Case C-24/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

15 January 2019

Referring court:

Raad voor Vergunningsbetwistingen (Belgium)

Date of the decision to refer:

4 December 2018

Applicants:

A

B

C

D

E

Defendant:

De gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen

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Subject of the action in the main proceedings

The applicants (A, B, C, D, E) are seeking the annulment of the decision of 30 November 2016 of the gewestelijke stedenbouwkundige ambtenaar (regional town planning official) of the departement Ruimte Vlaanderen (afdeling Oost-Vlaanderen) (Flanders Department of Spatial Planning; East Flanders Division; 'the defendant') to grant the NV Electrabel ('the applicant') development consent, subject to certain conditions, for the construction of five wind turbines on parcels of land located along the E40 motorway on the territory of Aalter and Nevele.

Subject and legal basis of the request for a preliminary ruling

Request pursuant to Article 267 TFEU.

In essence, the referring court wishes to establish whether the provisions of an Order of the Flemish Government (Section 5.20.6 VLAREM II) and an Omzendbrief (Omzendbrief) of the same government can be regarded as a 'plan or programme' within the meaning of Directive 2001/42/EC ('SEA Directive'), and if that is the case, and the two instruments appear not to comply with the aforementioned Directive, what the consequences are which the referring court, as the administrative court, can or should attach thereto.

Questions referred

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 of 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 the 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 policy-making 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 European 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 on grounds of legal certainty and thus constitutes a completely voluntary decision, be regarded as a 'plan or programme' within the meaning of Article 2(a) of 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?

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 Union 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 standards and the Circular in question) have been adopted?

8. Can a court or tribunal, if it has only indirect jurisdiction through an exception 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 in *Association France Nature Environnement*, [Case C-379/15]) 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?

Provisions of European Union law cited

Article 2(a) and Article 3(2)(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001on the assessment of the effects of certain plans and programmes on the environment (SEA Directive, OJ 2011 L 197, p. 30)

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16)

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive, OJ 1985 L 175, p. 40)

Article 3(3) TEU

Articles 191(2) and 288 TFEU

Article 37 of the Charter of Fundamental Rights of the European Union

Provisions of national law cited

Flemish decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid (Decree of 5 April 1995 laying down general provisions on environmental policy; 'DABM')

Flemish decreet betreffende de milieuvergunning van 28 juni 1985 (Decree of 28 June 1985 concerning environmental consent; 'Milieuvergunningsdecreet')

Section 5.20.6 of the besluit van de Vlaamse regering van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne (Order of the Flemish Government of 1 June 1995 on the general and sectoral provisions with regard to environmental health; 'VLAREM II')

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 of the Order of the Flemish Government of 1 June 1995 on general and sectoral provisions)

Omzendbrief R0/2014/02 van 25 april 2014 betreffende het afwegingskader en randvoorwaarden voor de oprichting van windturbines (Omzendbrief R0/2014/02 of 25 April 2014 concerning the assessment framework and preconditions for the installation of wind turbines; 'Omzendbrief')

Article 4.3.3 of the Vlaamse Codex Ruimtelijke Ordening (Flemish Codex Spatial Planning; 'VCRO')

Article 36 of the decreet van 4 april 2014 betreffende de organisatie en de rechtspleging van sommige Vlaamse bestuursrechtscolleges (Decree of 4 April 2014 concerning the organisation and the administration of justice of some Flemish administrative courts; 'DBRC-decreet')

Article 159 van de Grondwet (Constitution; 'Gw')

Principles of sound management

Brief summary of the facts and the procedure in the main proceedings

1 The Raad voor Vergunningsbetwistingen (Council for Consent Disputes; 'the referring court') is an independent Flemish administrative court that decides on 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.

2 The applicants seek the annulment of the planning consent granted to the applicant on 30 November 2016 (‘the contested decision’) for the installation of a number of wind turbines on the territory of the municipalities of Aalter and Nevele along the E40 motorway. Based on the applicable regional plans, the parcels of land on which the wind turbines would be installed are located partly on agricultural land and partly on agricultural land of scenic value.

3 On 25 March 2011, the applicant submitted an application to the defendant for town planning consent for the installation of eight wind turbines. In the course of the procedure, the application for one of the turbines was withdrawn. Eventually, consent was granted for five wind turbines.

4 The contested decision was taken after examination of the objections and comments received. The objections related, among other things, to the impact on the visual perception of the area, noise pollution, spatial planning, shadow flicker and safety.

5 The contested decision declares the objections of interested parties admissible but unfounded (except in relation to one turbine) and deals extensively with the water test, the environmental impact report, the assessment of sound spatial planning, as well as on the advisory trajectories followed. The reasons provided refer to relevant Flemish legislation, including VLAREM II and the Omzendbrief, which give rise to the questions referred for a preliminary ruling by the referring court. The consent is subject to certain conditions.

Main submissions of the parties to the main proceedings

6 In the interim judgment, the referring court deals only with the third plea of the applicants.

7 In the third plea in law, the applicants rely substantively on an infringement of Article 2(a) and Article 3(2)(a) of the SEA Directive; Article 4.1.1, §1, 4 ° DABM); Article 20 of the Flemish Milieuvergunningsdecreet; Section 5.20.6 of VLAREM II; 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; the Omzendbrief, Article 4.3.3 VCRO, Article 159 Gw, and the principles of sound management.

8 More specifically, they argue that those provisions were infringed because the contested decision was made in accordance with the sectoral conditions laid down in Section 5.20.6 VLAREM II and the Omzendbrief, and compliance with the VLAREM standards was itself imposed as a condition for the consent, whereas Section 5.20.6 was introduced without an (obligatory) environmental assessment being carried out even though that Section relates to a ‘programme’ within the

meaning of the SEA Directive. The Omzendbrief on which the defendant relies in the contested decision is, according to the applicants, also such a 'programme'.

9 According to the applicants, Section 5.20.6 VLAREM II and the Omzendbrief are unlawful because of the cited incompatibility with the SEA Directive, which means that they must be disapplied under Article 159 Gw. That unlawfulness is carried through to the contested decision. At the very least, the applicants request that a question in that regard be referred to the Court of Justice for a preliminary ruling.

10 According to the defendant, the declaration of unlawfulness in respect of Section 5.20.6 VLAREM II does not result in the unlawfulness of the contested decision, since that Section is not the legal basis of the contested decision but merely contains the sectoral conditions under which operation may take place.

11 Furthermore, it argues that the applicants have no interest in the plea: declaring Section 5.20.6 of VLAREM II inapplicable would result in there no longer being any sectoral environmental conditions in respect of wind turbines and in that way a more environmentally damaging legal vacuum would arise, which is not in the interests of the applicants and would run counter to the objectives of the SEA Directive.

12 In addition, it submits, moreover, that the sectoral environmental conditions cannot be regarded as a 'plan or programme' within the meaning of the Directive, but constitute a stand-alone normative scheme defining the sectoral conditions to be complied with by the operator, but which does not form a coherent system for wind turbine projects.

13 The drafting of the sectoral environmental conditions is not 'required' by laws, regulations or administrative provisions. The fact that the sectoral environmental conditions have a legislative basis does not detract from this. According to the defendant, the sectoral environmental conditions of section 5.20.6 VLAREM II contain a less complete framework than the Walloon legislation that was the subject of the judgment in Case C-290/15 cited by the applicants (judgment of 26 October 2015, *D'Oultrement*), in which the Court of Justice ruled that the Walloon legislation in question was covered by the term 'plans and programmes'.

14 Furthermore, the defendant submits that the objective of the SEA Directive is achieved because the obligation laid down therein to carry out an environmental assessment for plans and programmes is intended to ensure that, even before the adoption of plans and programmes which may have significant effects on the environment, the impact of their implementation on the environment is taken into account. In the present case, the sectoral environmental conditions would not cause 'significant' environmental effects and, on the contrary, those conditions would ensure a high level of environmental protection.

15 Finally, the defendant submits that the Omzendbrief is not a 'plan or programme' either, since it is not of a regulatory nature and may be departed from, so that it does not constitute a framework for the granting of consent.

16 In the view of the defendant, the referral of a question for a preliminary ruling is not necessary for the resolution of the dispute.

17 The applicants reply that they do indeed have an interest in pursuing their claim because compliance with section 5.20.6 VLAREM II was laid down as a condition for the consent and that condition is inextricably linked to the consent, as a result of which its unlawfulness also automatically affects the lawfulness of the consent. The unlawfulness of the sectoral conditions would presumably also imply that they do not receive the protection to which they are entitled: if an environmental assessment had in fact been carried out for both instruments (within the meaning of the SEA Directive), it is possible that (even) stricter standards might have been laid down.

18 As regards the analogy with the Walloon sectoral conditions, which the Court of Justice has already examined in an earlier preliminary ruling, they argue that the comparison with Section 5.20.6 VLAREM II necessarily leads to the conclusion that at issue here is a similar, virtually parallel, sectoral framework for the granting of consents for wind turbines. The judgment of the Court of Justice in case C-290/15, *D'Oultrement*, must therefore be applied, as a result of which Section 5.2.6 of VLAREM II is unlawful.

19 As regards the Omzendbrief: according to the applicants, it does in fact entail an obligation to carry out an environmental assessment within the meaning of the SEA Directive (EIA) because it contains various provisions that must be observed when granting consent. That is why it is a 'plan or programme' within the meaning of Directive 2001/42.

Brief summary of the reasons for the referral

20 The referring court considers it to be common ground that the contested decision of the public authority responsible for granting development consent, the defendant, relies in part on the compliance of the consent with Section 5.20.6 VLAREM II and the Omzendbrief.

21 In order to assess the substance of the case, the referring court must verify the lawfulness of the instruments in question. It is not disputed that Section 5.20.6 VLAREM II and the OMzendbrief have not undergone any environmental assessment within the meaning of the SEA Directive. The referring court is of the view that those instruments are not lawful and could therefore not possibly have served as the decisive basis for the contested decision, if it should become apparent that an environmental assessment on the basis of the SEA Directive was required for their adoption.

22 The parties to the main proceedings disagree as to whether the SEA Directive applies to Section 5.20.6 VLAREM II and the Omzendbrief. Despite the clarifications given by the Court of Justice, inter alia in the *D'Oultremont* judgment (Case C-290/15), the referring court doubts whether the instruments in question fall within the scope of the environmental assessment obligation of the SEA Directive.

23 The referring court concludes from European Union law that the main purpose of the SEA Directive is that plans and programmes which are likely to have significant effects on the environment are subjected to an environmental assessment during the course of their preparation and before they are adopted. Furthermore, the referring court observes that it is also clear from the case-law that the scope of application of that directive may not be interpreted restrictively if a high level of environmental protection is to be ensured (Article 3(3) TEU, Article 37 of the Charter of Fundamental Rights of the European Union and Article 191(2) TFEU), and that the effectiveness of the SEA Directive may not be impaired. The provisions that define the scope of the Directive must also be interpreted broadly. In particular, the referring court refers to the judgments of the Court of Justice in Case C-671/16, *Inter-Environnement Bruxelles ASBL*; Case C-160/17, *Raoul Thybaut and Others*; Case C-567/10, *Inter-Environnement Bruxelles ASBL and Others*; Case C-290/15, *Patrice D'Oultremont and Others*, and Case C-473/14, *Dimos Kropias Attikis*.

The instruments whose compatibility with EU law is the subject-matter of the questions referred

24 Section 5.20.6 VLAREM II is headed 'Installaties voor het opwekken van elektriciteit door middle van windenergie' ('Installations for the generation of electricity by means of wind energy'). That Section lays down generally formulated standards relating to shadow flicker, certain safety aspects and noise.

25 The Omzendbrief is headed 'Afwegingskader en randvoorwaarden voor de inplanting van windturbines' ('Assessment framework and preconditions for the installation of wind turbines') and is intended for councils of mayors and aldermen, provincial governors, members of the permanent (provincial) deputations and civil servants involved in consent applications. The Omzendbrief sets out the policy line of the Flemish Government and aims to minimise the effects on various sectors (including nature, landscape, environment, economy, noise, safety, energy efficiency, etc.) and to offer sufficient development opportunities for onshore wind energy. Standards are formulated for each of the relevant sectors, with further attention — as in the case of the VLAREM standards — being given to noise, shadow flicker, safety and nature.

26 The Omzendbrief is based on the pillars of sustainable spatial development, sustainable energy consumption, the advantages of wind energy in relation to other energy sources and the economic added-value of wind energy. The spatial

principle of deconcentrated bundling or clustering is central: by bundling wind turbines as much as possible, the preservation of the remaining open space in highly urbanised Flanders must be guaranteed. Finally, the Omzendbrief 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). Furthermore, the working group gives advice on actual consent applications, as in the present case.

27 With a view to answering the questions referred for a preliminary ruling, the interim judgment of the referring court contains an explanation of the legal basis and the effects of the instruments in question.

28 VLAREM II was adopted in implementation of the Flemish Milieuvergunningsdecreet, which aims to prevent and limit unacceptable nuisance and risks associated with certain establishments and, if necessary, to rectify the damage that the operation of an establishment or activity has inflicted on the environment. The Milieuvergunningsdecreet explains that the sectoral environmental conditions (such as Section 5.20.6 VLAREM II) apply to certain types or categories of classified establishments or activities.

29 The basis of the Omzendbrief is set out in the policy-making and discretionary powers which the authorities have when granting an 'environmental consent'. It encompasses guidelines which the public authority itself involves in its assessment whenever it has to assess an actual consent application. Whenever a public authority has wide discretionary powers (which is certainly the case when assessing whether an application is compatible with sound spatial planning), it can also indicate how it will deal with those policy-making and discretionary powers.

30 As regards the effects of the aforementioned instruments, the referring court states that general and sectoral conditions have direct effect regardless of the existence of consent. They limit the discretionary powers of the public authorities responsible for granting development consent. Moreover, the competent authority can make the operation of an establishment subject to compliance with specific environmental conditions, or, as in the present case, it can counter sources of nuisance by means of sound spatial planning through town planning conditions, which in turn can refer to, among other things, the general and sectoral conditions. Those specific environmental conditions and town planning conditions will then accompany the consent or notification certificate as a condition.

31 Fulfilling the general and sectoral conditions of VLAREM II does not give rise to an entitlement to a town planning consent or environmental consent. In any case, the public authority responsible for granting development consent must not only check compliance with the conditions set by VLAREM II, but must, taking into account all the specific aspects of the case, examine the nuisance and risk factors for humans and the environment and, taking into account the precise findings of that study, draw the appropriate final conclusions. Consents that take into account

general and sectoral conditions should not prejudice the requirements of statutory, decree-based or regulatory provisions. The referring court also points out that national case-law proceeds on the assumption that compliance with the VLAREM II regulatory standards constitutes an obligation of result for the applicant and that, in a specific case, those standards can offer sufficient guarantees that the possible nuisance factors involved can be avoided or remedied from a town planning point of view.

32 The Omzendbrief is not of a regulatory nature and its mere infringement does not therefore lead to the unlawfulness of the contested decision. That Omzendbrief does, however, offer an assessment framework that can be used as a testing framework for the spatial (consent) policy with regard to wind turbines. That Omzendbrief cannot, however, detract from the assessment that must be carried out in accordance with decree-based and regulatory instruments.

33 With regard to the two instruments in question, it is not disputed that they contain various provisions, including measures on safety, and standards relating to shadow flicker and noise levels, having regard to town and country planning zones. Furthermore, according to the referring court, it cannot be disputed that they are aimed at 'regional planning and land use' as interpreted in the case-law of the Court of Justice (Case C-290/15, *D'Oultrement*). It is also common cause that they at least also cover the energy sector and contribute to the projects listed in Annex II of the SEA Directive.

The provisions of European Union law which led to the questions posed by the referring court

34 In addition to recital 4 of the SEA Directive and its objective, as stated in Article 1, the referring court also refers to various elements of the legislative history of the SEA Directive. The provisions which are central to the review which the referring court has to carry out are Articles 2 and 3 of the Directive.

35 Article 2(a) of the SEA Directive states that 'plans and programmes' 'are subject to preparation and/or adoption by an authority at national, regional or local level or [...] are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and [...] are required by legislative, regulatory or administrative provisions' (the referring court emphasises that they are cumulative conditions).

36 Under Article 3(2)(a) of the SEA Directive, a systematic environmental assessment must be carried out for all plans and programmes which first, are prepared for certain sectors and which, second, set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive (judgment in Case C-671/16 and in Case C-160/17). Other plans and programmes must be the subject of such an assessment when they 'set the framework for future development consent of projects', provided that they 'are likely to have significant environmental effects' (Article 3(4) of the SMB Directive).

Referred questions 1 and 2: Article 2(a) of the SEA Directive: the term 'plan or programme'

37 According to the referring court, it follows from the case-law of the Court of Justice that no distinction is made between 'plans and programmes' and 'general rules' and that the general nature of a given regulation does not prevent that regulation from being covered by the term 'plans and programmes' (judgment of 7 June 2018, Case C-671/16, *Inter-Environnement Bruxelles ASBL and Others*, and judgment of 27 October 2016, Case C-290/15, *D'Oultrement*).

38 The referring court states that the power to draw up an Omzendbrief (Circular)is included in the discretionary and policy-making powers of the authority concerned. There is no question of the competent authority having a mandate to draw up the 'plan or programme', nor is there a formal procedure for its preparation. Circulars have an indicative value because, with sufficient justification, they can be deviated from within the limits of reasonableness. As long as those guidelines are not regarded as a legal rule, they are therefore not open to challenge before the Raad van State (Council of State) or the Raad voor Vergunningsbetwistingen.

39 The referring court also states that the finality of the instruments in question is partly independent of the creation of a framework for granting development consent. It points out that, according to the case-law of the Court of Justice, when interpreting the terms 'plans and programmes', account must however be taken of the reference to the 'framework for future development consent' in Article 3 of the SEA Directive. With regard to the latter phrase, it notes that it was only introduced late in the European legislative process (Proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, 4 December 1996, COM (96) 0511 final).

Referred questions 3 to 7: Article 2(a) and Article 3 of the SEA Directive: 'required' programmes

40 The referring court questions whether one is dealing here with '*required* plans or programmes'. To explain its doubts in that regard, extensive reference is made to the case-law of the Court of Justice, more specifically to the judgment and the Opinion in the aforementioned Case C-671/16 and the Opinion in Joined Cases C-105/09 and C-110/09 (*Terre wallonne ASBL*). Reference is also made to an English judgment, *HS2 Action Alliance Ltd, R* (on the application of) v *The Secretary of State for Transport & Anor* ([2014] UKSC 3). The restrictive interpretation of the terms 'plans and programmes' that seems to follow from the foregoing limits those terms to instruments required by law. However, according to the referring court, that might be in conflict with the purposive interpretation of directives which is presupposed elsewhere in the case-law (Case C-275/09, *Brussels Hoofstedelijk Gewest and Others*).

41 Unlike the defendant, the referring court considers that the Milieuvergunningsdecreet and the DABM leave no room for claiming that no provision was made for the preparation of sectoral environmental conditions. The situation is different in relation to the drafting of the Omzendbrief, which was motivated by the pursuit of legal certainty, does not contain any legal rules and for which no provision was made. It represents a free political decision.

42 With regard to Section 5.20.6 VLAREM II and the sectoral conditions contained therein, the interim judgment of the referring court also states that the obligation to prepare them is laid down in the Milieuvergunningsdecreet, but that they are not required in the sense of European Union law (they are indeed provided for, but they are not compulsory, see points 14 to 30 of the Opinion in Case C-567/10, *Inter-Environnement Bruxelles ASBL and Others*). The preparation of sectoral conditions, specifically for 'installations for generating electricity by means of wind energy', is not compulsory and the government could choose not to adopt these rules.

43 The referring court is therefore of the view that both the sectoral environmental conditions and the Omzendbrief are 'voluntary plans', which, if coupled with a requirement to carry out an environmental assessment, could undermine the objective of the Directive (Opinion in Case C-567/10). There was no obligation to draw up those instruments as an assessment framework for development consent within the meaning of the case-law of the Court of Justice, because the sectoral environmental conditions also operate autonomously as a general rule.

44 It is true that the Omzendbrief, which has indicative value, and Section 5.20.6 VLAREM II, which has autonomous effect, must be respected as legislation by the public authority responsible for granting development consent and they have the normative power to limit the discretionary powers of that authority and thus to counter unacceptable nuisance, but that discretionary power is certainly not restricted in a way that would lead to unacceptable nuisance being condoned at the level where development consent is granted. Those instruments work as a minimum threshold from which no deviation is possible if that would lead to unacceptable nuisance. In other words, they do not detract from the fact that no consent can be granted that runs counter to sound spatial planning or, more generally, that no consent can be granted that would entail unacceptable risks or nuisance for the environment. As regards Section 5.20.6 VLAREM II, it should be noted that the sectoral environmental conditions are autonomous to such an extent that they do not have to be imposed as a condition for consent in order to be enforceable.

45 The question is whether the abovementioned instruments have the normative power and the finality to be regarded as plans or programmes (Opinion in Joined Cases C-105/09 and C-110/09). The finality of both instruments is independent of the way in which a project will have to be executed, and the instruments mentioned do not indicate in any determinative sense to what extent a project can be approved as a framework for development consent. In the interpretation of the

Court of Justice, the 'required' nature of the plans and programmes must be read in conjunction with the term 'framework for future development consent' in Article 3 of the SEA Directive. According to the referring court, the finality (the will of the legislature), as evidenced by the parliamentary preparation of the Directive, is relevant to the assessment of the definition of 'a framework'.

46 The term 'framework' meets the aim of taking account of the environmental effects of any order which sets conditions for the granting of future development consent for projects, in the context of that order. A plan or programme sets a framework in so far as it influences any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources (Opinion in Joined Cases C-105/09 and C-110/09).

47 According to the referring court, it follows from the case-law that the setting of criteria and modalities for the approval and implementation of projects which are likely to have significant effects on the environment should be regarded as a large package and therefore as a plan or programme, where the environmental effects of the projects arise from those very criteria and modalities themselves. If, on the other hand, the criteria and modalities that have been laid down are unlikely to have a significant impact on the environment, there is no question of a large package and therefore no plan or programme.

48 The question which arises in that regard and in the context of what has been set out in relation to the operation of the two instruments and the minimum thresholds which are created by them, is whether the importance and scope of the standards in the present case are sufficient to warrant talk of 'a large package' of criteria and modalities and of a sufficiently coherent system and a sufficiently complete assessment framework for granting development consent. In other words, whether the scope of such standards is sufficiently broad for determining the conditions applicable to the sector concerned and the choices which are made through these standards, in particular with regard to the environment, and whether they serve to lay down the conditions under which future concrete projects for the construction and operation of wind farms may be permitted and whether compliance with them is a condition for the granting of consent. To put it yet another way: whether, by analogy with the *D'Oultremont* judgment, one is dealing here with a regulatory decision that concerns various provisions for the installation of wind turbines, which must be complied with when granting consent for the construction and operation of such installations, and the importance and scope of the standards are sufficient to warrant talk of instruments which are likely to have significant environmental effects within the meaning of Article 3(1) and (2) of the SEA Directive.

49 On the basis of the aforementioned case-law of the Court of Justice (Joined Cases C-105/09 and C-110/09, Case C-290/15, Case C-160/17, Case C-41/11, Case C-671 / 16, Case C-392/96), the referring court asks whether the instruments in question are likely to have a significant impact on the environment. According to the abovementioned case-law, the investigation that has to be carried out in order

to ascertain whether that condition has been fulfilled is limited to the question of whether it can be excluded on the basis of objective information that the plan or project in question will have significant effects on the site concerned.

50 In that sense, the question must also be asked whether an order such as that at issue in the present case entails an amendment to the legal reference framework which may have significant effects on the environment. After all, it is doubtful whether the 'possibility of environmental effects' (term used in the Opinion in Case C-160/17) [not available in English] is created through the present instruments or whether they are plans that are decisive for projects that are subject to the EIA Directive. It would be difficult with the instruments in question to undermine the requirement that the possibility of significant environmental effects should be the subject of an environmental impact assessment.

Referred questions 8 and 9: possibilities for the referring court to limit the effects of any incompatibility with the SEA Directive

51 It is clear from the judgment in Case C-379/15 (*Association France Nature Environnement*) that the Court of Justice has, on a case-by-case basis and by way of exception, intended to grant a national court the possibility of managing the effects of an annulment or declaration of illegality of a national provision that is deemed incompatible with Union law, for example by limiting it in time. This follows from the third paragraph of Article 3 TEU and Article 191(1) and (2) TFEU, which guarantee a high level of protection and improvement of the quality of the environment. The Court of Justice has attached certain conditions to the special modulation option.

52 The referring court points out that at first sight both the instruments in question contribute to the construction of wind turbines and are closely aligned to the objectives of European and Flemish legislation on renewable energy sources.

53 Under Article 36(1) and (2) of the DBRC Decree, the referring court only has the legal power to determine, at the request of one of the parties or on its own initiative, that the legal effects of the wholly or partially annulled individual order should remain wholly or partially in force or should remain provisionally in force for a period that it determines. That measure can only be ordered for exceptional reasons that justify a violation of the principle of legality, in a fully reasoned decision and after an adversarial debate. That decision may take into account the interests of third parties.

54 The referring court is therefore not competent to order the continued enforcement of the instruments concerned in the questions referred for a preliminary ruling which, depending on the answer to the questions referred, may have been adopted in an (ir)regular manner. Moreover, because of its limited normative power, the Omzendbrief is not a legal act that can be challenged before the referring court or the Raad van State. The referring court does not have the power to order the enforcement of the instruments in question, because it has no power to annul those

instruments, and the power to enforce cannot be exercised if the illegality of these instruments is only being assessed in interim proceedings by way of an exception.

55 However, under Flemish law, there is a possibility, based on case-law, not to attach any effects to the illegality on the basis of considerations originating in the principle of legal certainty. The referring court raises the question whether that enforcement possibility based on case-law could be applied from the point of view of European Union law, so that it could also temporarily continue to enforce the effects of the plan and/or programme in the event of a legality test in interim proceedings, which would otherwise lead to the standard being disapplied where 1) the requirements laid down in the judgment in Case C-379/15 have been met (and the measure affects European Union law) and 2) the conditions laid down in Article 36(1) and (2) of the DBRC Decree have been met (with the exception of the requirement that it be an order which has been annulled), whereby the exceptional nature of the continued enforcement is guaranteed and the period of enforcement can be limited to the time-frame strictly required to remedy the irregularity.

56 In that regard, the referring court observes that a simple declaration of inapplicability which it would be competent to issue on the basis of the abovementioned interim test of legality (with Article 159 GW as the legal basis), would, at first sight, have the consequence that the sectoral environmental conditions, aimed more at the wind turbines, would fall away. Moreover, that declaration of inapplicability could occur not only within the context of planning consent disputes, but also outside it, since the sectoral environmental conditions function as binding minimum standards for establishments and activities. Furthermore, the declaration of inapplicability of those standards would jeopardise the legality of all consents granted since 31 March 2012, in so far as they are decisively based on those instruments. The illegality of those consents could also be invoked in civil law cases or in criminal or administrative enforcement disputes. Such a declaration of inapplicability would also jeopardise the legal certainty of the assessment framework for wind turbines, and thus an objective in the field of renewable energy production.

57 The adoption and entry into force of a new provision of national law cannot, at first sight, prevent the adverse effects on the environment resulting from a declaration of inapplicability because, in principle, the adoption of a new order laying down sectoral standards for wind turbines cannot have retroactive effect, and the operation of existing wind turbines would be put at risk.

58 The declaration of inapplicability of the instruments in question would also, at first sight, have the effect of creating a legal vacuum with regard to the implementation of European Union law in the field of environmental protection which is even more damaging to the environment. In that regard, the referring court points out that the two instruments concerned are in line with the objectives of Directive 2009/28/ EC on the promotion of the use of energy from renewable sources and also give effect to its transposition in Flanders.

59 The declaration of inapplicability of the sectoral standards and the Omzendbrief could also lead to considerable legal uncertainty with regard to the enforceability of, inter alia, the environmental consents for the wind turbines already in operation.

60 The referring court also notes that, whereas it is not legally competent to continue to enforce the legality of the instruments in question on a temporary basis, it is competent, on the basis of Article 36(1) and (2) of the DBRC Decree, to continue to enforce the legal effects of the consent for a project on a temporary basis if it annuls that consent. However, as previously stated, a number of strict conditions apply. Therefore, if the answer of the Court of Justice to question 8 is in the negative, the referring court questions whether it would be able to continue to enforce temporarily the legal effects of an annulled individual order on the basis of the conditions imposed by Flemish law and European Union law for the modulation in time of a declaration of illegality because of conflict with the SEA Directive.

61 The continued enforcement of the legal effects of the instruments in question means that the legality of individual projects is not jeopardised and the Regional legislature is given the time strictly necessary to adopt new legislation that complies with the SEA Directive. The temporary continued enforcement of the legal effects of an individual project during the period of time strictly required by the Regional legislature in order to adopt new legislation that complies with the SEA Directive, does affect the legality of the individual project and obliges the applicant to submit a new application at the end of that time period. That approach also means that the referring court can only deal with the legal vacuum within the context of consent disputes on an ad hoc basis for each contested consent decision.