Court of Justice of the European Union
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Press and Information

Judgment in Case C-24/19
A and Others v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaandere

An order and a circular that set out the general conditions for the grant of development consent for the installation and operation of wind turbines must themselves be the subject of a prior environmental assessment

By the judgment A and others (Wind turbines at Aalter and Nevele) (C-24/19), delivered on 25 June 2020, the Court, sitting as the Grand Chamber, ruled on the interpretation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment,[1] and gave important clarifications as to the instruments that are subject to the assessment prescribed by that directive and as to the consequences flowing from a failure to carry out an assessment.

The Court received that request for interpretation in the context of proceedings between the neighbours of a site located close to the E40 motorway on the territory of the Aalter and Nevele communes, proposed for the installation of a wind farm by the Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen (regional town planning official of the Flanders Department of Land Planning, East Flanders Division, Belgium), concerning the grant by that official of development consent for the purpose of the installation and operation of five wind turbines ('the consent at issue'). The grant, on 30 November 20019, of the consent at issue had been subject, inter alia, to certain conditions laid down by the provisions of an order of the Flemish government and a circular on the installation and operation wind turbines being satisfied.

In support of an action seeking the annulment of the consent at issue brought before the Raad voor Vergunningsbetwistingen (Council for consent disputes, Belgium) ('the national court') the applicants alleged, in particular, a breach of Directive 2001/42, on the ground that the order and the circular, on the basis of which the consent had been granted, had not been subject to an environmental assessment. The official who had granted the consent at issue considered, on the contrary, that the order and circular in question were not required to be subject to such an assessment.

In today's judgment, the Court recalled that Directive 2001/42 covers plans and programmes, and modifications to them, which are prepared or adopted by an authority of a Member State, in so far as they are 'required by legislative, regulatory or administrative provisions'.[2] Furthermore, it makes the obligation to subject a specific plan or programme to an environmental assessment subject to the condition that the plan or programme, referred to in that provision, is likely to have significant effects on the environment.[3]

In the first place, as regards the concept of 'plans and programmes required by legislative, regulatory or administrative provisions', the Court held that an order and a circular adopted by the

[1] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30)
[2] Article 2(a) of Directive 2001/42
[3] Article 3(1) of Directive 2001/42

government of a federated entity of a Member State, both of which contain various provisions on the installation and operation of wind turbines are covered by that concept.

It is clear from the established case-law of the Court that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of that directive.[4] Thus, a measure must be regarded as 'required' where the legal basis of the power to adopt the measure is found in a particular provision, even if the adoption of that measure is not, strictly speaking, compulsory.[5]

Invited by the referring court and the UK Government to reconsider that line of case-law, the Court noted first of all that to restrict the condition referred to in Article 2(a), second indent, of Directive 2001/42 only to 'plans and programmes' whose adoption is compulsory would be likely to confer a marginal scope on that concept and would not enable the effectiveness of that provision to be maintained. According to the Court, having regard to the diversity of situations that arise and the wide-ranging practices of national authorities, the adoption of plans or programmes and modifications to them is often neither imposed as a general requirement, nor left entirely to the discretion of the competent authorities. Moreover, the high level of protection for the environment that Directive 2001/42 seeks to ensure by subjecting plans and programmes that are likely to have a significant effect on the environment to an environmental assessment meets the requirements of the Treaties and of the Charter of Fundamental Rights of the European Union on the protection and improvement of the quality of the environment.[6] Those objectives would be likely to be compromised by a strict interpretation, which would allow a Member State to circumvent easily that requirement for an environmental assessment by deliberately refraining from providing that competent authorities are required to adopt such plans and programmes. Finally, the Court observed that a broad interpretation of the concept of 'plans and programmes' was consistent with the EU's international undertakings.[7]

Next the Court examined whether the order and the circular in question satisfied the condition in Article 2(a), second indent, of Directive 2001/42. In that regard it observed that the order had been adopted by the Flemish government in its capacity as the executive authority of a federated Belgian entity, pursuant to a legislative power. In addition, the circular, which provides a framework for the competent authorities' discretion, also emanates from the Flemish government and amends, by extending or derogating from them, the provisions of the order, subject to the verifications which is it for the national court to carry out, as to its exact legal nature and effect. The Court therefore concluded that the order and, subject to those verifications, the circular were covered by the concept of 'plans and programmes', in that they must be regarded as 'required' within the meaning of Directive 2001/42.

In the second place, as regards whether the order and the circular must be subject to an environmental assessment in accordance with Directive 2001/42, on the ground that they are likely to have significant effects on the environment, the Court held that those instruments, both of which contain various provisions regarding the installation and operation of wind turbines, including measures on shadow flicker, safety and noise level standards, are instruments that must be subject to such an environmental assessment.

In that regard, the Court considered that the importance and scope of the requirements laid down in the order and circular in question regarding the installation and operation of wind turbines were sufficiently significant for the determination of the conditions subject to which consent would be granted for the installation and operation of wind farms, whose environmental impact was undeniable. It added that that interpretation could not be called into question by the particular legal nature of the circular.

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[4] Cases: C-567/10 Inter-Environnement Bruxelles and Others, paragraph 31; C-160/17 Thybaut and Others, paragraph 43 and C-321/18 Terre wallonne, paragraph 34.
[5] Case: C-671/16 Inter-Environnement Bruxelles and Others, paragraphs 38 to 40.
[6] Article 3(3) TEU, Article 191(2), TFEU, and Article 37 of the Charter of Fundamental Rights
[7] Such as those flowing from Article 2(7) of The Convention on environmental impact assessment in a transboundary context, signed in Espoo (Finland) on 26 February 1991.

In the third place, and lastly, as regards the possibility of maintaining the effects of those instruments and the consent, adopted in breach of Directive 2001/42, the Court recalled that Member States are required to eliminate the unlawful consequences of such a breach of EU law. The Court underlined that, having regard to the need to ensure the uniform application of EU law, it alone could, in exceptional cases, for overriding considerations of in the general interest, allow temporary suspension of the ousting effect of a rule of EU law that has been breached, provided that a national law empowers the national court to maintain certain effects of such acts in the context of the dispute before it. Consequently, the Court held that, in circumstances such as those in the present case, the national court could maintain the effects of the order and the circular, and the consent that was adopted on the basis of those instruments, only if the national law permitted it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, in the present case Belgium, and only for the period of time strictly necessary to remedy that illegality, which it was for the national court, if necessary, to assess.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355