JUDGMENT OF THE COURT (First Chamber)

21 July 2011 *

In Case C-2/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Puglia (Italy), made by decision of 23 September 2009, received at the Court on 4 January 2010, in the proceedings

Azienda Agro-Zootecnica Franchini Sarl,

Eolica di Altamura Srl

v

Regione Puglia,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič (Rapporteur) and E. Levits, Judges,

* Language of the case: Italian.

Advocate General: J. Mazák,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 10 February 2011,

after considering the observations submitted on behalf of:

— Azienda Agro-Zootecnica Franchini Sarl and Eolica di Altamura Srl, by S. Profeta and C. Rucireta, avvocati,

— the Regione Puglia, by L.A. Clarizio, L. Francesconi and M. Liberti, avvocati,

— the European Commission, by K. Herrmann and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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), 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 (OJ 2001 L 283, p. 33), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Birds Directive').

2 The reference has been made in proceedings between Azienda Agro-Zootecnica Franchini Sarl ('Azienda Agro-Zootecnica Franchini') and Eolica di Altamura Srl ('Eolica di Altamura'), on the one hand, and the Regione Puglia (Apulia Region), on the other, concerning the refusal to authorise the location of wind turbines not intended for self-consumption on land situated within the confines of the Alta Murgia national park, a protected area classified as a site of Community importance ('SCI') and special protection area ('SPA') forming part of the Natura 2000 European Ecological Network ('the Natura 2000 network'), even though no prior assessment had been carried out as to the environmental impact of the project on the particular site concerned.

Legal context

European Union legislation

The Birds Directive

3 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.

4 Article 4(4) of the Birds Directive provides as follows:

'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.'

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

The Habitats Directive

6 The third recital in the preamble to the Habitats Directive provides as follows:

'… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; … the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities'.

7 Article 2 of the Habitats Directive is worded as follows:

'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics'.

8 Article 3(1) of the Habitats Directive is worded as follows:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network … shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [the Birds Directive].'

9 Article 4 of the Habitats Directive governs the procedure for establishing the Natura 2000 network and the designation of special areas of conservation by the Member States.

10 Article 6 of the Habitats Directive, which lays down conservation measures for such areas, provides as follows:

'…

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.

…'

11 Article 7 of the Habitats Directive provides as follows:

'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.'

Directive 2001/77

12 Recital 2 in the preamble to Directive 2001/77 states as follows:

'The promotion of electricity produced from renewable energy sources is a high [European Union] priority … for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion. …'

13 Article 1 of Directive 2001/77 states that the purpose of the directive is 'to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof'.

14 Article 6 of Directive 2001/77, entitled Administrative procedures', provides in paragraph 1 as follows:

'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:

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

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

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

Directive 2009/28

15 Article 13 of Directive 2009/28, entitled 'Administrative procedures, regulations and codes', provides in paragraph 1 as follows:

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

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

…

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

(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;

…

(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.'

16 Article 26 of Directive 2009/28 repealed, with effect from 1 April 2010, Article 2, Article 3(2) and Articles 4 to 8 of Directive 2001/77. Directive 2001/77 will be repealed in its entirety with effect from 1 January 2012.

17 Article 27(1) of Directive 2009/28 provides as follows:

'Without prejudice to Article 4(1), (2) and (3), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 5 December 2010.

…'

National legislation

18 Directive 2001/77 was transposed into Italian law by Decreto Legislativo 29 dicembre 2003 No 387 (Legislative Decree No 387 of 29 December 2003) (GURI No 25 of 31 January 2004, Ordinary Supplement to GURI No 17), as amended by legge 24 dicembre 2007, No 244 (Law No 244 of 24 December 2007) (GURI No 300 of 28 December 2007, Ordinary Supplement to GURI No 285), Article 12 of which transposes Article 6 of Directive 2001/77, concerning authorisation procedures for plants producing energy from renewable sources.

19 Article 12 of Legislative Decree No 387, entitled 'Streamlining and simplification of authorisation procedures', provides as follows:

'…

The construction and operation of plants producing electricity from renewable sources … shall require a single authorisation, issued by the region or the provinces to which powers have been delegated, in compliance with the regulations in force concerning environmental protection and the conservation of the landscape and historical and artistic heritage, which, where appropriate, shall constitute a derogation from urban development legislation …

…

Pursuant to the Guidelines [for the conduct of the procedure referred to in paragraph 3], the regions may identify areas and sites which are not suitable for certain types of installation …'

20 Article 1(1226) of Finance Law No 296 of 27 December 2006 (Legge Finanziaria per 2007) (GURI No 299 of 27 December 2006, Ordinary Supplement to GURI No 244) confers upon the Minister for the Environment and the Protection of the Land and Sea the power to lay down by decree minimum uniform criteria on the basis of which the regions are required to adopt conservation measures.

21 By Decree of the Ministry of the Environment and the Protection of the Land and Sea of 17 October 2007 entitled 'Minimum uniform criteria for establishing conservation measures in relation to special areas of conservation (SACs) and special protection areas (SPAs)' (GURI No 258 of 6 November 2007) ('the Decree of 17 October 2007'), the regions and autonomous provinces were placed under an obligation to prohibit the construction of new wind power plants not intended for self-consumption in all SPAs.

22 Article 5(1) of the Decree of 17 October 2007, entitled 'Minimum uniform criteria for establishing conservation measures for all SPAs', provides as follows:

'In relation to all SPAs, the regions and autonomous provinces shall introduce, by means of the measure referred to in Article 3(1) of this Decree, the following prohibitions:

…

(1) the construction of new wind power plants, except for plants for which, at the date of adoption of the present measure, the authorisation procedure has already commenced as a result of the submission of the project. The competent organisms must evaluate the implications of the project, taking into account the biological cycles of the species in respect of which the site was designated, following consulta-

tion with the INFS (National Institute for Wild Fauna). Replacement and modernisation efforts, including technological efforts, which do not entail an increase in the impact on the site in the light of the SPA's conservation objectives, as well as installations intended for self-consumption with a total capacity not exceeding 20 kW shall also be exempted …'

Legislation of the Regione Puglia

23 Article 2 of Regional Law No 31 of 21 October 2008 laying down rules for the production of energy from renewable sources and the reduction of polluting emissions, and environmental rules ('Regional Law No 31') provides as follows:

'…

(6) In accordance with Articles 6 and 7 of [the Habitats Directive], together with Articles 4 and 6 of the implementing regulation provided for by Decree No 357 of the President of the Republic 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 … Natura 2000 network …

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

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

24 Eolica di Altamura states that it acquired the rights from the company Alburni Srl relating to a project for the construction of a wind farm not intended for self-consumption on land belonging to Azienda Agro-Zootecnica Franchini and situated within the confines of the Alta Murgia National Park, a protected area classified as SCI and SPA 'pSIC/ZPS IT 9120007 Murgia Alta'.

25 Both the application seeking prior confirmation that there was no objection to the project on the part of the entity responsible for the park and the application for environmental compatibility submitted to the Regione Puglia were rejected by decision of 1 September 2006 of the entity responsible for the park and by decision of 4 July 2007 of the Regione Puglia respectively.

26 The reasons given for the Regione Puglia's refusal made reference to the relevant regional provisions under which, first, the SCIs and SPAs provided for by the Habitat and Birds Directives were regarded as 'totally inappropriate' for the purpose of choosing the location of wind turbines and, second, in the absence of a regulatory plan for wind power plants, the SCIs and SPAs in question were regarded as 'unsuitable'.

27 Azienda Agro-Zootecnica Franchini and Eolica di Altamura brought an action before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Apulia) (Italy) against those decisions refusing to grant authorisation and against the relevant regulatory provisions of the Regione Puglia.

28 By decision of 17 September 2008, that court upheld the application and, consequently, annulled the regulatory provisions by which the Regione Puglia had imposed an absolute prohibition on the construction of wind power plants in the SCIs and SPAs provided for by the Habitats and Birds Directives.

29 However, while the proceedings which concluded with that decision were pending, the Regione Puglia approved Regional Regulation No 15 of 18 July 2008, which was similarly directed at conservation measures within the terms of those directives and Decree No 357.

30 In the main proceedings pending before the referring court, Azienda Agro-Zootecnica Franchini and Eolica di Altamura therefore seek annulment of Article 5(1)(n), 5(4) and 5(4a) of Regional Regulation No 15, under which, in essence, it is forbidden to construct new wind turbines within a 500-meter buffer zone of any of the SPAs of which the Natura 2000 network is composed. Those companies allege, inter alia, infringement of the principles laid down in Directive 2001/77.

31 The Regione Puglia contends that the action should be dismissed as inadmissible or unfounded.

32 During the course of the main proceedings, Regional Law No 31 entered into force. Article 2(6) of that law prohibits the construction of new wind power plants not intended for self-consumption on all Natura 2000 network sites, that is to say, including on sites of Community importance designated in accordance with the Habitats Directive.

33 The Tribunale amministrativo regionale per la Puglia takes the view that Article 2(6) of Regional Law No 31 is immediately applicable to the wind farm project submitted by Azienda Agro-Zootecnica Franchini and Eolica Altamura. That provision applies to the application for authorisation and environmental compatibility submitted by those companies from the date of entry into force of Regional Law No 31 (that is to say, as from 8 November 2008), independently of any specific assessment as to environmental impact or effect.

34 In those circumstances, the Tribunale amministrativo regionale per la Puglia decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 1(1226) of Law No 296 …, in conjunction with the first paragraph of Article 5 of the … Decree of 17 October 2007 and with Article 2(6) of [Regional] Law No 31 …, compatible with [European Union] law, and in particular with the principles which may be inferred from Directives 2001/77… and 2009/28… and the [Birds and Habitats Directives], in so far as those provisions absolutely prohibit, without distinction, the location of wind turbines not intended for self-consumption in the SCIs and SPAs comprising the "Natura 2000" ecological network, instead of requiring an appropriate environmental impact assessment to be carried out to analyse the impact of an individual project on the particular site affected?'

The question referred

35 As a preliminary point, it must be borne in mind 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 European Union law, it does have jurisdiction to supply the national court with a ruling on the interpretation of European Union law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, inter alia, Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraph 17; Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 18; and Case C-439/06 *citiworks* [2008] ECR I-3913, paragraph 21).

36 From that perspective, the referring court must be regarded as asking the Court, in essence, whether the Habitats and Birds Directives and Directives 2001/77 and 2009/28 must be interpreted as precluding legislation which prohibits the location of wind

turbines not intended for self-consumption on sites forming part of the Natura 2000 network without any prior assessment of the environmental impact of the project on the specific site concerned.

The interpretation of the Habitats and Birds Directives

37 In order to answer the question referred, it is necessary to examine whether the Birds and Habitats Directives, in particular Article 6(3) of the Habitats Directive, preclude legislation such as that at issue in the main proceedings.

38 According to the applicant companies, that type of legislation is at variance with the scheme established by the Habitats and Birds Directives. They submit that the protection regime established by those directives does not prohibit all activity within the areas forming part of the Natura 2000 network but simply makes authorisation of such activities conditional upon a prior environmental impact assessment being carried out under Article 6(3) of the Habitats Directive. Legislation such as that at issue in the main proceedings, which prohibits in absolute terms the location of new wind turbines on sites forming part of that network, without any requirement for a prior assessment of the impact of the project or plan on a particular site, would therefore, they submit, have the effect of rendering the scheme established by the Habitats and Birds Directives completely redundant.

39 The European Commission and the Regione Puglia take issue with that line of argument. They maintain that Article 6(3) of the Habitats Directives is applicable only if a plan or project is forbidden in an area forming part of the Natura 2000 network. They observe in that connection that the fact that certain activities may be author-

ised within sites forming part of that network does not, however, mean that such interventions must always be proceeded with. The Commission also points out that Article 193 TFEU allows Member States to maintain or introduce, subject to certain conditions, more stringent environmental protective measures.

40 It should be noted, first, that, as observed by the parties to the main proceedings, the system of protection afforded by the Habitats and Birds Directives to sites forming part of the Natura 2000 network does not prohibit all human activity within those sites but simply makes authorisation of such activity conditional upon a prior assessment of the environmental impact of the project concerned. Thus, the first sentence of Article 6(3) of the Habitats Directive – applicable, in accordance with Article 7 of that directive, to areas classified pursuant to Article 4(1) of the Birds Directive or similarly recognised under Article 4(2) thereof – provides that 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, is to be subject to an assessment of its implications for the site in view of the site's conservation objectives.

41 Moreover, according to established case-law, in order for the mechanism for the protection of the environment provided for in Article 6(3) of the Habitats Directive to be triggered, there must be a probability or a risk that a plan or project will have a significant effect on the site concerned (see, inter alia, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 40 and 43, and Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131, paragraph 33).

42 It is therefore clear that the European Union legislature intended to create a protection mechanism which is triggered only if a plan or project represents a risk for a site forming part of the Natura 2000 network.

43 It is in the light of those considerations that it is necessary to determine whether the Habitats and Birds Directives preclude national and regional legislation such as that at issue in the main proceedings.

44 It is apparent from the file before the Court that that legislation prohibits the construction of new wind turbines not intended for self-consumption in SCIs and SPAs forming part of the Natura 2000 Network. That prohibition extends to a 200-meter buffer zone.

45 The effect of that legislation is that any plan or project for a new wind power plant on one of those sites is automatically refused, without any requirement for an assessment of the environmental impact of the individual plan or project on the particular site.

46 It is therefore clear that such legislation establishes a system for protecting sites forming part of the Natura 2000 network which is more stringent than that established by the Habitats and Birds Directives.

47 Consequently, as the Advocate General observed at point 33 of his Opinion, it is necessary, in order to answer the referring court's question, to determine whether, and if so under what conditions, European Union law permits Member States to introduce stricter national protective measures than those laid down by those directives.

48 It should be noted in this regard that European Union rules do not seek to effect complete harmonisation in the area of the environment (see, inter alia, Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 46, and Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 27).

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

50 There is no provision in the Habitats Directive that is equivalent to Article 14 of the Birds Directive. Nevertheless, since that directive was adopted on the basis of Article 192 TFEU, it should be noted that Article 193 TFEU provides that Member States may adopt more stringent protective measures. Under that provision, such measures are simply required to be compatible with the FEU Treaty and notified to the Commission. The Court has thus held 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' (see *Deponiezweckverband Eiterköpfe*, paragraph 58).

51 It is apparent from both the file submitted to the Court and the parties' arguments at the hearing that the essential purpose of the national and regional legislation at issue in the main proceedings is the conservation of the areas forming part of the Natura 2000 network, and in particular the protection of the habitats of wild birds against the dangers which wind turbines may represent for them.

52 It follows that legislation such as that at issue in the main proceedings which, with a view to protecting wild bird populations inhabiting protected areas forming part of the Natura 2000 network, imposes an absolute prohibition on the construction of new wind turbines in those areas, pursues the same objectives as the Habitats Directive. To the extent that it provides for a stricter system of protection than that established by Article 6 of that directive, it therefore constitutes a more stringent protective measure within the meaning of Article 193 TFEU.

53 It is, admittedly, not apparent from the documents submitted to the Court that the Italian Government communicated those measures to the Commission in accordance with Article 193 TFEU. Nevertheless, it should be noted that, while that provision requires Member States to communicate to the Commission the more stringent protective measures which they intend to maintain or introduce in environmental matters, it does not make implementation of the planned measures conditional upon agreement by the Commission or its failure to object. In that context, as the Advocate General noted at point 38 of his Opinion, neither the wording nor the purpose of the provision under examination therefore provides any support for the view that failure by the Member States to comply with their notification obligation under Article 193 TFEU in itself renders unlawful the more stringent protective measures thus adopted (see, by analogy, Case 380/87 *Enichem Base and Others* [1989] ECR 2491, paragraphs 20 to 23; Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraph 100; and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, paragraphs 60 to 63).

54 The fact none the less remains that the more stringent protective measures put in place by the national and regional legislation at issue in the main proceedings must also comply with the other provisions of the FEU Treaty.

55 The applicants in the main proceedings have submitted in this regard that the objective of developing new and renewable forms of energy, as established for European Union policy by Article 194(1)(c) TFEU, should take precedence over the environmental-protection objectives pursued by the Habitats and Birds Directives.

56 Suffice it to observe in that connection that Article 194(1) TFEU states that European Union policy on energy must have regard for the need to preserve and improve the environment.

57 Moreover, a measure such as that at issue in the main proceedings, which prohibits only the location of new wind turbines not intended for self-consumption on sites forming part of the Natura 2000 network, with the possibility of exemption for wind turbines intended for self-consumption with a capacity not exceeding 20 kW, is not, in view of its limited scope, liable to jeopardise the European Union objective of developing new and renewable forms of energy.

58 It must therefore be concluded that the Birds and Habitats Directives, in particular Article 6(3) of the Habitats Directive, do not preclude a more stringent national protective measure which imposes an absolute prohibition on the construction of wind turbines not intended for self-consumption within areas forming part of the Natura 2000 network, without any requirement for an assessment of the environmental impact of the individual project or plan on the site concerned forming part of that network.

Interpretation of Directives 2001/77 and 2009/28

59 It is necessary to examine whether Directives 2001/77 and 2009/28 must be interpreted as precluding legislation such as that at issue in the main proceedings.

60 As regards, first, Directive 2001/77, Article 1 thereof states that the purpose of the directive is to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity and to create a basis for a future Community framework thereof.

61 To that end, Article 6(1) of Directive 2001/77 requires Member States to evaluate the legislative and regulatory framework with regard to administrative procedures, in particular authorisation procedures, which are applicable to production plants for electricity produced from renewable energy sources. The objectives of that evaluation procedure are to streamline and reduce administrative barriers and to ensure that the rules applicable to that type of production plant are objective, transparent and non-discriminatory.

62 It is apparent, however, that the referring court entertains doubts as to whether the national and regional legislation at issue in the main proceedings complies with those criteria. At the hearing, the applicants in the main proceedings also argued that such legislation discriminates against wind turbines by comparison with other industrial activities which are subject to the rules requiring prior assessment laid down in Article 6(3) of the Habitats Directive.

63 In that connection, it should be pointed out, first, that a total ban on the construction of new wind turbines in areas forming part of the Natura 2000 network, deriving from a legislative provision, is not contrary to the objectives of streamlining and reducing administrative barriers and, in principle, constitutes a sufficiently transparent and objective procedure.

64 Next, as to whether the measure is discriminatory, it should be recalled that the prohibition of discrimination laid down in Article 6(1) of Directive 2001/77 is simply a specific expression of the principle of equality, which is one of the fundamental principles of European Union law and requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 67; Case C-303/05 *Advocaten voor de Wereld*

[2007] ECR I-3633, paragraph 56; and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

65 In the present case, it is for the referring court to determine whether the difference in treatment between the projects for the construction of wind turbines and projects relating to other industrial activities proposed for sites forming part of the Natura 2000 network may be justified on the basis of objective differences between those two kinds of project.

66 In that context, the referring court must have regard to the particular features of wind turbines, taking account in particular of the dangers which they may represent for birds, such as the risk of collision, disturbances and displacement, barrier effects forcing birds to change direction and habitat loss or degradation.

67 As regards, second, Directive 2009/28, Article 13(1) thereof provides that '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 … are proportionate and necessary'. In particular, Member States are required to take appropriate steps to ensure that those rules are 'objective, transparent, proportionate, do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies'.

68 It is true, as pointed out by the Commission in its observations, that the period for transposition of Directive 2009/28, which ended on 5 December 2010, had not yet expired at the date on which the order for reference was made, that is to say, 23 September 2009.

69 However, as the Court has already held and in so far as Directive 2009/28 had already entered into force at the time of the facts in the main proceedings, the interpretation of that directive sought by the referring court must be regarded as being useful to that court (see, to that effect, Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraphs 29 to 41).

70 First, it follows from the case-law that not only the national provisions specifically intended to transpose a directive but also, from the date of that directive's entry into force, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within the scope of that directive (see, to that effect, Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 29).

71 Second, in any event, it follows from established case-law that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 67).

72 For those reasons, contrary to the Commission's submission, it is necessary to reply to the part of the referring court's question concerning the interpretation of Directive 2009/28, in particular in the light of the principle of proportionality which Article 13 of that directive introduces with regard to administrative procedures for the authorisation of plants producing renewable energy.

73 In this regard, the principle of proportionality referred to in Article 13 of Directive 2009/28, which is one of the general principles of European Union law, requires that measures adopted by Member States in this field 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 (see, inter alia, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41).

74 It is for the referring court to determine whether the national measure at issue is proportionate. That court must take account in particular of the fact that the legislation at issue in the main proceedings is confined to wind power plants and does not extend to other forms of renewable energy production, such as photovoltaic plants. Moreover, the prohibition applies solely to new wind turbines for commercial purposes, as wind power plants intended for self-consumption and having a capacity not exceeding 20 kW are excluded from the scope of that prohibition.

75 It follows from all of the foregoing that the Habitats and Birds Directives and Directives 2001/77 and 2009/28 must be interpreted as not precluding legislation which prohibits the location of wind turbines not intended for self-consumption on sites forming part of the Natura 2000 network, without any requirement for a prior assessment of the environmental impact of the project on the site specifically concerned, on condition that the principles of non-discrimination and proportionality are respected.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, 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 and 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 must be interpreted as not precluding legislation which prohibits the location of wind turbines not intended for self-consumption on sites forming part of the Natura 2000 European Ecological Network, without any requirement for a prior assessment of the environmental impact of the project on the site specifically concerned, on condition that the principles of non-discrimination and proportionality are respected.

[Signatures]