, and subject to the verifications which it is for the referring court to make, the Circular of 2006 amends, by extending or derogating from them, the provisions of the Vlarem II such that it may be regarded as satisfying the condition recalled in paragraph 52 above.

61 It is also necessary to observe that the general nature of the Order and the Circular of 2006 do not preclude those instruments from being classified as 'plans and programmes' within the meaning of Article 2(a) of Directive 2001/42. While it is clear from the wording of that provision that the concept of 'plans and programmes' can cover normative instruments that are legislative, regulatory or administrative, that directive does not contain any special provisions in relation to policies or general legislation that would call for them to be distinguished from plans and programmes for the purpose of that directive. The fact that a national measure is to some extent abstract and pursues an objective of transforming an existing geographical zone is illustrative of its planning and programming aspect and does not prevent it from being included in the concept of 'plans and

programmes' (see, to that effect, judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 60 and the case-law cited).

62 It follows that the Vlarem II and, subject to the verifications which it is for the referring court to carry out, the Circular of 2006, also fulfil the second condition, laid down in the second indent of Article 2(a) of Directive 2001/42.

63 Having regard to all those considerations, the answer to the first question and sub-questions (a) to (d) of the second question is that Article 2(a) of Directive 2001/42 must be interpreted as meaning that the concept of 'plans and programmes' covers an order and circular, adopted by the government of a federated entity of a Member State, both of which contain various provisions concerning the installation and operation of wind turbines.

The second question, sub-questions (e) to (g): the concept of 'plans and programmes' subject to an environmental assessment, within the meaning of Article 3(2)(a) of Directive 2001/42

64 By sub-questions (e) to (g) of its second question the referring court asks, in essence, whether Article 3(2)(a) of Directive 2001/42 must be interpreted as meaning that an order and a circular, both of which contain various provisions regarding the installation and operation of wind turbines, including measures on shadow flicker, safety and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with that provision.

65 Article 3 of Directive 2001/42 makes the obligation to subject a specific plan or programme to an environmental assessment conditional upon the plan or programme covered by that provision being likely to have significant environmental effects (judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 30). More specifically, Article 3(2)(a) of that directive provides that a systematic environmental assessment is to be carried out for all plans and programmes that are prepared for certain sectors and set the framework for future development consent of projects listed in Annexes I and II to Directive 2011/92 (judgment of 8 May 2019, *'Verdi Ambiente e Società (VAS) — Aps Onlus' and Others*, C-305/18, EU:C:2019:384, paragraph 47).

66 In the first place, it is common ground in the present case that the Order and the Circular of 2006 concern the energy sector, referred to in Article 3(2)(a) of Directive 2001/42, and that those national instruments concern wind farm projects, which are amongst the projects listed in point 3(i) of Annex II to Directive 2011/92.

67 In the second place, as regards the question whether such instruments set the framework for future development consent for projects, it must be noted that the concept of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects that are likely to have significant effects on the environment (judgments of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 49; of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 53; and of 12 June 2019, *CFE*, C-43/18, EU:C:2019:483, paragraph 61).

68 Such an interpretation is intended to ensure that provisions which are likely to have significant environmental effects are subject to an environmental assessment (see, to that effect, judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 42, and of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 54).

69 In the present case, the Order and the Circular of 2006 lay down conditions in relation to the installation and operation of wind turbines in the Flemish region as regards, inter alia, shadow flicker, safety procedures and noise emission.

70 While the Order and the Circular of 2006 do not appear to constitute a complete set of standards in relation to the installation and operation of wind turbines, the Court has already had occasion to clarify that the concept of 'a significant body of criteria and detailed rules' must be construed qualitatively and not quantitatively. It is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of that directive (see, to that effect, judgments of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 55, and of 12 June 2019, *CFE*, C-43/18, EU:C:2018:483, paragraph 64).

71 The importance and scope of the requirements laid down by the Order and the Circular of 2006 indicate, as the Advocate General observed in point 94 of his Opinion, that those instruments constitute a framework, which is admittedly non-exhaustive, but which is sufficiently significant for the determination of the conditions for consent to be granted for the installation in the proposed geographic zone of wind farms whose environmental impact is undeniable.

72 It is also appropriate to recall in that regard that, in paragraph 50 of the judgment of 27 October 2016, *D'Oultremont and Others* (C-290/15, EU:C:2016:816), the Court held that a measure that set out standards, comparable to those laid down in the Order and the Circular of 2006, as regards the installation and operation of wind turbines, had a sufficiently significant importance and scope in the determination of the conditions applicable to the sector concerned and the choices, in particular those related to the environment, laid down through those standards, are designed to determine the conditions under which actual projects for the installation and operation of wind turbine sites might be authorised in the future.

73 Having regard to those elements, it must be held that the Order and, subject to the verifications referred to in paragraphs 60 and 62 above, the Circular of 2006 fall within the concept of 'plans and programmes' that must, in accordance with Article 3(2) of Directive 2001/42, be subject to an environmental impact assessment.

74 That interpretation cannot be called into question by the particular legal nature of the Circular of 2006.

75 The phrase 'which set the framework for future development consent', in Article 3(2)(a) of Directive 2001/42, does not include any reference to national laws and therefore constitutes an autonomous concept of European Union law that must be interpreted uniformly throughout the territory thereof.

76 While it is uncertain whether an instrument such as the Circular of 2006 is capable of producing compulsory legal effects for third parties, that circular cannot, however, subject to verification by the referring court as to its precise legal effect, be treated in the same way as provisions of purely indicative value, which do not meet the condition recalled in the preceding paragraph (see, to that effect, judgment of 12 June 2019, *Terre wallonne*, C-321/18, EU:C:2019:484, paragraph 44).

77 In addition to the fact that the Circular of 2006 is entitled 'Assessment framework and conditions required for the installation of wind turbines', it is clear from the indications provided by the referring court that the consent of 30 November 2016 specifies that it must meet the conditions

set out in that circular at all times, which suggests that the circular is binding at least for the authorities with competence to grant such consents.

78 Furthermore, as the Advocate General observed in point 95 of his Opinion, the Belgian Government itself appears to accept the binding nature of the Order and the Circular of 2006 upon such authorities as a whole when that government observes that the possible non-compliance with EU law of the environmental conditions that those instruments lay down would have the consequence of invalidating consents previously granted, such that, according to that government, it is appropriate to restrict the temporal effects of the judgment to be given by the referring court.

79 It follows from all the foregoing considerations that the answer to sub-questions (e) to (g) of the second question is that Article 3(2)(a) of Directive 2001/42 must be interpreted as meaning that an order and a circular, both of which contain various provisions regarding the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with that provision.

The second question, sub-questions (h) and (i): the possibility for the referring court to maintain the effects of the Order and the Circular of 2006, as well as the consent of 30 November 2016

80 By sub-questions (h) and (i) of its second question, the referring court asks, in essence, whether and under what conditions, if it is found that an environmental assessment within the meaning of Directive 2001/42 should have been carried out prior to the adoption of the order and circular on the basis of which the consent, which is contested before it, was granted for the installation and operation of wind turbines, with the result that those instruments and that consent do not comply with EU law, that court may maintain the effects of those instruments and that consent.

81 First of all, as stated in Article 1 of Directive 2001/42, the fundamental objective of that directive is to ensure that (certain) plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment when they are being prepared and prior to their adoption.

82 In the absence of provisions in that directive on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all ‘plans’ or ‘programmes’ that are likely to have ‘significant environmental effects’, within the meaning of that directive, are subject to an environmental assessment, in accordance with the procedural requirements and the criteria laid down by that directive (see, to that effect, judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 30 and the case-law cited).

83 Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are required to eliminate the unlawful consequences of such a breach of EU law. It follows that the competent national authorities, including national courts hearing an action against an instrument of national law adopted in breach of EU law, are therefore under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment. That may, for a ‘plan’ or ‘programme’ adopted in breach of the obligation to carry out an environmental assessment, consist, for example, in adopting measures to suspend or annul that plan or programme (see, to that effect, judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraphs 31 and 32), or in revoking or

suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgment of 12 November 2019, *Commission* v *Ireland* (*Derrybrien Wind Farm*), C-261/18, EU:C:2019:955, paragraph 75 and the case-law cited).

84 It must be added that only the Court of Justice may, in exceptional cases, for overriding considerations of legal certainty, allow temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. If national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily, the uniform application of EU law would be undermined (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 177 and the case-law cited).

85 In response to the argument put forward by the Commission in its written observations that the exceptional maintenance of the effects of national measures that contravene EU law is only possible in the context of a direct action against potentially defective measures, and not by way of an objection of illegality where the action before the national court challenges acts adopted on the basis of those measures, it must be stated, as the Advocate General indicated in points 126 to 128 of his Opinion, that the case-law of the Court of Justice has not drawn such a distinction and that such maintenance, by the Court of Justice, is possible in the context of either one or other of those procedural routes.

86 In the present case, the order for reference states that while the Decreet betreffende de organisatie en de rechtspleging van sommige Vlaamse bestuursrechtscolleges (Decree on the organisation and procedure of certain Flemish administrative courts), of 4 April 2014 (*Belgisch Staatsblad* of 1 October 2014, p. 77620), does not permit the referring court to maintain temporarily the effects of the Order and the Circular of 2006, the Belgian Constitution, as interpreted in national case-law, recognises the right of that court to disapply such regulatory national instruments where they do not comply with hierarchically superior norms. As regards the effects of the consent of 30 November 2016, Article 36(1) and (2) of the Decree on the organisation and procedure of certain Flemish administrative courts permits the referring court to maintain those effects temporarily, even though the consent was adopted pursuant to national instruments that failed to comply with EU law.

87 In that regard, it must be observed that it is clear from the case file before the Court that the wind farm project does not appear to have reached its completion and indeed that its construction has not yet commenced.

88 If it proved to be correct that the construction of the wind farm project has not commenced, the maintenance of the effects of the consent of 30 November 2016 during the period of the environmental assessment prescribed by the Order and the Circular of 2006 would not in any event appear to be necessary (see, to that effect, judgments of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 43, and of 28 February 2018, *Comune di Castelbellino*, C-117/17, EU:C:2018:129, pargraph 30). The referring court would therefore have to annul the consent adopted on the basis of the ‘plan’ or ‘programme’ which was itself adopted in breach of the obligation to carry out an environmental assessment (see, by analogy, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 46).

89 Such an annulment should equally be ordered, in accordance with the principles recalled in paragraph 83 above, if it is the case that the installation of the wind farm project has commenced, or is even completed.

90 However, it has been held, in the first place, that, while taking into account the existence of an overriding consideration relating to the protection of the environment, a national court may exceptionally be authorised to make use of a national provision empowering it to maintain certain effects of a national measure the procedure for the adoption of which did not comply with Directive 2001/42, such as that referred to in paragraph 86 above, where there is a risk that the annulment of that measure could create a legal vacuum that is incompatible with that Member State's obligation to adopt measures to transpose another act of EU law concerning the protection of the environment, such as Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1) (see, to that effect, judgments of 28 February 2012, *Inter-Environnement Wallonie* and *Terre wallonne*, C-41/11, EU:C:2012:103, paragraphs 56 and 63).

91 In that regard, the referring court states that the Order and the Circular of 2006 contribute to the implementation of the objectives of Directive 2009/28 on the generation of energy from renewable sources. Even if that generation is guided by considerations pertaining to the protection of the environment and constitutes a fundamental objective of the European Union in the field of energy, it does not follow that any barrier to its development in the territory of a Member State, such as that which could arise from the annulment of development consent given to a generator and to a supplier of electricity for the purpose of the installation of a number of wind turbines, can suffice to compromise the overall implementation of that directive on its territory.

92 In the second place, in paragraph 179 of the judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622), the Court recognised that the security of electricity supply of the Member State concerned was also an overriding consideration. The Court nevertheless specified at the same time that considerations as to the security of electricity supply could justify maintaining the effects of national measures adopted in breach of the obligations under EU law only if, in the event that the effects of those measures were annulled or suspended, there was a genuine and serious threat of disruption to the electricity supply of the Member State concerned which could not be remedied by any other means or alternatives, particularly in the context of the internal market.

93 As the Commission submitted at the hearing before the Court, and as the Advocate General observed in point 132 of his Opinion, it is not clear that cessation of the activity of a limited number of wind turbines would be likely to have significant implications for the supply of electricity for the whole of the Member State concerned.

94 In any event, any possible the maintenance of the effects of those acts may last only as long as is strictly necessary to remedy the breach found (see, to that effect, judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 62, and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 181).

95 Having regard to the foregoing considerations, the answer to sub-questions (h) and (i) of the second question is that, where it appears that an environmental assessment, within the meaning of Directive 2001/42, should have been carried out prior to the adoption of the order and circular on the basis of which a consent, which is contested before a national court, relating to the installation and operation of wind turbines was granted with the result that those instruments and that consent are incompatible with EU law, that court may maintain the effects of those instruments and that consent only if the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy

that illegality. It is for the referring court, if necessary, to carry out that assessment in the case in the main proceedings.

Costs

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

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

1. **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 the concept of 'plans and programmes' covers an order and circular, adopted by the government of a federated entity of a Member State, both of which contain various provisions concerning the installation and operation of wind turbines.**

2. **Article 3(2)(a) of Directive 2001/42 must be interpreted as meaning that an order and a circular, both of which contain various provisions concerning the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with that provision.**

3. **Where it appears that an environmental assessment within the meaning of Directive 2001/42 should have been carried out prior to the adoption of the order and circular on the basis of which a consent, which is contested before a national court, was granted for the installation and operation of wind turbines with the result that those instruments and that consent do not comply with EU law, that court may maintain the effects of those instruments and that consent only if the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy that illegality. It is for the referring court, if necessary, to carry out that assessment in the case in the main proceedings.**

[Signatures]

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* Language of the case: Dutch