

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 14 April 2011¹

I — Introduction

1. This reference for a preliminary ruling concerns the interpretation of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market,² 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,³ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds ('Birds Directive'),⁴ and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('Habitats Directive').⁵

applicant companies') on the one hand, and Regione Puglia, on the other, concerning the refusal of authorisation to locate wind turbines on land which forms part of the Alta Murgia National Park, a protected area classified as a site of Community importance and a special protection area 'pSIC / ZPS IT 9120007 Murgia Alta'. National legislation prohibits, inter alia, the location of wind turbines not intended for self-consumption in sites of Community importance (SCIs) and special protection areas (SPAs) forming part of the ecological network Natura 2000.

II — Legal context

2. The reference has been made in proceedings between Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl ('the

A — *European Union law*

1 — Original language: English.

2 — OJ 2001 L 283, p. 33.

3 — OJ 2009 L 140, p. 16.

4 — OJ 1979 L 103, p. 1.

5 — OJ 1992 L 206, p. 7.

3. Article 191 TFEU (ex Article 174 EC) provides:

‘1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. ...’

4. Article 192(1) TFEU (ex Article 175 EC) provides:

‘The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.’

5. Article 193 TFEU (ex Article 176 EC) provides that ‘[t]he protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.’

6. Article 194(1) TFEU provides:

‘In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;

- (b) ensure security of energy supply in the Union; better exploited within the framework of the internal electricity market.
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.'
- (2) The promotion of electricity produced from renewable energy sources is a high Community priority as outlined in the White Paper on Renewable Energy Sources (hereinafter referred to as "the White Paper") for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion. That was endorsed by the Council in its resolution of 8 June 1998 on renewable sources of energy, and by the European Parliament in its resolution on the White Paper.

1. Directive 2001/77

7. Recitals 1 to 3 in the preamble to Directive 2001/77 provide:

- (3) The increased use of electricity produced from renewable energy sources constitutes an important part of the package of measures needed to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and of any policy package to meet further commitments.'

'(1) The potential for the exploitation of renewable energy sources is under-used in the Community at present. The Community recognises the need to promote renewable energy sources as a priority measure given that their exploitation contributes to environmental protection and sustainable development. In addition this can also create local employment, have a positive impact on social cohesion, contribute to security of supply and make it possible to meet Kyoto targets more quickly. It is therefore necessary to ensure that this potential is

8. Article 6(1) of Directive 2001/77 provides that:

'Member States or the competent bodies appointed by the Member States shall evaluate the existing legislative and regulatory framework with regard to authorisation procedures or the other procedures laid down

in Article 4 of Directive 96/92/EC, which are applicable to production plants for electricity produced from renewable energy sources, with a view to:

into biofuels or other energy products, are proportionate and necessary.

— reducing the regulatory and non-regulatory barriers to the increase in electricity production from renewable energy sources,

Member States shall, in particular, take the appropriate steps to ensure that:

...

— streamlining and expediting procedures at the appropriate administrative level, and

(c) administrative procedures are streamlined and expedited at the appropriate administrative level;

— ensuring that the rules are objective, transparent and non-discriminatory, and take fully into account the particularities of the various renewable energy source technologies.'

(d) rules governing authorisation, certification and licensing are objective, transparent, proportionate, do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies;

...

9. Article 13 of Directive 2009/28, entitled 'Administrative procedures, regulations and codes', provides:

'1. Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass

(f) simplified and less burdensome authorisation procedures, including through simple notification if allowed by the applicable regulatory framework, are established for smaller projects and for decentralised devices for producing energy from renewable sources, where appropriate.

...'

2. Birds Directive

10. Article 2 of the Birds Directive provides that 'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

11. Article 3(1) of the Birds Directive provides that, in the light of the requirements referred to in Article 2, Member States are to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all species of birds naturally occurring in the wild in the European territory of the Member States to which the EC Treaty applies. Under Article 3(2)(a), the measures to preserve, maintain and re-establish biotopes and habitats are to include, in particular, the creation of protected areas.

12. Article 4(1) and (2) of the Birds Directive requires Member States to classify as special protection areas the territories satisfying the ornithological criteria established by those provisions.

13. Article 4(4) of the Birds Directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

14. Article 14 of the Birds Directive provides that 'Member States may introduce stricter protective measures than those provided for under this Directive.'

3. Habitats Directive

15. Article 3(1) of the Habitats Directive provides for the setting-up of a coherent European ecological network of special areas of conservation under the title Natura 2000, which also includes the special protection areas classified by the Member States pursuant to the Birds Directive.

16. Article 6(2) to (4) of the Habitats Directive provides:

‘2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative

reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.’

17. Article 7 of the Habitats Directive provides that ‘obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later’.

B — *National provisions*

provides that the Regions and Autonomous provinces must adopt in relation to all SPAs the following prohibitions:

18. Article 1(1226) of Law No 296 of 27 December 2006 (the 'Finance Law 2007') (Legge 27 dicembre 2006 n. 296, legge finanziaria per il 2007)⁶ provides that in order to avert further infringement proceedings, the Regions and Autonomous provinces of Trento and Bolzano shall adopt or complete the adoption of the measures laid down by Articles 4 and 6 of the regulation provided for by the Decree of the President of the Republic No 357 of 8 September 1997, as subsequently amended within three months following the date of entry into force of that law, on the basis of the minimum uniform criteria laid down by Decree of the Minister for the Environment and the protection of the territory and the sea.

19. Article 5(1) of Decree of the Ministry for the Protection of the Environment, Land and Sea of 17 October 2007 laying down minimum uniform criteria for establishing conservation measures in relation to special areas of conservation (SACs) and special protection areas (SPAs) (Decreto del Ministero dell'Ambiente e della Tutela del Territorio e del Mare 17 ottobre 2007, recante criteri minimi uniformi per la definizione di misure di conservazione relative a Zone speciali di conservazione (ZSC) e a Zone di protezione speciale (ZPS))⁷ (the 'Ministerial Decree')

- ‘... (1) the construction of new wind turbines, except for those which at the date of adoption of the present act, the authorisation procedure had already commenced due to submission of the project. The competent organisms must evaluate the effects of the project, taking into account the biological cycles of the species in respect of which the site was designated, following consultation with the INFS (National Institute for wild fauna). Replacement and modernisation efforts, including technological, which do not entail an increase in the impact on the site in the light of the conservation objectives of the SPA as well as wind turbines for self-production with a global strength up to 20kW shall also be exempted.’

20. Article 2 of Regional Law No 31 of Apulia of 21 October 2008 laying down rules for energy production from renewable sources and for the reduction of polluting emissions, and environmental rules (Legge regionale della Puglia 21 ottobre 2008, n. 31, recante norme in materia di produzione di energia da fonti rinnovabili e per la riduzione di immissioni

6 — GURI No 299 of 27 December 2006, SO No 244.

7 — GURI No 258 of 6 November 2007.

inquinanti e in materia ambientale) ('Regional Law No 31') provides:

'...

(6) In accordance with Articles 6 and 7 of Directive 92/43/EEC, together with Articles 4 and 6 of the implementing regulation provided for by the Decree of the President of the Republic No 357 of 8 September 1997, as amended ..., it is forbidden to locate wind turbines not intended for self-consumption in SCIs and SPAs forming part of the ecological network Natura 2000

(8) The prohibition laid down in [paragraphs] 6 and 7 above extends to a 200 meter buffer zone.'

to produce electricity for commercial purposes), which was to be built on the land of Azienda Agro-Zootecnica Franchini. That land forms part of the Alta Murgia National Park, a protected area classified as a site of Community importance and a special protection area 'pSIC / ZPS IT 9120007 Murgia Alta'. The applications for authorisation to construct a wind farm were rejected by the entity in charge of the park and the Regione Puglia (Region of Apulia), by decisions of 1 September 2006 and 4 July 2007 respectively. The Region of Apulia refusal was based on Article 6(3)(a) of Regional Regulation No 16 of 4 October 2006 which provides, in relation to the location of wind turbines, that sites of Community importance and special protection areas pursuant to the Habitat and Birds Directives are considered totally 'inappropriate' and Article 14(2)(a) of that regional regulation which provides that in the absence of a regulatory plan for wind turbines those sites are considered 'unsuitable'. The applicant companies challenged the rejections and the regional regulation on which they were based before the referring court, and at that initial stage their action succeeded. However, while those proceedings were pending, Regional Regulation No 15/2008 was adopted, which obliged the applicant companies to bring a further action for annulment.

III — The dispute in the main proceedings and the question referred for a preliminary reference

21. According to the order for reference, Eolica di Altamura acquired the rights to construct a wind farm not intended for self-consumption (that is to say, it is designed

22. In the main proceedings before the referring court, the applicant companies seek annulment of Article 5(1)(n), 5(4) and 5(4)(a) of Regional Regulation No 15/2008. Article

5(1)(n) prohibits inter alia the construction of new wind turbines within the Natura 2000 sites. The applicant companies claim, inter alia, infringement of the principles contained in Directive 2001/77. Regione Puglia claims that the action should be declared inadmissible or unfounded.

23. During the main proceedings, Regional Law No 31 entered into force. The referring court considers that the prohibition of wind turbines not intended for self-consumption in accordance with Article 2(6) of Regional Law No 31, applies to the request for authorisation and environmental compatibility presented by the applicant companies from the date of entry into force of that law (that is, since 8 November 2008) independently of any specific evaluation of environmental impact or effect.

24. On the basis of those considerations, the Tribunale Amministrativo Regionale per la Puglia decided, by decision of 23 September 2009, which arrived at the Court on 4 January 2010, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 1(1226) of Law No 296 of 27 December 2006, in conjunction with the first paragraph of Article 5 of the ... Decree

of the Ministry for the Protection of the Environment, Land and Sea of 17 October 2007 and with Article 2(6) of Regional Law No 31 of Apulia of 21 October 2008, compatible with [Union] law, and in particular with the principles which may be inferred from Directives 2001/77/EC and 2009/28/EC (concerning renewable energies) and Directives 79/409/EEC and 92/43/EEC (concerning the protection of birds and natural habitats), in so far as those provisions absolutely prohibit, without distinction, the location of wind turbines not intended for self-consumption in the sites of Community importance (SCIs) and special protection areas (SPAs) comprising the “Natura 2000” ecological network, instead of requiring an appropriate environmental impact assessment to be being carried out to analyse the impact of an individual project on the particular site affected?’

IV — Procedure before the Court

25. Written pleadings were submitted by the applicant companies and the Commission. A hearing was held on 10 February 2011 at which the applicant companies, Regione Puglia and the Commission presented oral submissions.

V — Assessment

circumstances, of constructing wind turbines in sites forming part of the ecological network Natura 2000 in the absence of an analysis of the impact of an individual project on a particular site.

A — Preliminary matter

26. It is clear that the reference asks the Court to rule on the compatibility of national legislation with Union law. In that connection, it is sufficient to point out that, although the Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with Union law, it does have jurisdiction to supply the national court with a ruling on the interpretation of that law so as to enable that court to determine whether such compatibility exists and to decide the case before it.⁸

28. It would appear from the file before the Court, subject to verification by the referring court, that the prohibition in question is limited in scope as it currently applies to wind turbines only and not to other means of producing energy from renewable sources.⁹

B — Substance

27. The question by the referring court in my view centres on whether the Birds Directive, the Habitats Directive, Directive 2001/77 and Directive 2009/28 preclude the adoption by a Member State of national measures which consist of a prohibition, in certain

29. Moreover, it would appear, subject to verification by the referring court, that the prohibition in respect of wind turbines is limited as it applies only to the construction of new wind turbines rather than existing ones.¹⁰ The

⁸ — Case C-439/06 *citiworks* [2008] ECR I-3913, paragraph 21 and the case-law cited.

⁹ — I would note in that regard that while Directive 2001/77 defines 'renewable energy sources' as 'renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases)' no particular preference is contained in that directive with regard to any particular source. Thus as indicated by the Commission, Member States can in principle choose the renewable energy sources which they consider most appropriate. According to the Commission, neither Directive 2001/77 nor indeed Directive 2009/28 establish any priority between different sources of renewable energy. See Article 2(a) of Directive 2001/77.

¹⁰ — See point 19 above. It would appear that the replacement and modernisation of existing wind turbines within the Natura 2000 sites is also permitted provided certain conditions are met.

prohibition would also appear not to be applicable to wind turbines for self-consumption with a global strength up to 20 kW.¹¹ At the hearing the Commission and Regione Puglia stressed the limited scope of the prohibition in question.

30. In my view, the referring court, the applicant companies and the Commission correctly state that the classification of a zone as a site of Community importance¹² or special protection area¹³ forming part of the ecological network Natura 2000 does not result in all construction therein being banned in accordance with the Birds and Habitats Directives.

31. Article 6(2) of the Habitats Directive, in conjunction with Article 7¹⁴ thereof, requires Member States to take appropriate steps to avoid, in sites of Community importance and special protection areas, the deterioration of

habitats and significant disturbance of the species for which the areas have been designated. Article 6(3) of the Habitats Directive provides that the competent national authorities may authorise a plan or project not directly connected with or necessary to the management of the site but which is likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site. That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site.¹⁵

32. Thus in order to approve a plan or project for sites of Community importance and special protection areas, an appropriate, individual assessment of that plan or project must as a preliminary matter be carried out in accordance with Article 6(3) of the Habitats Directive.

11 — See points 19 and 20 above.

12 — See definition in Article 1(k) of the Habitats Directive. See Article 3(1) of the Habitats Directive in relation to the setting-up of an ecological network of special areas of conservation under the title Natura 2000, which includes special protection areas classified by the Member States pursuant to the Birds Directive.

13 — See Article 3(2)(a) of the Birds Directive which provides for the creation by the Member States of protected areas. See Article 4(1) and (2) of the Birds Directive concerning the choice of the areas most appropriate for classification as special protection areas.

14 — Article 7 of Directive 92/43 substitutes the obligations arising from Article 6(2) to (4) of that directive for those arising from Article 4(4) of Directive 79/409. See Case C-304/05 *Commission v Italy* [2007] ECR I-7495, paragraph 104.

15 — Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 32 to 34. Following the assessment of the implications undertaken pursuant to Article 6(3) of the Habitats Directive and in the event of a negative assessment, the competent authorities have the choice of either refusing authorisation for the plan or project or of granting authorisation under Article 6(4) of that directive, provided that the conditions laid down in that provision are satisfied. See Case C-239/04 *Commission v Portugal* [2006] ECR I-10183, paragraph 25.

33. In the case at hand, it would appear that national legislation prohibits, in certain circumstances, the construction of wind turbines in the site in question without a prior, individual assessment of the plan or project relating to that construction being carried out pursuant to Article 6(3) of the Habitats Directive and a concrete finding of an adverse impact on the site. I therefore consider that in order to answer the question referred it must be determined whether, and if so under what conditions, Union law permits the introduction of stricter national protective measures than those laid down by Article 6(3) of the Habitats Directive which prohibit in certain circumstances the construction of wind turbines in Natura 2000 sites in the absence of an individual assessment of the plan or project in relation to such construction and a finding of adverse impact.

34. In accordance with Article 14 of the Birds Directive, Member States may introduce stricter protective measures than those provided for under that directive. While no conditions are explicitly imposed in Article 14 of the Birds Directive, in my view such stricter protective measures must comply with the Treaty on European Union and the Treaty on the Functioning of the European Union.

35. The Habitats Directive does not contain a similar provision to Article 14 of the Birds Directive. However, as indicated by the Commission in its pleadings, given that the legal basis of the Habitats Directive was

Article 130s EC (later Article 175 EC and now Article 192 TFEU), Article 130t EC (later Article 176 EC and now Article 193 TFEU) was applicable. Article 193 TFEU permits the adoption by Member states of more stringent national protective measures provided they are compatible with the Treaties, that is the Treaty on European Union and the Treaty on the Functioning of the European Union¹⁶ and are notified to the Commission.

36. There is no information in the file before the Court concerning the notification to the Commission of the stricter national protective measures.

37. However, it would appear from the EUR-Lex portal that the Ministerial Decree was notified to the Commission as a national measure implementing both the Habitats and Birds Directives.¹⁷ Subject therefore to verification by the referring court, it would appear that the Commission was informed of the obligation imposed on the regions and autonomous provinces pursuant to Article 5(1)(l) of

16 — See Article 1 TEU. See also Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraphs 58 and 59. In paragraph 58 of the judgment the Court stated that 'in connection with the Community's environmental policy, to the extent that a measure of domestic law pursues the same objectives as a directive, Article 176 EC makes provision for and authorises the minimum requirements laid down by that directive to be exceeded, in the conditions set by that article'.

17 — The preamble to the Ministerial Decree in question refers, inter alia, to Article 1(1226) of the Finance Law 2007 and it would appear to be part of that decree.

the Ministerial Decree in question to prohibit, subject to certain conditions, the construction of new wind turbines in sites forming part of the Natura 2000 network.

measures if necessary. However, neither the wording nor the purpose of Article 193 TFEU support a finding that failure by the Member States to observe their obligation to notify the Commission in itself renders unlawful the national protective measures in question.¹⁹

38. In any event, in my view, breach of the obligation to notify the Commission pursuant to Article 193 TFEU does not constitute a substantial procedural defect such as to render the more stringent national measures in question invalid or inapplicable to individuals. Article 193 TFEU merely requires the Member States to inform the Commission. No time limit or procedure for monitoring by the Union of the more stringent national protective measures is laid down pursuant to Article 193 TFEU.¹⁸ Moreover, Article 193 TFEU does not make the implementation of those measures conditional upon agreement by the Commission or its failure to object. It would appear therefore that the obligation imposed on the Member States by Article 193 TFEU is intended to ensure that the Commission is informed of national protective measures regarding the environment which are more stringent than Union legislation in that domain. Such notification enables the Commission to assess whether the national protective measures are compatible with Union law, and take appropriate

39. Despite the degree of discretion afforded by Article 14 of the Birds Directive and Article 193 TFEU to Member States in adopting more stringent protective measures than those adopted by the Union, Member States must exercise their discretion in conformity firstly, with the Union's environmental and energy policies²⁰ which, in accordance with Articles 191 and 194 TFEU, seek, inter alia, to preserve, protect and improve the quality of the environment, to combat climate change, and to promote the development of new and renewable forms of energy and secondly, the general principles of Union law.

40. In my view, the prohibition in question would appear to be in conformity with the objectives of the Union's environmental policy.

18 — See by contrast Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 47 to 55. See also Case C-443/98 *Unilever* [2000] ECR I-7535.

19 — See by analogy Case 380/87 *Enichem Base and Others* [1989] ECR 2491.

20 — The separate title on Energy contained in Article 194 TFEU was introduced by the Lisbon Treaty. See however, Article 2 EC which refers to the sustainable development of economic activities and Article 3(1)(u) EC which provides that the activities of the Community shall include measures in the sphere of energy.

41. The referring court indicated in the order for reference that the Ministerial Decree and thus, *inter alia*, the prohibition contained in Article 5(1)(l) thereof was adopted on the basis of a delegation of power pursuant to Article 1(1226) of the Finance Law 2007, in order to prevent further infringement proceedings against the Italian Republic following the issuing of a reasoned opinion by the Commission against Italy in infringement proceedings No 2006/2131 and relating, *inter alia*, to Articles 2, 3 and 4 of the Birds Directive which provide that requisite measures must be taken to preserve, maintain or re-establish a sufficient diversity and area of habitats for all species, in addition to special conservation measures.²¹ No other explanation of the reason(s) which led to the adoption of the prohibition in question has been presented to the Court.

of the Habitats Directive, namely the conservation of certain habitats and species and the aversion of deterioration of the natural habitats and significant disturbance of the species in question. I would note in that regard that at the hearing the Commission indicated, subject to verification by the referring court, that two species of birds which are very sensitive to wind turbines are present on the site in question. Moreover, Regione Puglia stated at the hearing that a large number of the birds which are the symbol of the site in question have been killed by wind turbines (located outside the site).

42. It would thus appear, subject to verification by the referring court, that the prohibition in certain circumstances of constructing new wind turbines on Natura 2000 sites pursues the same objectives as the Birds and Habitats Directives and in particular Article 6(1) to (3)

43. Moreover, at the hearing the Commission referred to its 2010 guidance document for wind energy development in the Natura 2000 network²² and the risks presented by wind turbines. The considerable list of potential impacts of wind energy developments on nature and wildlife outlined in that guidance document include collision risk, disturbances and displacement (loss of habitat use), barrier effects (wind farms may force birds or mammals to change direction) and habitat loss or degradation.

21 — Those proceedings culminated in a finding by the Court in Case C-573/08 *Commission v Italy* [2010], that by failing to transpose the Birds Directive into Italian law in a manner which is wholly in compliance with that directive, and by failing to transpose Article 9 of that directive in a manner which ensures that the derogations adopted by the competent Italian authorities comply with the conditions and requirements referred to in that article, the Italian Republic had failed to fulfil its obligations under Articles 2 to 7, 9 to 11, 13 and 18 of the directive.

22 — See 'Guidance on wind energy and Natura 2000', available on http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm.

44. I would also note that the environmental effects which resulted from a particular wind farm which was constructed without a correct assessment of its environmental effects were described by the Court in *Commission v Ireland*.²³

45. I consider that the prohibition in question would also appear to be in conformity with the objectives of the Union's energy policy.

46. The referring court considers that Directives 2001/77 and 2009/28 express a clear preference for the development of the use of renewable energy as it contributes to the protection of the environment, the protection of eco-systems from the dangers resulting from climate change, sustainable development and the growth of local economies. According to the referring court, in particular, Article 6 of Directive 2001/77 requires Member States to reduce the regulatory and non-regulatory barriers to the increase in electricity production from renewable energy sources, to streamline and expedite procedures at the appropriate administrative level, and ensure that the rules are objective, transparent and non-discriminatory, and take

fully into account the particularities of the various renewable energy source technologies.

47. In my view, the Treaty on European Union and the Treaty on the Functioning of the European Union do not establish any priority between the Union's environmental policy and its energy policy. Article 194(1) TFEU however provides that the Union's energy policy shall have regard to the need to preserve and improve the environment.²⁴ Article 191(1) TFEU refers to the objective of combating climate change.

48. The first and second recitals in the preamble to Directive 2001/77 refer to the need to promote renewable energy sources as a priority measure and the promotion of electricity produced from renewable energy sources as a high Community priority.²⁵ However, in my view, contrary to the arguments of the applicant companies, the EU legislature did not seek to favour such objectives above all other (environmental) objectives but sought to promote electricity produced from renewable energy sources in order to protect the environment and comply with the Kyoto Protocol to the United Nations Framework

24 — I would note that the legal basis of Directive 2001/77 is Article 175(1) EC (now Article 192(1) TFEU) and the legal basis of Directive 2009/28 is primarily Article 175(1) EC.

25 — No objective is prioritised by the articles of that directive.

23 — Case C-215/06 [2008] ECR I-4911.

Convention on Climate Change,²⁶ to ensure energy security and diversification of supply and also social and economic cohesion.²⁷ The principal measures to achieve such goals include the setting by Directive 2001/77 of non-binding indicative targets for the consumption of electricity produced from renewable sources²⁸ and the de-bureaucratisation of administrative procedures for obtaining permission to construct plants producing electricity from renewable energy sources.²⁹

Murgia Alta' is geographically very extensive, there is no evidence before the Court that the limited prohibition of the construction of certain wind turbines in Natura 2000 sites in Apulia has hindered the production of electricity from renewable energy sources at national or regional level. At the hearing, the Commission stated that Apulia is one of the regions in Italy with the greatest number of wind turbines: it is the first region in terms of capacity and the second after Sicily with respect to the number of installations.

49. Despite the claims by the applicant companies that the 'pSIC / ZPS IT 9120007

26 — See recital 3 in the preamble to Directive 2001/77.

27 — See explanatory memorandum to the proposal for that directive COM(2000) 279 final, 2000/116 (COD) and the White Paper on renewable energy sources COM(97) 599 final, referred to in the second recital in the preamble to Directive 2001/77. The introduction to the explanatory memorandum states that 'the Directive proposes that Member States are required to take the necessary measures to ensure that the level of [renewable generated electricity] develops in conformity with the energy and environmental objectives undertaken at national as well as Community level.' Point 2.1 states that '[t]he promotion of renewable sources of energy is a high Community priority, for reasons of security and diversification of energy supply, for reasons of environmental protection and for reasons of social and economic cohesion.'

28 — Article 3 of Directive 2009/28 fixes mandatory national overall targets and measures for the use of energy from renewable sources. However, as Member States were not required, in accordance with Article 27 of Directive 2009/28, to transpose Article 3 until 5 December 2010, it would appear that that provision is not applicable to the dispute in the main proceedings.

29 — Article 6(1) of Directive 2001/77.

50. Indeed, given the evidence presented by the Commission concerning the current level of electricity produced from renewable energy sources nationally³⁰ and the strong presence of wind turbines in Apulia, it would appear on the basis of the information submitted to the Court at the hearing, subject to verification by the referring court, that the future attainment of the binding target set by Directive 2009/28 in respect of Italy for 2020 of 17 % is not hindered by the prohibition in question.

30 — At the hearing the Commission indicated, subject to verification by the referring court, that in 2006, 18.3 % of electricity consumed in Italy was produced from renewable sources.

51. In my view, it is also necessary to examine whether the prohibition in question breaches the de-bureaucratisation rules laid down by Article 6(1) of Directive 2001/77.

must not be treated in the same way unless such treatment is objectively justified.³²

52. I consider, in the absence of any claims to the contrary raised before the Court, and subject to verification by the referring court, that the prohibition in question which is defined by law appears to be sufficiently transparent and objective. Moreover, given the apparently limited scope of the prohibition in question,³¹ there is no evidence before the Court that the objective of reducing regulatory or non-regulatory barriers to the increase in electricity production from renewable energy sources and streamlining and expediting procedures have been hampered at regional or national level.

54. In the context of the main proceedings a breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them. When assessing the question of discrimination it is necessary to take into account the principles and objectives of the applicable Union legislation which in the case in the main proceedings are based on the Union's environmental policy.³³ The Union's policy on the environment aims, in accordance with Article 191(2) TFEU, at a high level of protection and is based in particular on the precautionary principle and the principle that preventive action should be taken.³⁴

53. As regards the question of discrimination, it is settled case-law that compliance with the principle of equal treatment requires that comparable situations must not be treated differently and that different situations

55. The applicant companies' claim that industrial developments other than the construction of wind farms on the site in question are not subject to an equivalent prohibition but must, where applicable, be assessed in

31 — See points 28 and 29 above.

32 — See Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 46.

33 — See footnote 24 above.

34 — See to that effect Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 30.

accordance with Article 6(3) of the Habitats Directive.³⁵

construction and operation of wind farms. This is however ultimately a matter for the referring court to assess.

56. There is no evidence before the Court, subject to verification by the referring court, that authorisations to construct commercial wind farms were granted to operators other than the applicant companies in ‘pSIC / ZPS IT 9120007 Murgia Alta’ following the entry into force of Regional Law No 31.

57. Moreover, given the alleged adverse effects that may result in Natura 2000 sites and in the particular site in question specifically from the construction and operation of wind farms,³⁶ it would appear, subject to verification by the referring court, that the prohibition is not discriminatory. In that regard, there is no evidence whatsoever before the Court that other industrial developments have all the alleged potential comparable detrimental effects on such sites³⁷ as the

58. In my view, the prohibition in question must also comply with the principle of proportionality which requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.³⁸ It is for the referring court to check that the prohibition at issue in the main proceedings does not go beyond what is necessary to achieve the objective pursued. In that regard, I consider that the referring court should take into account, inter alia, the apparently limited scope of the prohibition in that it appears to apply to a defined, limited geographic area, to one particular renewable energy source only and only applies to new wind farms which are commercial in scale.³⁹

35 — It would appear from the file before the Court that the applicant companies have not suffered nor do they claim any discrimination based on nationality.

36 — See point 42 et seq. above.

37 — Regard being had to their unique characteristics and purpose.

38 — See Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 16, and Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 96.

39 — See points 28 and 29 above.

VI — Conclusion

59. Accordingly, I propose that the Court should answer the question referred by the Tribunale Amministrativo Regionale per la Puglia as follows:

Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, 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, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora do not preclude the adoption by a Member State of more stringent national measures prohibiting the construction on a Natura 2000 site of wind turbines not intended for self-consumption provided that that prohibition is in conformity with the Union's environmental and energy policies, that it is not contrary to the principle of equal treatment and that it does not go beyond what is necessary to achieve the objective pursued, those being matters which it is for the referring court to determine.