Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 3 March 2020[1]

Case C-24/19

A,
B,
C,
D,
E
v
Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen,
Intervener:
Organisatie voor Duurzame Energie Vlaanderen VZW

(Request for a preliminary ruling
from the Raad voor Vergunningsbetwistingen (Council for Consent Disputes, Belgium))

(Reference for a preliminary ruling — Directive 2001/42/EC — Assessment of the effects of certain plans and programmes on the environment — Strategic environmental assessment — Definition of 'plans and programmes' — Conditions relating to the construction of wind farms laid down in an order and an administrative circular — Legal effects of the lack of a strategic environmental assessment — Power of the national court to maintain provisionally the effects of the national measures)

1. The assessment of the effects (or impact) of certain 'projects' or certain 'plans and programmes' on the environment is one of the key instruments of EU law for attaining a high level of protection of the environment.

2. The environmental assessment of *projects* is governed by Directive 2011/92/EU,[2] while that of *plans and programmes* is governed by Directive 2001/42/EC.[3] Unless I am mistaken, the Court of Justice has, to date, given 17 judgments on the latter directive, and a considerable proportion of these were in response to references for a preliminary ruling from Belgian courts.

3. The Raad voor Vergunningsbetwistingen (Council for Consent Disputes, Belgium) has referred to the Court of Justice a number of questions concerning the scope of the SEA Directive, suggesting, inter alia, that the Court amend the case-law laid down in the judgment of 22 March 2012, *Inter-Environnement Bruxelles and Others*.[4]

1 Original language: Spanish.

2 Directive 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; 'the EIA Directive').

3 Directive 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). Also known as the Directive on 'strategic environmental assessment' ('the SEA Directive')

4 Case C-567/10, EU:C:2012:159 ('judgment in *Inter-Environnement Bruxelles and Others*'). In short, according to that judgment, the SEA Directive covers not only plans and programmes required under national legislation but also those the adoption of which is provided for but is not compulsory.

4. That court asks whether national courts are entitled to maintain temporarily the effects of national legislation at issue in a dispute in the event that it is not compatible with EU law, in accordance with the case-law laid down in the judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*.[5]

I. Legal framework

A. EU law. Directive 2001/42

5. In accordance with Article 1:

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

6. Pursuant to Article 2:

'For the purposes of this Directive:

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

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

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

(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;

…'

7. Article 3 provides:

'1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes:

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

5 Case C-41/11, EU:C:2012:103 ('judgment in *Inter-Environnement Wallonie*').

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

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.

…'

B. Belgian law

1. Section 5.20.6 VLAREM II[6]

8. The Order of the Flemish Government of 1 June 1995 on the general and sectoral provisions with regard to environmental health ('VLAREM II'), adopted in implementation of earlier provisions of the Flemish Government,[7] was significantly amended in 2011[8] to include section 5.20.6, headed 'Installations for the generation of electricity by means of wind energy'.

9. Section 5.20.6 lays down standards for wind farms relating to shadow flicker, certain safety aspects and noise produced by wind energy generation plants.

2. Administrative circular of 2006[9]

10. The Circular is intended for councils of mayors and aldermen, provincial governors, members of the permanent (provincial) deputations and civil servants involved in consent applications.

11. The Circular sets out the Flemish Government's guidelines aimed at offering sufficient development opportunities for onshore wind energy and minimising its effects on various sectors (including nature, landscape, economy, noise, safety, energy efficiency, etc.).

12. Standards are formulated for each of those sectors, with further attention — as in the case of the VLAREM standards — being given to noise, shadow flicker, safety and the nature of wind power plants.

13. The Circular is based on the pillars of sustainable spatial development, sustainable energy consumption, and the advantages of wind energy and its added value in relation to other energy sources.

6 Besluit van de Vlaamse regering van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne.

7 Vlaams decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid (Decree of the Region of Flanders of 5 April 1995 laying down general provisions on environmental policy; 'DABM 1995'), which amended the Vlaams decreet betreffende de milieuvergunning van 28 juni 1985 (Decree of the Region of Flanders of 28 June 1985 concerning environmental consent; 'Decree on environmental consent').

8 Article 99 of the besluit van 23 december 2011 tot wijziging van het besluit van de Vlaamse Regering van 6 februari 1991 houdende de vaststelling van het Vlaams reglement betreffende de milieuvergunning en van het besluit van de Vlaamse regering van 1 juni 1995 houdende algemene en sectorale bepalingen (Order of 23 December 2011 amending the Order of the Flemish Government of 6 February 1991 on the adoption of Flemish regulations concerning environmental consents and the Order of the Flemish Government of 1 June 1995 on general and sectoral provisions).

9 Omzendbrief van 12 mei 2006 EME/2006/01 — RO/2006/02 "afweginskader en randvoorwaarden voor de inplanting van windturbines" (Circular of 12 May 2006 EME/2006/01 — RO/2006/02, 'assessment framework and preconditions for the installation of wind turbines', 'the Circular'). Replaced by Omzendbrief R0/2014/02 van 25 april 2014 betreffende het afwegingskader en randvoorwaarden voor de oprichting van windturbines (Circular R0/2014/02 of 25 April 2014 concerning the assessment framework and preconditions for the installation of wind turbines).

14. The spatial principle of decentralised clustering is central: by clustering wind turbines as much as possible, the preservation of the remaining open space in highly urbanised Flanders ought to be guaranteed.

15. Finally, the Circular describes the role of the so-called Windwerkgroep (Wind Working Group), which has the task of selecting locations for large-scale wind farms and submitting them to the Minister van Ruimtelijke ordening (Minister for Spatial Planning of the Flemish Government). Furthermore, the working group gives advice on specific consent applications.

II. The dispute and the questions referred for a preliminary ruling

16. On 25 March 2011, NV Electrabel ('Electrabel') submitted an application to the competent administrative authority for town planning consent for the installation of eight wind turbines. In the course of the procedure, it withdrew the application for one of the turbines.

17. By decision of 30 November 2016, the competent official [10] granted consent, subject to conditions, for five wind turbines on parcels of land situated along the E40 motorway, in the municipalities of Aalter and Nevele. [11] The reasons on which that decision is based refer to the relevant legislation, including VLAREM II and the Circular.

18. Consent was granted after examination of the objections and comments received, which concerned, among other matters, the impact on scenic value, noise pollution, spatial planning, shadow flicker and safety. [12]

19. Five applicants requested the referring court to annul the decision of 30 November 2016. They argued that it was based on a body of legislation (VLAREM II and the Circular) which is incompatible with Articles 2(a) and 3(2)(a) of the SEA Directive on the grounds that it was adopted without the relevant environmental impact assessment.

20. The Flemish administrative authority submits that that body of legislation does not constitute a plan or a programme within the meaning of the SEA Directive, because it does not establish a coherent and sufficiently complete system for the installation of the wind energy projects.

21. Despite the clarifications given by the judgment in *D'Oultremont and Others*, [13] the referring court questions the validity of the Flemish body of legislation (VLAREM II and the Circular) and the legal basis for the wind turbine development consent at issue if it were to be found that that body of legislation required an environmental impact assessment.

22. In addition, the referring court asks the Court of Justice to reconsider its line of settled case-law, beginning with the judgment in *Inter-Environnement Bruxelles and Others*, concerning the phrase 'required by legislative, regulatory or administrative provisions' in Article 2(a) of the SEA Directive. [14]

10 In particular, the gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen (afdeling Oost-Vlaanderen) (regional town planning official of the Flanders Department of Spatial Planning, East Flanders Division; 'the Flemish administrative authority').

11 Based on the applicable regional plans, the parcels of land on which the construction of the wind turbines was planned are located partly on agricultural land and partly on agricultural land of scenic value.

12 The water analyses, the environmental impact report, the assessment of spatial planning and the various opinions gathered were studied in detail.

13 Judgment of 27 October 2016 (C-290/15, EU:C:2016:816, 'judgment in *D'Oultremont*').

14 Judgment in *Inter-Environnement Bruxelles and Others*, paragraph 31.

23. According to the national court, the Court of Justice should attach priority to an interpretation which is more in keeping with the intention of the EU legislature, which would lead the Court to limiting the application of that provision to acts whose adoption by the national legislature is compulsory and not merely acts *regulated by* national legislative or regulatory provisions. The national court argues that this was the interpretation initially proposed by Advocate General Kokott in her Opinion in *Inter-Environnement Bruxelles and Others*.[15]

24. Against that background, the Raad voor Vergunningsbetwistingen (Council for Consent Disputes, Belgium) has referred the following questions to the Court of Justice for a preliminary ruling:

'Do Article 2(a) and Article 3(2)(a) of Directive 2001/42/EEC mean that Article 99 of the besluit van de Vlaamse regering van 23 december 2011 tot wijziging van het besluit van de Vlaamse regering van 6 februari 1991 houdende de vaststelling van het Vlaams reglement betreffende de milieuvergunning en van het besluit van de Vlaamse regering van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne (Order of the Flemish Government of 23 December 2011 amending the Order of the Flemish Government of 6 February 1991 on the adoption of Flemish regulations concerning environmental consent and the Order of the Flemish Government of 1 June 1995 on general and sectoral provisions relating to environmental health), as regards the updating of the aforementioned Orders in keeping with the evolution of technology, which introduces into VLAREM II Section 5.20.6 on installations for the generation of electricity by means of wind energy, and the Omzendbrief "Afwegingskader en randvoorwaarden voor de inplanting van windturbines" (Circular "Assessment framework and preconditions for the installation of wind turbines") of 2006 [together referred to as "the instruments in question"], which both 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 that directive? If it appears that an environmental assessment should have been carried out before the adoption of the instruments in question, can the Raad (Council) modulate the legal effects of the illegal nature of these instruments in time? To that end, a number of sub-questions must be asked:

(1) Can a policy instrument such as the present Circular, which the public authority concerned is competent to draw up on the basis of its discretionary and policymaking powers, so that the competent authority was not actually 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 SEA Directive?

(2) Is it sufficient that a policy instrument or general rule, such as the instruments in question, 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 the SEA Directive, 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 EU legislature has indicated that that purpose is an element of the definition of "plans and programmes"?

(3) Can a policy instrument such as the Circular in question, the format of which is drawn up for reasons 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 the SEA Directive, and does such an interpretation not run counter to the case-law of the Court of Justice that a purposive interpretation of a directive may not deviate fundamentally from the clearly expressed will of the EU legislature?

15 C-567/10, EU:C:2011:755, points 14 and 20.

(4) Can Section 5.20.6 VLAREM II, 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 the SEA Directive and does such an interpretation not run counter to the case-law of the Court of Justice that a purposive interpretation of a directive may not deviate fundamentally from the clearly expressed will of the EU legislature?

(5) Can a policy instrument and a normative government Order, such as the instruments in question, 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, as a measure by which projects may be approved, may be derived, be regarded as a "plan or programme" … that constitute the "framework for future development consent" within the meaning of Article 2(a) and 3(2) of the SEA Directive, and does such an interpretation not run counter to the case-law of the Court of Justice that a purposive interpretation of a directive may not deviate fundamentally from the clearly expressed will of the Union legislature?

(6) Can a policy instrument such as Circular: EME/2006/01 — RO /2006/02 which has a purely indicative value and/or a normative government Order such as Section 5.20.6 VLAREM II that only sets a minimum threshold for development consent and in addition operates fully autonomously as a general rule, both of which only contain 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, it can be excluded that they are likely to have significant effects on the environment, be regarded as a "plan or programme" on a joint reading of Article 2(a) and Article 3(1) and (2) of the SEA Directive, and can they thus be considered 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?

(7) If the answer to the previous question is in the negative, can a court or tribunal determine this itself, after the Order or the pseudo-legislation (such as the VLAREM II standards and the Circular in question) have been adopted?

(8) Can a court or tribunal, if it has only indirect jurisdiction through an objection being raised, the result of which applies *inter partes*, and if the answer to the questions referred for a preliminary ruling shows that the instruments in question 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, as 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] in *Association France Nature Environnement*, [(Case C-379/15, EU:C:2016:603 'judgment in *Association France Nature Environnement*')]) have been met?

(9) If the answer to question 8 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 in *Association France Nature Environnement*) for the continued maintenance of the legal effects of plans or programmes that do not conform to the SEA Directive?'

25. Written observations were lodged by A and Others, the Belgian, Netherlands and United Kingdom Governments, and the Commission.

26. At the hearing, held on 9 December 2019, oral argument was presented by A and Others, the other party to the national proceedings, Organisatie voor Duuurzame Energie Vlaanderen VZM (Flemish Renewable Energy Organisation VZM), the Belgian and Netherlands Governments, and the Commission.

III. Analysis of the questions referred for a preliminary ruling

A. Introductory remark

27. The referring court has referred nine questions which can be divided into two groups:

– by the first seven questions, the referring court seeks to ascertain whether the definition of 'plans and programmes' having significant effects on the environment which require an environmental impact assessment (Article 2(a) and Article 3(2)(a) of the SEA Directive) encompasses national legislation such as that at issue;

– by the last two questions, the referring court asks whether it is possible to limit in time the effects of any annulment of that national legislation and of the development consents granted thereunder.

28. Since this is the first time the Raad voor Vergunningsbetwistingen (Council for Consent Disputes) has made a reference for a preliminary ruling to the Court of Justice, it is necessary, before answering those questions, to determine whether that body is a court or tribunal for the purposes of Article 267 TFEU. [16]

29. According to the information provided, the Raad voor Vergunningsbetwistingen (Council for Consent Disputes) is a court created in 2009 by Article 4.8.1 of the Vlaamse Codex Ruimtelijke Ordening (Flemish Spatial Planning Code), which hears appeals against registration decisions and decisions to grant or refuse a town planning consent or subdivision consent, as well as disputes regarding environmental consents and expropriations.

30. It is an independent court composed of eight administrative law judges, whose judgments can be the subject of an appeal on a point of law to the Council of State. It adjudicates on disputes in *inter partes* proceedings, applying rules of law adopted by the Flanders Region in relation to the environment and town planning.

31. Therefore, all the indications are that it can be categorised as a court or tribunal which can appropriately rely on Article 267 TFEU.

B. Introduction to the SEA Directive

32. The SEA Directive applies the principle of integration and protection of the environment (Articles 11 TFEU and 191 TFEU), requiring an environmental impact assessment during the preparation and approval of plans and programmes liable to have significant effects on the environment.

16 In order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, judgments of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 17); of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 17); and of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126, paragraph 27).

33. Although the word 'strategic' does not appear in its title or its text, the directive is usually known as the 'Strategic Environmental Impact Assessment Directive' because it places such an assessment at a higher (more *strategic*) level than that provided for in the EIA Directive.

34. The SEA Directive does not include substantive conditions for the grant of development consent for projects and instead is aimed at ensuring, above all, that when certain plans and programmes are approved, account is taken of their effects on the environment. Therefore, it is, essentially, a directive on procedure, which sets out for Member States the steps that they must follow in order to identify and assess the effects of certain plans and programmes on the environment.

35. Conceived in this way, the aim of the strategic environmental impact assessment ('SEA') is to help policymakers to take well-informed decisions based on objective information and on the results of consultations involving the public, stakeholders and the competent authorities.

36. The SEA Directive and the EIA Directive complement one another: the former is intended to bring forward the environmental impact assessment [17] to the strategic planning stage of the actions taken by national authorities. The study of the environmental effects required is, therefore, broader or more comprehensive than that relating to a specific project.

37. On that basis, the difficulty lies in establishing exactly how far the SEA requirement extends. It is clear that it ranks higher than the assessment of specific projects but also that it should not apply to all of a Member State's legislation concerning the environment.

38. Naturally, it is not straightforward to differentiate between: (i) *projects* having an environmental impact, which are subject to the EIA Directive; (ii) *plans and programmes* having significant environmental effects, which are subject to the SEA Directive; and (iii) *national legislation* having some effect on the environment, which is excluded from the requirement of an environmental impact assessment. The boundaries between those three categories underlie the questions referred for a preliminary ruling by the referring court.

39. The implementation of the SEA Directive has created a number of difficulties for the authorities of the Member States, which the Commission has attempted to alleviate. [18] The key is to ascertain what is meant by 'plans and programmes' and to identify which of these have significant effects on the environment.

17 In its broadest sense (which covers plans and programmes as well as projects), an environmental assessment is justified by the fact that, prior to its decision, it is necessary for the competent authority to weigh up the effects on the environment of the corresponding technical planning and decision-making processes. Its objective is to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects. See judgments of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380, paragraph 58); of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589, paragraph 33) ('*Comune di Corridonia and Others*'); of 31 May 2018, *Commission* v *Poland* (C-526/16, not published, EU:C:2018:356, paragraph 75); and of 12 November 2019, *Commission* v *Ireland (Derrybrien wind farm)* (C-261/18, EU:C:2019:955, paragraph 73).

18 European Commission, *Guidance on the implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment*, 2006 (https://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf). See also document COM(2017) 234 final of 15 May 2017, Report from the Commission to the Council and the European Parliament under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. In the context of academic opinion, see McGuinn, J., Oulès, L., Banfi, P., McNeill, A., O'Brien, S., Lukakova, Z., Sheate, W., Kolaric, S. and Sadauskis, R., *Study to support the REFIT evaluation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)*, 2019, (https://ec.europa.eu/environment/eia/pdf/REFIT%20Study.pdf).

C. The first seven questions: definition of 'plans and programmes' in the SEA Directive

40. The rules governing the scope of the SEA Directive are primarily laid down in two interrelated articles:

– Article 2(a) defines the cumulative conditions which plans and programmes must satisfy in order for the SEA Directive to be applicable to them: (a) they must have been prepared and/or adopted by an authority at national, regional or local level or prepared by an authority for adoption, through a legislative procedure, by a parliament or government; and (b) they must be required by legislative, regulatory or administrative provisions;

– Article 3(2)(a) sets out the conditions for identifying which such plans and programmes are likely to have significant environmental effects and are therefore required to undergo an SEA: (a) the preparation of such plans and programmes in relation to certain sectors and economic activities and (b) the requirement that those plans and programmes set the framework for future development consent of projects.

41. Those provisions in combination actually give rise to four conditions which I shall now proceed to examine in order to provide a general outline of them and also to determine whether they are satisfied by regional legislation like that at issue in this case.

1. Preparation or adoption of the plan or programme by an authority of a Member State

42. The first condition, the assessment of which does not tend to raise difficulties as regards interpretation, is that the national legislation must have been adopted or prepared by an authority of a Member State at national, regional or local level.

43. The referring court states that the Flemish regional authorities adopted section 5.20.6 VLAREM II in implementation of the Decree on environmental consent. The referring court also states [19] that section 5.20.6 and the Circular were enacted to implement Directive 2009/28/EC. [20]

44. However, the Belgian Government submits that section 5.20.6 VLAREM II does not satisfy the first condition because, although the provisions concerned were adopted by the regional administration, they have no programmatic or planning aspect. I shall give my view on that argument later, although I will say now that, in my view, the legislative nature of that section cannot be denied.

45. As regards the Circular, it is for the national court to specify its characteristics in national law, a subject on which there has been disagreement between the parties.

46. According to the information at the Court's disposal, it appears that the Circular was prepared and adopted as an administrative act, which does not mean strictly speaking that the Region of Flanders was exercising legislative or regulatory power. The Circular expresses the Flemish administration's intention to carry out (in the terms set out by the Circular itself) the implementation of provisions on the construction of wind farms.

47. More specifically, the Belgian Government submits that the Circular includes the guidelines that the regional authority intends to follow when it exercises discretionary power in particular instances, such as the grant of development consent for the construction of wind turbines.

19 Paragraph 10.2 of the order for reference.

20 Directive 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).

48. I believe — and this, I stress, is subject to the view of the referring court — that, since the content of the Circular is binding on the Flemish regional administration, which adopted it as a set of rules governing its future actions,[21] it may come within the definition of 'plan or programme' laid down in the SEA Directive. That would not be the case if the Circular were not a legally binding instrument, including *ad intra*.

2. Plans or programmes required by legislative, regulatory or administrative provisions

(a) General considerations

49. In accordance with Article 2(a), second indent, of the SEA Directive, plans or programmes adopted by the authorities of a Member State that fall within its scope are those 'required by legislative, regulatory or administrative provisions'.

50. Since the judgment in *Inter-Environnement Bruxelles and Others*, 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 the SEA Directive.[22]

51. That interpretation given by the Court entails a *generous* reading of the SEA Directive, which is construed as being applicable to plans and programmes provided for by national legislative or regulatory provisions where their adoption is both *compulsory* and *optional*.

52. In *Inter-Environnement Bruxelles and Others*, Advocate General Kokott proposed a stricter interpretation: only plans and programmes the adoption of which was *compulsory*, because required by a provision of national law, would need an SEA.[23]

53. The referring court invites the Court of Justice to amend its case-law and bring it into line with that stricter interpretation. The United Kingdom Government supports that proposal, with which the Supreme Court of the United Kingdom also concurred on a previous occasion in the judgment in *HS2 Action Alliance*.[24] The Belgian Government did likewise, in the alternative, in its written observations but retracted this at the hearing. A and Others, the Commission and the Netherlands Government oppose that view and reassert their support for that case-law: none of them, or, ultimately, the Belgian Government, have proposed an amendment of the case-law in the sense suggested by the referring court.

54. Should the Court abandon or, alternatively, confirm its interpretation of the phrase '*required* by legislative, regulatory or administrative provisions'?

21 See, by analogy, judgment of 8 March 2016, *Greece* v *Commission* (C-431/14 P, EU:C:2016:145, paragraph 69 and the case-law cited), which states: 'in adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and, in principle, cannot depart from those rules without being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations'.

22 Judgment in *Inter-Environnement Bruxelles and Others*, paragraph 31; judgments of 7 June 2018, *Thybaut and Others* (C-160/17, EU:C:2018:401, paragraph 43) ('judgment in *Thybaut and Others*'); and of 12 June 2019, *CFE* (C-43/18, EU:C:2019:483, paragraph 54) ('*judgment in CFE*').

23 Opinion of Advocate General Kokott of 17 November 2011, *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2011:755, points 18 and 19). In her Opinion of 25 January 2018, *Inter-Environnement Bruxelles ASBL and Others* (C-671/16, EU:C:2018:39, points 41 and 42), Advocate General Kokott reiterated her view, stating that the Court of Justice had extended the scope of the SEA Directive further than was intended by the legislature and the Member States were able to envisage.

24 HS2 Action Alliance Ltd, R (on the application of) v The Secretary of State for Transport & Anor [2014] UKSC 3, paragraphs 175 to 189.

55. For my part, I recognise that the dispute about this point involves compelling reasons in support of both positions.[25] If I ultimately opt to suggest that the Court should endorse its case-law, it will be because no *new* argument has been put forward which tips the balance in favour of changing that case-law, as was made clear at the hearing,.

56. The absence of *new* arguments is akin to the repetition by the referring court, and by those who support that position, of those already put forward by Advocate General Kokott, with which the Court, in a succession of judgments since 2012, does not agree.[26]

57. In those circumstances, I cannot find sufficient grounds for proposing a different solution. On similar occasions I have stated that,[27] when faced with situations like this, I believe it is wiser to opt for the stability of the case-law, that is to give priority to the *stare decisis* criterion, which is more compatible with the requirements of legal certainty.

58. The key to the problem lies in the type of interpretation of the SEA Directive chosen:

– If priority is given to a literal and historical interpretation of Article 2(a), second indent, it can be argued that only plans and programmes the adoption of which is compulsory by law require an environmental impact assessment.

– However, if priority is given to a systematic and purposive interpretation of that provision, plans and programmes the adoption of which is voluntary but which are provided for in laws or regulations will also fall within the scope of the SEA Directive and will require an SEA when they have a significant effect on the environment.

59. At the risk of repeating the terms of a debate about which, I repeat, there is little new to say, I shall merely draw attention to the bases for the interpretation maintained by the Court thus far.

60. A literal interpretation of Article 2(a), second indent, is inconclusive. The word 'required' can mean that the plans and programmes concerned are 'prescribed', 'compulsory', 'imperative', but is ambiguous as regards whether or not it covers only plans and programmes whose adoption by national authorities is compulsory.[28] The maxim *in claris non fit interpretatio* is not applicable here.

61. Since all the language versions of an EU act have the same weight, in order to maintain a uniform interpretation of EU law, in the case of divergence between those versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[29] Therefore, it is necessary to rely on the systematic and purposive approaches, but first I shall refer to the historical interpretation of Article 2(a), second indent of the SEA Directive.

25 See the analysis in legal literature by Ricketts, S. and Munn, J., 'The Meaning of "Required by Legislative, Regulatory or Administrative Provisions"', in Jones, G., Scotford, E. (eds.), *The Strategic Environmental Assessment Directive. A plan for success*? Hart Publishing, Oxford, 2017, pp. 63 to 79.

26 With regard to the approaches found in *Inter-Environnement Bruxelles and Others*, legal commentators have taken the view that 'for AG Kokott, the focus was upon the Directive as a legal instrument negotiated by the Member States. By contrast, the Court focused on the Directive as an effective legal device that operates according its own legal integrity' (Fisher, E., 'Blazing Upstream? Strategic Environmental Assessment as "Hot" Law', Jones, G. and Scotford, E. (eds.), *The Strategic Environmental Assessment Directive. A plan for success*?, Hart Publishing, Oxford, 2017, p. 174.

27 Recently, in the Opinion in *La Quadrature du net and Others* (C-511/18 and C-512/18, EU:C:2020:6, point 123).

28 The words 'exigé' in French and 'exigido' in Portuguese create the same ambiguity as the Spanish. The words used in the English ('required'), Romanian ('impuse') and German ('erstellt werden müssen') language versions appear to refer to plans and programmes whose adoption is compulsory. The Italian adjective 'previsti', on the other hand, suggests that plans and programmes whose adoption is not compulsory are also covered.

29 See, in that connection, judgments of 2 April 1998, *EMU Tabac and Others* (C-296/95, EU:C:1998:152, paragraph 36); of 20 November 2003, *Kyocera* (C-152/01, EU:C:2003:623, paragraphs 32 and 33); and of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraphs 48 and 49).

62. If regard is had to the origins of that provision, the phrase 'required by legislative, regulatory or administrative provisions' did not appear in the Commission's initial proposal [30] or in a subsequent amended version. [31] It was added by the Council in a common position adopted on 30 March 2002, and was not altered by the European Parliament. [32]

63. The additional wording inserted by the Council suggests that that institution wished to make certain plans and programmes subject to an SEA but not that its express intention was to restrict the SEA exclusively to plans and programmes whose adoption is compulsory. Where plans and programmes whose adoption is voluntary are provided for in legislative and regulatory provisions, their effects on the environment can be as significant as, or even more significant than, plans and programmes whose adoption is compulsory. It is dangerous to assume that the Council's intention was to exclude such plans and programmes from the SEA requirement solely because a number of States argued that that assessment could deter national authorities from adopting them. [33]

64. Since the literal and historical interpretations are inconclusive, it is necessary to resort to a systematic and purposive interpretation.

65. From a systematic point of view, the SEA Directive applies only to 'certain', but not all, plans and programmes with significant effects on the environment. The exclusions laid down in Article 3(8) and (9) of the directive do not refer to plans and programmes the adoption of which is voluntary and which are provided for in national legislation but rather to:

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

– financial or budget plans and programmes; and

– plans and programmes co-financed from EU structural funds.

66. A broad interpretation of the term 'required' better enables the inclusion in the scope of the SEA Directive of plans and programmes whose adoption and preparation, under national legislation, cannot easily be classified as one or the other of compulsory or optional, because it covers multiple situations falling between the two extremes.

30 Proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment /* COM/96/0511 final — SYN 96/0304 */ (OJ 1997 C 129, p. 14).

31 COM(1999) 73 final of 22 February 1999 (OJ 1989 C 83, p. 13).

32 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), which states: 'The definition of "plans and programmes" was modified by clarifying that only plans and programmes were covered which are required by legislative, regulatory or administrative provisions and which are prepared and/or adopted by an authority or prepared by an authority for a legislative procedure, having regard to the Member States' different procedures and regulations'.

33 Advocate General Kokott argued in favour of the contrary position in her Opinion of 17 November 2011 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2011:755, points 15 to 21).

67. The wide-ranging practices of Member States in relation to the adoption of such plans and programmes [34] calls for a broad interpretation of the word 'required'. That argument is all the more important in the light of the fact that amendments to plans and programmes, which must be treated in the same way as their adoption and preparation, require an environmental assessment where they satisfy the conditions laid down in the directive. [35]

68. Usually, such amendments are decided on by the authorities of the Member States without there being a *legal obligation* to carry them out. A strict interpretation of the term 'required' would exclude amendments de facto from the SEA Directive, even if their environmental impact were significant.

69. A purposive interpretation of Article 2(a), second indent, of the SEA Directive also lends support to a broad construction of the word 'required', which would enable the inclusion of plans and programmes adopted voluntarily by national authorities.

70. In the light of the aim of the SEA Directive (to ensure a high level of protection of the environment), the provisions which delimit its scope, and specifically those which define the acts referred to, should not be interpreted strictly. [36]

71. A *pro-environment* interpretation of the SEA Directive is also justified by primary legislation:

– Pursuant to Article 191(2) TFEU (successor to Article 174(2) EC), Union policy on the environment is to aim at a 'high level of protection', taking into account the diversity of situations in the various regions of the Union.

– Article 3(3) TEU provides that the Union works in particular for a 'high level of protection and improvement of the quality of the environment'. [37]

72. The aim of the SEA Directive (which, I repeat, is to ensure a *high* level of protection of the environment) could be undermined by an interpretation of the term 'required' which excludes from the requirement of an SEA plans and programmes which are provided for in national legislation but the adoption of which is voluntary. That interpretation would compromise, at least partially, the practical effect of that directive, [38] contrary to its purpose of laying down a procedure to scrutinise legislative acts having potentially significant effects on the environment.

34 The SEA Directive does not define the terms 'plans' and 'programmes', whose treatment is identical. The 2006 *Guidance [of the European Commission] on the implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment* (https://ec.europa.eu/environment/archives/eia/pdf/030923_sea_guidance.pdf) may be helpful for a definition — albeit one which is rather vague because of the differences between Member States — of both terms. The guidance states: 'The kind of document which in some Member States is thought of as a **plan** is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development. Waste management plans, water resources plans, etc. … In some Member States, **programme** is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme'.

35 The Court has repeatedly held that the notion of 'plans and programmes' not only includes their preparation but also their modification and is intended to ensure that provisions which are likely to have significant environmental effects are subject to an environmental assessment (judgments of 8 May 2019, *Verdi Ambiente e Società (VAS) — Aps Onlus and Others* (C-305/18, EU:C:2019:384, paragraph 52), and *CFE*, paragraph 71).

36 Judgments in *Inter-Environnement Bruxelles and Others*, paragraph 37; *Thybaut and Others*, paragraphs 38 to 40; *CFE*, paragraphs 36 and 37; and judgment of 12 June 2019, *Terre wallonne* (C-321/18, EU:C:2019:484, paragraphs 23 and 24).

37 Judgment of 21 December 2016, *Associazione Italia Nostra Onlus* (C-444/15, EU:C:2016:978, paragraphs 41 and 42).

38 Judgment of 22 September 2011, *Valčiukienė and Others* (C-295/10, EU:C:2011:608, paragraph 42).

73. It does not seem to me that the approach adopted thus far by the Court frustrates or runs counter to the legislature's intention. The fact that the SEA Directive may apply also to plans and programmes which are provided for by national legislation but the adoption of which is voluntary does not mean that such plans *always* require an SEA: they must also satisfy the conditions laid down in Article 3 of the SEA Directive.

74. In particular, it should be underlined that the plans and programmes concerned must include the *legislative framework* for subsequent development consent for projects having significant effects on the environment. I believe that that element is key to the correct determination of the scope of the SEA Directive, without excessive interference in the legislative activities of the Member States.

75. I believe, therefore, that, in order to achieve a reasonable, effective and homogenous application of the SEA Directive, the Court should refine its case-law on the definition of that *legislative framework* rather than on the expression 'required by legislative, regulatory or administrative provisions'.

(b) Application of those criteria to the present case

76. The referring court needs to establish whether section 5.20.6 VLAREM II and the Circular can be regarded as plans or programmes 'required by legislative, regulatory or administrative provisions'.

77. As regards section 5.20.6 VLAREM II, the referring court confirms that its adoption was provided for by Article 20 of the Decree on environmental consent and by Article 5.1.1 of the DABM. The referring court also confirms that, although it was provided for in legislation, the adoption of that provision was not compulsory for the Flemish regional authorities, which could have refrained from adopting it.

78. In accordance with the interpretation of the Court of Justice which I summarised above, and which I propose to retain, section 5.20.6 VLAREM II must be construed as including a plan or programme *required* by legislative, regulatory or administrative provisions for the purposes of Article 2(a), second indent, of the SEA Directive.

79. As regards the Circular, the Commission asserts that it does not fall into that category because the environmental protection standards applicable in the Flanders Region in relation to the construction of wind farms do not specifically provide for its adoption. The Circular is the outcome of a freely taken political decision of the Flemish regional administration, which was not provided for in legislation. [39]

80. It is for the referring court to determine whether, in the light of its contents, the Circular implements and supplements section 5.20.6 VLAREM II, to the extent that it has acquired the status of a (more or less) veiled regulatory provision. [40] If, under Belgian law, the Circular restricts the scope of the administration's own actions by laying down guidelines on conduct which private individuals must also follow, it could be considered to have been *provided for* by the Decree on environmental consent of 1985 by the DABM.

3. Plan or programme concerning an activity or economic sector covered by the SEA Directive

81. Article 3(2)(a) of the SEA Directive provides that, subject to paragraph 3 of that article, an environmental assessment is to be carried out for all plans and programmes which are prepared, inter alia, 'for … energy, … town and country planning or land use'.

39 Logically, the right to adopt administrative circulars is recognised by Belgian administrative law in general terms. See footnote 56 above.

40 The referring court goes so far as to describe it as 'pseudo-legislation'.

82. Section 5.20.6 VLAREM II and the Circular relate to the energy sector, particularly the construction of wind farms. The noise standards applicable to wind turbines concern their location in residential areas, and, therefore, also have a bearing on town and country planning and land use.

83. Accordingly, there is no doubt that the subject matter of that body of legislation is covered by the SEA Directive.

4. Plan or programme in the nature of a reference framework for consent for projects covered by the EIA Directive

84. In addition to concerning one of the sectors included in Article 3(2)(a), that provision also stipulates that for plans and projects to require an SEA, they must:

– set the framework for future development consent of projects; and

– be projects listed in Annexes I and II to Directive 85/337/EEC.[41]

85. As regards the second criterion, section 5.20.6 VLAREM II and the Circular concern a type of installation expressly referred to in point 3(i) of Annex II to the EIA Directive, under the heading 'Installations for the harnessing of wind power for energy production (wind farms)'.[42]

86. As regards the first criterion, Article 3(2)(a) of the SEA Directive lays down the essential pre-requisite that the plan or programme must set the reference framework for future development consent of projects in order to be subject to an SEA.

87. The Court has held that the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures, 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.[43]

88. Accordingly, a measure will be regarded as a *framework* for future consent for the implementation of projects and, therefore, as a plan or programme for which an SEA is required, if it establishes a significant body of criteria and detailed rules (rules and procedures) for the implementation of projects having significant effects on the environment.[44]

89. That interpretation 'is intended to ensure … that provisions [forming part of a series of provisions] which are likely to have significant effects on the environment are subject to an environmental assessment';[45] by argument *ex contrario*, it precludes criteria and conditions which are laid down in isolation from requiring an SEA.

41 The importance of that requirement is also clear from the fact that Article 3(4) of the SEA Directive provides that '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'.
For the sake of completeness, it should also be noted that there is at least one more obligation to carry out a strategic environmental assessment of plans and programmes which is not subject to a framework for the development consent of projects. That is the obligation laid down in Article 3(2)(b) of the SEA Directive, in accordance with which there must also be an assessment of plans and programmes subject to a specific impact assessment under Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), which encompasses only some of the effects on the environment.

42 The Court ruled to the same effect in *D'Oultremont*, paragraphs 42 to 44.

43 Judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 95); *D'Oultremont*, paragraph 49; judgment of 8 May 2019, *Verdi Ambiente e Società (VAS) — Aps Onlus and Others* (C-305/18, EU:C:2019:384, paragraph 50); and *CFE*, paragraph 61.

44 The broadness of that interpretation is highlighted by Gonthier, E., 'La Cour de justice de l'Union européenne définit la notion de "plan et programme"', *Aménagement-Environnement*, 2017, No 3, pp. 184 and 185.

45 Judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:403, paragraph 54).

90. Accordingly, the notion of 'a significant body of criteria and detailed rules' (a reference framework) must be construed qualitatively and not quantitatively. It will suffice if that *body* is significant, and not exhaustive, for the plan or programme establishing it to require an SEA. That avoids strategies which may be designed to circumvent the obligations laid down in the SEA Directive, for example by splitting measures, thereby reducing the practical effect of that directive. [46]

91. That case-law must be applied to the Flemish legislation at issue (section 5.20.6 VLAREM II and the Circular, if the latter produces legal effects), taking into account the factors that I shall set out below.

92. First and foremost, the Court has held that legislation (in that case, Walloon) on the construction of wind farms, similar in part to the Flemish legislation examined here, was a framework for the adoption of projects with significant effects on the environment. That point was made unambiguously in *D'Oultremont*. [47]

93. While it is true that there are a number of differences between the two, the Flemish legislation at issue in this case lays down in detail similar requirements to those set out in the Walloon order in respect of a number of sensitive issues (noise, shadow flicker, safety and the nature of wind turbines).

94. In principle, no project for construction of a wind farm in Flanders could be authorised without satisfying the conditions laid down in the legislation concerned. Therefore, the information available indicates that it constitutes a non-exhaustive but significant reference framework for the authorisation of wind energy projects, whose environmental impact is undeniable.

95. The Belgian Government implicitly admits that section 5.20.6 VLAREM II and the Circular represent a reference framework for the authorisation of wind-farm projects when it states, in relation to the possible limitation of the temporal effects of the judgment, that the outcome of a finding of unlawfulness in that judgment would be that legally valid environmental conditions for wind power plants would cease to exist. [48]

96. The Commission argues that only the noise standards for wind turbines laid down in section 5.20.6 VLAREM II are relevant for the purposes of the authorisation of wind-farm projects because they directly determine the location of wind farms in relation to housing and residential areas. That is not the case of the standards on shadow flicker and the safety of wind turbines, which concern the operational phase of wind farms: their impact must be assessed in accordance with the EIA Directive and not the SEA Directive.

97. I do not agree with that approach because it focuses on an individual analysis of the provisions of the plan or programme and not on the plan or programme as a whole. Furthermore, the requirements concerning shadow flicker and the safety of wind turbines should also be taken into account at the time of their construction, regardless of whether they later affect the operation of the wind farm (as occurs, moreover, with the noise standards).

98. Second, the Court has held that the notion of 'plans and programmes' can cover acts adopted by law or regulation.

46 Judgment in *D'Oultremont*, paragraph 48; *Thybaut and Others*, paragraph 55; *Inter-Environnement Bruxelles and Others*, paragraph 55; and the Opinion of Advocate General Kokott of 17 November 2011 in the latter case (EU:C:2011:755, points 25 and 26).

47 Judgment in *D'Oultremont*, paragraph 50: '…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.'

48 Written observations, point 97.

99. The Court has refused to exclude legislative measures from the twofold notion of 'plans and programmes', because such measures are expressly referred to in the definition in Article 2(a), first indent, of the SEA Directive.[49] It has also rejected any analogy with the categories laid down in the Aarhus Convention[50] and the Kiev Protocol,[51] asserting that that directive differs from both international treaties 'inasmuch as [it] 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"'.[52]

100. In the Belgian Government's submission, section 5.20.6 VLAREM II is a general provision lacking a programmatic or planning aspect, which is not aimed at amending the existing framework for the construction of wind farms. The Belgian Government maintains that section 5.20.6 is not caught by the definition of plan or programme and, therefore, does not require an SEA.[53]

101. In fact, that line of reasoning reactivates the interpretation of the SEA Directive in the light of the Aarhus Convention and the Kiev Protocol, pursuant to which legislative and regulatory provisions are exempt from an environmental impact assessment.

102. As I stated above, the Court rejected that interpretation in its judgment in *D'Oultremont*. Thus, a domestic regulatory provision (as here) requires an SEA where it sets a significant reference framework for the carrying out of wind farm projects. I have already explained that that applied to the provisions examined in the *D'Oultremont* judgment, the requirements of which were, I repeat, partly analogous to those now at issue.

103. Third, the case-law of the Court does not require that plans and programmes 'must concern planning for a given area' but rather that 'they cover, in the wider sense, regional and district planning in general.'[54]

104. Section 5.20.6 VLAREM II, like the Walloon legislation at issue in *D'Oultremont*, concerns the territory of a region (Flanders) as a whole. The noise limit values it sets create a close link with that territory because they are determined by reference to the different types of use of the geographical areas. The places where wind turbines may be erected, as is the case of the municipalities of Aalter and Nevele, can be deduced from the application of those values.

105. Finally, the Court has held that it is necessary to avoid the same plan being subject to several EIAs. Therefore, as long as an assessment of their effects has already been carried out, plans and programmes which fall within a hierarchy of measures which have in turn been the subject of an assessment of their environmental effects, and in respect of which it may reasonably be considered that the interests which the SEA Directive is designed to protect have been taken into account sufficiently, are excluded from the SEA provisions.[55]

49 Judgments of 17 June 2010, *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, paragraph 41), and *D'Oultremont*, paragraph 52.

50 Convention of 1998 on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 4), adopted by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

51 Protocol of 2003 on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 35), adopted by Council Decision 2008/871/EC of 20 October 2008 (OJ 2008 L 308, p. 33).

52 Judgment in *D'Oultremont*, paragraph 53. See also the Opinion of Advocate General Kokott of 25 January 2018 in *Inter-Environnement Bruxelles and Others* (C-671/16, EU:C:2018:39, points 32 to 37).

53 The Belgian Government cites in support of its position a judgment of the Belgian Constitutional Court (judgment No 33/2019 of 28 February 2019, rôle 6662, pp. 43 et seq. (available at https://www.const-court.be/public/f/2019/2019-033f.pdf)), and two judgments of the Raad van State (Council of State (Administrative Division), Netherlands) (Nos 201709167/1/R3 and 201807375/1/R3) of 3 April 2019 (ECLI:NL:RVS:2019:1064).

54 Judgment in *D'Oultremont*, paragraphs 45 and 46.

55 Judgments of 10 September 2015, *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 55); *Inter-Environnement Bruxelles and Others*, paragraph 42; and *CFE*, paragraph 73.

106. Pursuant to that case-law, if section 5.20.6 VLAREM II and the Circular form part of a sequence of legislation the adoption of which has already been subject to an SEA, it will not be compulsory for them to undergo another specific assessment.

107. There is no information in the case file to confirm that point. The legal basis for section 5.20.6 VLAREM II is the Decree on environmental consent but the conditions it lays down for the construction of wind farms are not even the same as those in the basic rule. Section 5.20.6 VLAREM| II is, as the Commission stated at the hearing, a *new* plan or programme for the purposes of the SEA Directive.

108. I indicated above that it is for the national court to determine whether, in the light of its contents, the Circular implements and supplements section 5.20.6 VLAREM II as a veiled regulatory provision.[56] If that is the case, it must also be subject to the SEA Directive, since, at first sight, it includes environmental quality standards on noise which are less strict than section 5.20.6 VLAREM II, in that they permit the installation of wind turbines in places not authorised for that purpose by the latter provision.

109. The Circular appears to afford the Flanders administrative authorities the possibility of more readily allowing exceptions to the applicable standards laid down in the VLAREM II in relation to the construction of wind turbines. That confirms that, in accordance with the case-law, it may be covered by Article 3(2)(a) of the SEA Directive.[57]

110. In summary, a body of legislation like that at issue in this case, whose provisions govern the framework for obtaining development consent for wind farms, as regards shadow flicker, safety and noise, comes within the definition of 'plans and programmes' in Article 2(a) of the SEA Directive and may have a significant effect on the environment. To that extent, it requires an SEA to be carried out, in accordance with Article 3(2)(a) of that directive.

D. Questions 8 and 9

111. The referring court asks for clarification of how the judgment of the Court of Justice would affect plans and programmes (and individual decisions adopted on the basis of these) if section 5.20.6 VLAREM II and the Circular should have been subject to an SEA. In particular, the referring court asks if it would be possible to limit the effects of any annulment in order to maintain temporarily the effects of those provisions with the aim of protecting the environment and ensuring the supply of electricity.

112. The referring court also asks whether that temporal limitation could apply not only in (direct) actions for annulment against plans and programmes adopted without an SEA but also in (indirect) actions in which the alleged nullity of plans and programmes is the reason — or one of the reasons — for challenging individual consent decisions for projects which implement those plans and programmes.

56 I am not in a position to express a view on the nature and legal effects of circulars in Belgian law, a matter in relation to which it will be necessary to have regard to any rulings made by the Conseil d'État (Council of State).

57 In relation to an urban land consolidation area concerning the centre of Orp-le-Petit, a village within the municipality of Orp-Jauche (Belgium), which altered the sectoral plan, the municipal development plan and local planning rules (themselves plans and programmes within the meaning of the SEA Directive), the Court found that it should also be characterised as a plan or programme and be subject to the same rules of law, stating that, 'although such an instrument does not, and cannot, lay down positive requirements, the possibility which it lays down of allowing a derogation from the planning rules in force to be obtained more easily amends the legal process and consequently brings the consolidation area at issue in the main proceedings within the scope of Article 2(a) and Article 3(2)(a) of the SEA Directive' (judgment in *Thybaut and Others*, paragraphs 57 and 58).

113. I note that the referring court asks the latter question since it states that it does not have the power under Belgian law to annul section 5.20.6 VLAREM II and the Circular.[58] It is required to give judgment only on the action for annulment against a specific decision to grant consent for wind turbines,[59] but in that action the issue of the possible nullity of section 5.20.6 VLAREM II and the Circular has been raised by way of an objection of illegality.

114. According to the Court, 'in the absence of provisions in [the SEA 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" likely to have "significant environmental effects" within the meaning of Directive 2001/42 are subject to an environmental assessment prior to their adoption in accordance with the procedural requirements and the criteria laid down by that directive'.[60]

115. In accordance with the Court's settled case-law, Member States are required to nullify the unlawful consequences of an infringement of EU law, and that obligation is owed, within the sphere of its competence, by every organ of the Member State concerned.

116. In particular, as regards the obligation to rectify the failure to carry out the assessment required by the SEA Directive, it follows from that case-law that:

– the suspension or annulment of an instrument vitiated by such a defect is also a matter for national courts seised of an action brought against an instrument of national law adopted in breach of the SEA Directive;

– the detailed procedural rules applicable to such actions are a matter for the domestic legal order of each Member State, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness);

– national courts must adopt, on the basis of their national law, measures to suspend or annul the plan or programme adopted in breach of the obligation to carry out an SEA, as required by the SEA Directive.[61]

117. In accordance with that general obligation, a plan or programme adopted without an SEA, in breach of the SEA Directive, must be suspended, annulled or disapplied by the national court in order to give effect to the primacy of EU law. A fortiori, consents for projects based on such a plan or programme must be treated in the same way.

118. However, the Court has acknowledged that 'exceptionally and for overriding considerations of legal certainty, [it may] grant a provisional suspension of the ousting effect which a rule of EU law has on national law that is contrary thereto.'[62]

58 See footnote 68 above.

59 The consent granted to Electrabel to install five wind turbines in the municipalities of Aalter and Nevele.

60 Judgments in *Inter-Environnement Wallonie*, paragraph 42; *Association France Nature Environnement*, paragraph 29; *Comune di Corridonia and Others*, paragraph 34; and of 12 November 2019, *Commission* v *Ireland (Derrybrien wind farm)* (C-261/18, EU:C:2019:955, paragraph 75).

61 Judgments in *Inter-Environnement Wallonie*, paragraphs 43 to 46; *Association France Nature Environnement*, paragraphs 30 to 32; *Comune di Corridonia and Others*, paragraph 35; and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraphs 171 and 172).

62 Judgments of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 66 and 67) ('judgment in *Winner Wetten*'), and *Association France Nature Environnement*, paragraph 33.

119. The Court reserved that right exclusively to itself, stating that if national courts had the power to give national provisions primacy in relation to EU law contrary to those national provisions, even provisionally, the uniform application of EU law would be damaged.

120. The Court accepted, therefore, that a national court may, when this is allowed by domestic law, exceptionally and case by case, limit in time certain effects of a declaration of the illegality of a provision of national law adopted in disregard of the obligations provided for by the SEA Directive.

121. In order to make use of that possibility, in situations like this, the limitation must be justified by an overriding consideration linked to environmental protection and the specific facts of the case on which the national court must adjudicate must be taken into account. That exceptional power can be exercised only if all the conditions laid down in the judgment in *Inter-Environnement Wallonie*,[63] to which I shall refer below, are satisfied.[64]

122. In relation to the EIA Directive, the Court has also held[65] that in the event of failure to carry out an assessment of the environmental impact of a project required under the EIA Directive, although Member States are required to nullify the unlawful consequences of that failure, EU law does not preclude regularisation through the conducting of such an assessment while the project is under way or even after it has been completed, provided that certain conditions are fulfilled.[66]

123. It follows from that case-law that the Court exceptionally allows national courts to suspend temporarily, and under strict conditions, the 'ousting effect' of the primacy of the SEA Directive in order to protect an overriding requirement in the public interest, such as the environment or guaranteeing a country's electricity supply.

124. Until now, that possibility was recognised in cases involving actions for annulment before national courts against plans and programmes falling within the scope of the SEA Directive, whose adoption was not made subject to an SEA.[67] The referring court asks whether that same possibility may be extended to actions against individual consent decisions for the construction of wind turbines which apply those plans and programmes.[68]

125. The parties who have lodged observations have put forward conflicting arguments in relation to this issue:

– The Commission submits that the possibility of maintaining exceptionally the effects of the plans and programmes contrary to the SEA Directive is permissible only in the context of a direct action for annulment against those plans and programmes. The Commission can see no grounds for extending it to individual consent decisions.

63 Paragraphs 59 to 63. On the same lines, see the judgment in *Association France Nature Environnement*, paragraph 43.

64 A recent study examines the similarities and differences between the *Winner Wetten* case-law, which lays down a centralised procedure, under the supervision of the Court of Justice, for suspending the application of the ousting effect of the principle of primacy over contrary national provisions, and the *Association France Nature Environnement* case-law, which establishes a decentralised procedure for that suspension, to be carried out by national courts under very strict conditions. That study stresses the importance of that case-law for preventing the legal vacuums to which the strict application of the ousting effect of the principle of primacy may lead (Dougan, M, 'Primacy and the remedy of disapplication', *Common Market Law Review*, 2019, No 4, pp. 1490 to 1505).

65 Judgments in *Comune di Corridonia and Others*, paragraph 43; of 28 February 2018, *Comune di Castelbellino* (C-117/17, EU:C:2018:129, paragraph 30); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 175).

66 First, the national rules allowing for that regularisation must not provide the parties concerned with an opportunity to circumvent the rules of EU law or to refrain from applying them, and second, an assessment carried out for regularisation purposes is not to be conducted solely in respect of the project's future environmental impact, but must also take into account its environmental impact since the time of completion of that project.

67 Judgments in *Inter-Environnement Wallonie* and *Association France Nature Environnement*.

68 As already explained, the referring court states that, as regards the plea of illegality raised in the proceedings before it, it is only entitled under Belgian law to annul individual decisions but not plans and programmes.

– The Belgian Government adopts the contrary position. In its submission, the procedural situation of an objection of illegality (which indirectly challenges the plan or programme on the grounds of infringement of the SEA Directive, as a means of disputing the validity of the development consent for a particular project) calls for the application of that case-law of the Court. [69]

126. To my mind, the Belgian Government's line of reasoning is, in the abstract, more persuasive. After all, the two methods of challenge (direct actions and indirect actions) pursue the same objective, which is to rid the legal order of decisions and provisions that are, in so far as is important for the present purposes, contrary to EU law.

127. One of the considerations which led the Court to develop its case-law on the temporary maintenance of the effects of a national measure that is incompatible with EU law was concern about legal certainty. The lack of certainty (or legislative vacuum) caused by a declaration of invalidity of such an act increases if a (direct) action for annulment is upheld *erga omnes*, but also occurs in indirect actions where an objection of illegality is upheld. [70] Multiple indirect actions may, in fact, lead to the same consequences as the direct annulment of the relevant provision. [71]

128. Application of the parallel which the Court took into account in *Winner Wetten* therefore explains why the temporary suspension of the 'ousting effect' of primacy by the national court can also take place in the context of objections of illegality in the context of individual decisions implementing plans and programmes adopted contrary to the SEA Directive. [72]

129. Furthermore, it must be recalled that the obligation to carry out an SEA is a *procedural* requirement which must be fulfilled when certain plans and programmes are approved. It is possible that even where the latter have not been made subject to that requirement, they have a *substantive* content which reflects a high level of environmental protection.

130. That factor (which explains in part the 'permissive' case-law of the Court set out above) concerns both direct actions for annulment of a plan or programme adopted without the required SEA and indirect actions in which the infringement of EU law is raised through an objection of illegality against individual decisions implementing the plan or programme.

131. Finally, protection of the environment and guaranteeing the supply of electricity in a Member State are overriding reasons in the public interest accepted by the Court as justification for suspending the 'ousting effect' of the primacy of EU law over national law adopted in breach of the SEA Directive.

132. In this case, at least one of those overriding reasons (protection of the environment) [73] could justify the temporary maintenance of the effects of the development consents to build five wind turbines in the municipalities of Aalter and Nevele and, indirectly, of the rules adhered to.

69 In that connection, the Belgian Government contends that direct actions for annulment against plans and programmes must be lodged within a short period of time, whereas objections of illegality can be invoked without any temporal limitation. In the latter case, legal certainty has greater scope for action since the plans and programmes were applied in a large number of individual decisions.

70 In some Member States, their procedural mechanisms allow the effects of a judgment ordering annulment, given in an indirect action, to be extended to other, similar situations. If such a mechanism exists in Belgian law, the nullity of the consent could be 'expanded' to encompass other, similar consents, based on the invalidity of section 5.20.6 VLAREM II and the Circular; that would be tantamount to precluding with *erga omnes* effect the application of these following recognition that they do not comply with the SEA Directive.

71 The judgment in *Winner Wetten* states at paragraph 65: 'In the exercise of that power, the Court may decide, for example, to suspend the effects of the annulment or the finding of invalidity of such a measure until the adoption of a new measure remedying the illegality is found'.

72 Judgment in *Winner Wetten*, paragraphs 67 and 68.

73 Although that assessment falls to the referring court, it does not appear that if the five wind turbines in Aalter and Nevele were to cease operating it would have a significant impact on the electricity supply in Belgium, as the Commission observed at the hearing. It would be different if, owing to a large number of actions against similar consents, the annulment were to affect all the wind power plants in Flanders.

133. That exceptional power, which the Court may grant the national court, can be exercised only if all the conditions laid down in the judgment in *Inter-Environnement Wallonie* are satisfied;[74] these are:

– The contested provision of national law must be a measure which correctly transposes EU environmental protection law.

– The adoption and entry into force of a new provision of national law must not enable the adverse effects on the environment resulting from the annulment of the contested provision of national law to be avoided.

– Annulment of the contested national provision must result in a legal vacuum in relation to the transposition of EU environmental protection law which would be more harmful to the environment, in the sense that such an annulment would result in a lower level of protection and would also run specifically counter to the fundamental objective of EU law.

– Exceptional maintenance of the effects of the contested provision of national law can last only for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied.

134. According to the information in the order for reference and the observations lodged, those conditions are met in this case:

– Section 5.20.6 VLAREM II and the Circular correctly transpose a provision of EU law on the protection of the environment, namely Directive 2009/28. The development of electricity generation through wind farms is an essential aspect of the Belgian State's strategy for achieving an increase in electricity generation from renewable sources by 2020.

– Section 5.20.6 VLAREM II and the Circular have been an important component of the Belgian legislation on the construction of wind farms and, according to the national court, since 31 March 2012, they have largely been the basis for the grant of individual consents for the installation of wind turbines.

– The adoption and entry into force of a new provision of national law would not enable the adverse effects on the environment resulting from the annulment of section 5.20.6 VLAREM II and the Circular to be avoided. Annulment of those instruments would open the possibility of a cascade of challenges to the legality of development consents for the construction of wind turbines in the Flanders Region since 31 March 2012, with the consequence that the decision may even be taken to halt their construction.

– Annulment of section 5.20.6 VLAREM II and the Circular would result in a legal vacuum in relation to the transposition of EU environmental protection law which would be more harmful to the environment. In particular, the reference standards on noise, shadow flicker and the safety of wind turbines would disappear from the Flanders Region, with the risk that these might be replaced by lower standards of environmental protection.

74 Paragraphs 59 to 63. Also in that connection, see *Association France Nature Environnement*, paragraph 43.

135. In summary, it appears more logical that the Court should agree that the national court, if its national law so provides,[75] may exceptionally maintain the effects of section 5.20.6 VLAREM II and the Circular, in addition to the development consents granted for the construction of wind turbines on the basis of those provisions, for the period of time which is strictly necessary to adopt the measures enabling the irregularity which has been established to be remedied, in other words, the time necessary for the competent regional authorities to carry out an SEA of that body of legislation.

136. Furthermore, if that assessment is favourable, it would be possible to continue to apply the Flemish legislation as a plan or programme compatible with the SEA Directive, once the failure to carry out an SEA has been remedied.

IV. Conclusion

137. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Raad voor Vergunningsbetwistingen (Council for Consent Disputes, Belgium):

(1) National legislation containing precise standards on shadow flicker, safety and noise from wind farms, as a reference framework for authorising the location and characteristics of future projects for the construction of wind turbines for the generation of electricity comes within the definition of "plans and programmes" in 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 and has a significant effect on the environment, such that it requires a prior strategic environmental assessment to be carried out in accordance with Article 3(2)(a) of that directive.

(2) The national court is entitled to limit the temporal effects of its judgment in the main proceedings, if it allows the action and upholds the objection of illegality of the contested national legislation, in order to maintain temporarily the effects of the development consents for the construction of wind turbines with a view to protecting the environment and, as the case may be, guaranteeing the supply of electricity. That possibility is subject to compliance with the conditions laid down in the judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103), relating, in so far as is important for the present purposes, to 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.

75 For that purpose, it has statutory and case-law mechanisms, according to paragraph 10.1 of the order for reference.