Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

27 October 2016*

(Reference for a preliminary ruling — Assessment of the effects of certain plans and programmes on the environment — Directive 2001/42/EC — Articles 2(a) and 3(2)(a) — Definition of 'plans and programmes' — Conditions concerning the installation of wind turbines laid down by a regulatory order — Provisions concerning, inter alia, safety, inspection, site restoration and financial collateral and permitted noise levels set having regard to area use)

In Case C-290/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decision of 2 June 2015, received at the Court on 15 June 2015, in the proceedings

**Patrice D'Oultremont and Others,**

v

**Région wallonne,**

intervening parties:

**Fédération de l'Énergie d'origine renouvelable et alternative ASBL (EDORA),**

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 7 April 2016,

after considering the observations submitted on behalf of:

— Mr D'Oultremont and Others, by J. Sambon, avocat,

— the Fédération de l'énergie d'origine renouvelable et alternative ASBL (EDORA), by J. Sohier, S. Rodrigues, L. Levi, A. Blot and M. Chomé, avocats,

— the Belgian Government, by J. Van Holm, M. Jacobs and S. Vanrie, acting as Agents, and by P. Moërynck, avocat,

* Language of the case: French.

— the French Government, by D. Colas and J. Traband, acting as Agents,

— the Netherlands Government, by M.K. Bulterman, B. Koopman and J. Langer, acting as Agents,

— the European Commission, by O. Beynet and C. Hermes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2016,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(a) and 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 Mr Patrice D'Oultremont and Others and the Région wallonne (Walloon Region) concerning the validity of the order of the Walloon Government of 13 February 2014 on sector-specific conditions for wind farms of a total power of at least 0.5 MW, amending the order of the Walloon Government of 4 July 2002 concerning the procedure and various enforcement measures in respect of the decree of 11 March 1999 on environmental consent and amending the order of the Walloon Government of 4 July 2002 establishing the list of projects subject to an impact assessment and classified installations and activities (*Moniteur belge* of 7 March 2014, p. 20263) ('the order of 13 February 2014').

### Legal context

#### *International law*

##### The Convention on environmental impact assessment in a transboundary context

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 Pursuant to Article 2(7) of the Espoo Convention:

'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.'

##### The Protocol on Strategic Environmental Assessment to the Espoo Convention

5 The Protocol on Strategic Environmental Assessment to the Espoo Convention was signed in Kiev (Ukraine) on 21 May 2003 by the Commission, on behalf of the European Community ('the Kiev Protocol'). That protocol was approved by Council Decision 2008/871/EC of 20 October 2008 (OJ 2008 L 308, p. 33).

6 Article 13(1) of the Kiev Protocol stipulates:

'Each Party shall endeavour to ensure that environmental, including health, concerns are considered and integrated to the extent appropriate in the preparation of its proposals for policies and legislation that are likely to have significant effects on the environment, including health.'

The Aarhus Convention

7 The Convention on access to information, public participation in decision-making and access to justice in environmental matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention') also deals with environmental assessment.

8 Article 6 of that convention contains rules on public participation in the authorisation of activities. Articles 7 and 8 of the convention refer to such participation concerning plans, programmes, policies, regulations and other legally binding rules of general application.

*European Union law*

9 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.'

10 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.'

11 Article 2 of that directive 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 [Union], as well as any modifications to them:

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

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

(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;

...'

12 Under Article 3 of the 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 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 repealed and replaced Directive 85/337 from 17 February 2012], or

...

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

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

...'

*Belgian law*

13 Pursuant to Article 6(1)(II) of the loi spéciale du 8 août 1980 de réformes institutionnelles (Special Law on institutional reform of 8 August 1980) (*Moniteur belge* of 15 August 1980, p. 9434), the Regions alone are competent in matters relating to environmental protection.

14 In the Walloon Region, Directive 2001/42 has been partially transposed by Article D.52 et seq. in Book I of the code de l'environnement (Environment Code) (*Moniteur belge* of 9 July 2004, p. 54654), as is apparent from Article D.51/1 of that code.

15 Article D.6 of Book I of that code defines, in paragraph 13, the 'plans and programmes' as being 'decisions excluding those referred to in the [code wallon de l'aménagement du territoire, de l'urbanisme, du patrimoine et de l'énergie (Walloon Town and Country Planning, Heritage and Energy Code) (*Moniteur belge* of 19 May 1984, p. 6939, and corrigendum, *Moniteur belge* of 25 May 1984, p. 7636)] and the amendments thereto which have as their purpose to decide upon either (i) an ordered sequence of actions or operations intended to achieve one or more specific aims connected with the quality of the environment, or (ii) the intended use of or the protection scheme for one or more zones or a site, in particular in order to define the framework for consent for the development of specific activities there, and which:

a. are subject to preparation and/or adopted by an authority at regional or local level, or prepared by an authority for adoption by the Parliament or the Walloon Government;

b. are required by decree or regulatory or administrative provisions;

The plans and programmes to which this decree relates also include those jointly financed by the European [Union].'

16 According to its Article 2, the décret du gouvernement wallon du 11 mars 1999 relatif au permis d'environnement (Decree of the Walloon Government of 11 March 1999 on environmental consent) (*Moniteur belge* of 8 June 1999, p. 21114, and corrigendum, *Moniteur belge* of 22 December 1999, p. 48280; 'the Decree of 11 March 1999') seeks 'to ensure, with a view to an integrated approach to the prevention and reduction of pollution, the protection of humans or the environment against the dangers, nuisances or disadvantages which an establishment may cause, directly or indirectly, during or after its operation'.

17 Article 4 of that decree provides:

'The Government shall lay down general, sector-specific or comprehensive conditions for the purpose of attaining the objectives in Article 2. Those conditions shall have regulatory force.

...

These rules may concern in particular:

...

3° the information to be provided regularly to the authorities designated by the Government and concerning:
   a. the establishment's emissions;
   b. The measures taken to reduce environmental nuisance;

...'

18 Article 5 of that decree provides:

'§ 1. The general conditions shall apply to all installations and activities.

§ 2. The sector-specific conditions shall apply to the installations and activities of an economic or territorial sector or a sector in which there is a specific risk or in which such a risk may arise.

...'

19 Article 1 of the order of 13 February 2014 is worded as follows:

'The present sector-specific conditions apply to wind farms the total power of which is at least 0.5 MW of electricity, referred to in sections 40.10.01.04.02 and 40.10.01.04.03 of Annex I to the [arrêté du 4 juillet 2002 fixant les conditions générales d'exploitation des établissements visés par le décret du 11 mars 1999 (order of 4 July 2002 laying down general conditions for the operation of the establishments covered by the decree of 11 March 1999) (*Moniteur belge* of 21 September 2002, p. 20264, and corrigendum, *Moniteur belge* of 1 October 2002, p. 44152)].'

20 According to Article 5 of the order of 13 February 2014, which appears in Chapter III of that order, headed 'Operation':

'Except for maintenance requirements, no light may be used at night at the base of the wind turbine or its surroundings.'

21 Article 9 of that order, which also features in Chapter III, is worded as follows:

'Within the wind farm, but outside the wind turbines, the magnetic field which is inherent in the operation of the wind farm when measured at 1.5 metres from the ground may not exceed the limit value of 100 microteslas.'

22 Article 10, which also features in Chapter III of the order, provides as follows:

'§ 1. The effects of shadow flicker arising from the operation of the wind turbines shall be limited to 30 hours per year and 30 minutes per day for all housing constructed or with planning permission and which would be subject to such shadow flicker. Those effects are calculated in accordance with the "worst case scenario" approach, characterised by the following parameters:

1. the sun shines from morning to evening (sky continually clear)

2. the wind turbines are in operation at all times (wind speed always in the operating range for wind turbines and the latter are 100% available);

3. the rotor blades of the wind turbines are always perpendicular to the sun's rays.

The operator shall use all available means to reduce exposure to the shadow thrown in order to comply with those limits.

§ 2. Those limits shall not apply if the shadow produced by the operation of the installation does not affect the inhabitants when they are inside their houses. In that situation, the operator shall provide evidence by any legally permissible means.'

23 The first section, headed 'Sound level standards', in Chapter V of the order of 13 February 2014, headed, 'Noise', includes Article 20, which sets out the limit levels in respect of noise emission from a wind farm, and Article 21, which determines the limit values according to which 'town and country planning' zones are concerned, that is to say, geographical parameters determined on the basis of the use-related plan of the competent authorities (residential zones, agricultural zones, zones of economic activity and others).

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

24 On 21 February 2013, the Walloon Government adopted a 'reference framework', which was later amended in July of that year, setting out recommendations for the installation of wind turbines in the Walloon Region. That instrument was supplemented by a map which was intended to provide a framework for the planning and implementation of the Walloon Region's wind-turbine programme ('projected for 2020') and which bore the name 'benchmark map'. That map was the subject of an environmental impact assessment.

25 A public inquiry was organised in all the municipalities of Wallonia from 16 September to 30 October 2013. The documents made available to the public during that inquiry included the documents referred to in the preceding paragraph of this judgment, namely the reference framework, the benchmark map and the environmental impact assessment.

26 However, neither the reference framework nor the benchmark map has been adopted definitively.

27 In the meantime, the Walloon Government adopted the order of 13 February 2014.

28 On 6 May 2014, Mr D'Oultremont and Others brought an action for annulment of that order before the referring court, the Conseil d'État (Council of State, Belgium). In support of their application, Mr D'Oultremont and Others submitted, inter alia, that that order failed to comply with the provisions of Directive 2001/42, in that the Walloon Region had adopted the order without its provisions having been subjected to an impact assessment or to a procedure involving public participation.

29 The Walloon Region and the intervener in the main proceedings, Fédération de l'énergie d'origine renouvelable et alternative ASBL (Federation for renewable and alternative energies) (EDORA), for their part, take the view that that order is excluded from the definition of 'plans and programmes', within the meaning of that directive.

30 The referring court states that, despite clarifications provided by the Court of Justice in the judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355), the answer to the question of whether the provisions of the order of 13 February 2014 constitute 'plans and programmes' is not immediately obvious.

31 One particular difficulty, according to that court, lies in the fact that the provisions of that order are dissociated from the reference framework and the mapping of zones for the installation of wind turbines, referred to in paragraph 24 of the present judgment, and that that fact deprives those provisions, at least in part, of programmatic content in terms of setting a framework for wind-power generation.

32 On this view, the order of 13 February 2014 does not set out a 'complete framework', a set of coordinated measures governing the operation of wind farms with a view to protecting the environment. However, according to the referring court, the fact remains that the consideration, during the issuing of authorisations, of the provisions of the order concerning noise and the effects of shadow flicker produced by the functioning of the wind turbines necessarily has the consequence of determining the location of the wind turbines in relation to housing.

33 If the definition of 'plans and programmes' given by the regional legislature in paragraph 13 of Article D.6 of Book I of the Environment Code were to be accepted, from the moment at which they are dissociated from the reference framework and the mapping setting out the best sites for the installation of wind turbines, the sector-specific conditions would not in themselves constitute, according to the referring court, a 'progressive and ordered implementation process for a specific objective connected with the quality of the environment'.

34 The referring court again states that the sector-specific conditions laid down in the order of 13 February 2014 also do not determine the intended use or the protection scheme in respect of one or more zones or a site. All wind farms are covered, whatever site is chosen, subject only to a variation of the noise levels in relation to the zoning on the sector plan.

35 According to the referring court, it appears to follow from Annexes I and II to Directive 2001/42, read in the light of paragraph 47 of the judgment of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355), that a plan or a programme must cover a limited geographical zone, as is the case with, for example, the 'vulnerable zones identified in connection with sustainable management of nitrogen in agriculture', within the meaning of 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), with which that judgment was particularly concerned.

36 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Articles 2(a) and 3(2)(a) of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment to be interpreted to the effect that a regulatory order containing various provisions on the installation of wind turbines, including measures on safety, inspection, site restoration and financial collateral and permitted noise levels set having regard to town and country planning zones, such provisions setting a framework for the grant of administrative consent allowing a developer to install and operate installations which are automatically subject under national law to an assessment of their effects on the environment, must be considered to be a "plan or programme" within the meaning of those articles?'

**The question referred for a preliminary ruling**

37 By its question, the referring court asks in essence whether Articles 2(a) and 3(2)(a) of Directive 2001/42 must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions concerning the installation of wind turbines which must be respected in the granting of administrative consent for the installation and operation of such installations come under the definition of 'plans and programmes' within the meaning of that directive.

38 First, it must be noted that it is apparent from recital 4 of Directive 2001/42 that environmental evaluation is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes.

39 Next, and as was stated by the Advocate General in point 34 of her Opinion, the delimitation of the definition of 'plans and programmes' in relation to other measures not coming within the material scope of Directive 2001/42 must be made with regard to the specific objective laid down in Article 1 of that directive, namely to subject plans and programmes which are likely to have significant effects on the environment to an environmental assessment (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 40 and the case-law cited).

40 Consequently, given the objective of Directive 2001/42, which is to provide for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly (see, to that effect, judgments of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 37, and of 10 September 2015, *Dimos Kropias Attikis*, C-473/14, EU:C:2015:582, paragraph 50).

41 As regards Article 2(a) of Directive 2001/42, the definition of 'plans and programmes' laid down in that provision sets out the cumulative condition that they are, first, 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, secondly, required by legislative, regulatory or administrative provisions.

42 It follows from the findings of the referring court that the order of 13 February 2014 was prepared and adopted by a regional authority, in this case the Walloon Government, and that that order is required by the provisions of the Decree of 11 March 1999.

43 For its part, Article 3(2)(a) of Directive 2001/42 provides, subject to paragraph 3 of that article, that an environmental assessment is to be carried out for all plans and programmes which are prepared, inter alia, for the energy sector and which set the framework for future development consent for projects listed in Annexes I and II to Directive 2011/92.

44 It is also common ground that the order of 13 February 2014 concerns the energy sector and that it helps to define the framework for the implementation, in the Walloon Region, of wind farm projects which form part of the projects listed in Annex II to Directive 2011/92.

45 As for the term 'plans and programmes', whilst it is true that it must cover a specific area, the fact nonetheless remains that it is not apparent from the wording of either Article 2(a) of Directive 2001/42 or Article 3(2)(a) of that directive that those plans or programmes must concern planning for a given area. It follows from the wording of those provisions that they cover, in the wider sense, regional and district planning in general.

46 According to the findings of the referring court, the order of 13 February 2014 concerns the entire Walloon Region and the limit values that it lays down in respect of noise are closely connected with that region, since those limits are determined in relation to the various uses of the geographical areas in question.

47 As regards the argument that the order of 13 February 2014 does not set out a sufficiently complete framework concerning the wind power sector, it should be recalled that the assessment of the criteria laid down in Articles 2(a) and 3(2)(a) of Directive 2001/42 for determining whether an order, such as that at issue in the main proceedings, may come within that definition must in particular be carried out in the light of the objective of that directive, which, as is apparent from paragraph 39 of the present judgment, is to make decisions likely to have significant environmental effects subject to an environmental assessment.

48 Furthermore, as the Advocate General stated in point 55 of her Opinion, 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, judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 30 and the case-law cited).

49 Having regard to that objective, it should be noted that the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (see, to that effect, judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 95 and the case-law cited).

50 In the present case, it should be noted that the order of 13 February 2014 concerns, in particular, technical standards, operating conditions (particularly shadow flicker), the prevention of accidents and fires (inter alia, the stopping of the wind turbine), noise level standards, restoration and financial collateral for wind turbines. Such standards have a sufficiently significant importance and scope in the determination of the conditions applicable to the sector concerned and the choices, in particular related to the environment, available under those standards must determine the conditions under which actual projects for the installation and operation of wind turbine sites may be authorised in the future.

51 Lastly, relying on the Aarhus Convention and the Kiev Protocol, the French Government seeks to distinguish the notion of 'plans and programmes' from that of 'general rules', under which it claims that the order of 13 February 2014 comes, with the result that that order does not come within the scope of Directive 2001/42.

52 In that regard, it should be noted that it is apparent from the actual wording of Article 2(a), first indent, of that directive, borne out by the case-law referred to in paragraph 49 of the present judgment, that the notion of 'plans and programmes' can cover normative acts adopted by law or regulation.

53 Moreover, as the Advocate General stated in point 70 of her Opinion, Directive 2001/42 differs from the Aarhus Convention and the Kiev Protocol inasmuch as 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'.

54 It follows from all of the foregoing that the answer to the question referred is that Articles 2(a) and 3(2)(a) of Directive 2001/42 must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of 'plans and programmes', within the meaning of that directive.

## Costs

55 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:

**Articles 2(a) and 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 must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of 'plans and programmes', within the meaning of that directive.**

[Signatures]