Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
of 14 July 2016 [1]

Case C-290/15

Patrice D'Oultremont and Others
v
Région wallonne

(Request for a preliminary ruling from the Conseil d'État (Council of State, Belgium))

(Environment — Directive 2001/42/EC — Plan and programme — Definition — Construction of wind power installations)

I – **Introduction**

1. Expanding the use of wind power for energy generation is a controversial notion which is met with strong resistance in some quarters. Nevertheless, it is a project with which the European Union and many Member States, faced with the threat of climate change, are pressing ahead.

2. The present dispute arose from the fact that the adoption of certain provisions relating to wind power installations in the Walloon Region of Belgium was not preceded by an environmental assessment including public participation pursuant to the directive on the assessment of the effects of certain plans and programmes on the environment [2] ('the SEA (Strategic Environmental Assessment) Directive'). This is regrettable not least because such a procedure can serve as a forum for disputes concerning projects of the kind mentioned above and may help bring greater objectivity to the debate.

3. It was a few years ago that the Court, in the judgment in *Terre wallonne and Inter-Environnement Wallonie*, examined the content of the SEA Directive for the first time. [3] A comprehensive body of case-law relating to that directive has already grown up since then. [4] The present request for a preliminary ruling nonetheless raises once again the issue that was central to that first case, that is to say the meaning of the two terms 'plans and programmes'. The Court is thus asked to decide whether an order which, inter alia, lays down rules governing noise generation and shadow flicker arising from wind power installations constitutes a plan or a programme within the meaning of the SEA Directive and may therefore require an environmental assessment.

4. So far in the present proceedings before the Court, however, no consideration has been given to the fact that a further judgment, as well as containing many important findings in relation to other areas of EU environmental law, has already provided an abstract definition of the meaning to be given to a 'plan or programme' within the meaning of the SEA Directive. According to that definition, a 'plan or

1 — Original language: German

2 — Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 (OJ 2001 L 197, p. 30).

3 — Judgment of 17 June 2010 in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355).

4 — The Court has since replied to questions concerning that directive in nine other requests for a preliminary ruling. Moreover, in addition to the present case, there are at least two further requests for a preliminary ruling pending.

programme' is a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny.[5] It therefore remains only to be examined whether that definition needs to be further refined and whether it is relevant in the present case.

II – **Legal context**

A – *International law*

5. EU environmental assessment law is closely linked to various international agreements.

1. The Espoo Convention

6. The Espoo Convention on Environmental Impact Assessment in a Transboundary Context[6] was signed in 1991 and approved on behalf of the then European Community in 1997.[7]

7. The assessment of plans and programmes is dealt with in Article 2(7):

'Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.'

2. The Kiev Protocol

8. The European Union has been a Contracting Party to the Kiev Protocol[8] ('the 'Kiev Protocol') since 2008.[9] The provisions of that Protocol are largely the same as those of the SEA Directive and are transposed by that directive.[10]

9. Article 13 of the Kiev Protocol deals with the preparation of policies and legislation but has no corresponding provision in the SEA Directive.

'1. Each Party shall endeavour to ensure that environmental, including health, concerns are considered and integrated to the extent appropriate in the preparation of its proposals for policies and legislation that are likely to have significant effects on the environment, including health.

2. …'

5 — Judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 95).

6 — OJ 1992 C 104, p. 7.

7 — According to the Proposal for a Council Decision on the approval, on behalf of the European Community, of the first and the second amendments to the UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (COM(2007) 470 final), the Community approved that convention, on 27 June 1997, by way of an unpublished Council Decision which appears to be dated 15 October 1996 (see the proposal for the first Council Decision in OJ 1992 C 104, p. 5).

8 — OJ 2008 L 308, p. 35.

9 — Council Decision 2008/871/EC of 20 October 2008 on the approval, on behalf of the European Community, of the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 33).

10 — See the Declaration by the European Community in accordance with Article 23(5) of the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (OJ 2008 L 308, p. 34).

3. The Aarhus Convention

10. The 1998 Convention on access to information, public participation in decision-making and access to justice in environmental matters[11] ('the Aarhaus Convention') also touches on environmental assessment.

11. Article 6 of the Aarhus Convention contains provisions concerning public participation in the authorisation of activities.[12] Articles 7 and 8 deal with public participation concerning plans, programmes, policies and legislation.

12. Account is to be taken in particular of the fourth sentence of Article 7 of the Aarhus Convention, concerning policies:

'To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.'

13. The first sentence of Article 8 of the Aarhus Convention provides that each Contracting Party is to strive 'to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment'.

B – *EU law*

1. The SEA Directive

14. The objectives of the SEA directive are set out in particular in Article 1:

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

15. Plans and programmes are defined in Article 2(a):

'For the purposes of this Directive

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

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

— which are required by legislative, regulatory or administrative provisions.'

11 — OJ 2005 L 124, p. 4, approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

12 — See, in that regard, my Opinion in *Lesoochranárske Zoskupenie* (II) (C-243/15, EU:C:2016:491, points 64 to 85).

16. Article 3 determines which plans and programmes are to be subject to assessment. Paragraphs 1, 2 and 4 thereof are of particular relevance:

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

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

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

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

3. …

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.'

17. Annex 1 determines what information is to be included in the environmental report. Of particular interest is point (c), which states that the report must set out the environmental characteristics of areas likely to be significantly affected.

18. Annex II defines the criteria for determining the likely significance of effects referred to in Article 3(5) of the SEA Directive. Account is to be taken in particular of the characteristics of the effects and of the areas likely to be affected, as required in accordance with the fifth to seventh indents of Annex II(2):

— 'the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),

— the value and vulnerability of the area likely to be affected due to:

  — special natural characteristics or cultural heritage,

  — exceeded environmental quality standards or limit values,

  — intensive land-use,

— the effects on areas or landscapes which have a recognised national, Community or international protection status.'

2. The EIA Directive

19. The EIA Directive [13] replaced Directive 85/337/EEC and, in accordance with Annex II(3)(i) thereto, covers 'Installations for the harnessing of wind power for energy production (wind farms)'.

C – *Belgian law*

20. The Regulations of the Walloon Government of 13 February 2014 laying down sectoral conditions applicable to wind farms of a total power greater than or equal to 0.5 MW ('the contested order') relate essentially to the operation of wind turbines (access, inspections, maintenance), the prevention of accidents and fires (inter alia, the stopping of the wind turbine), noise, shadow flicker from rotating blades, the allowable magnetic field, the restoration of the site in the event that the wind turbines are decommissioned and the provision of financial collateral.

21. The noise limit values vary according to which 'town and country planning' zone is concerned (such as, for example, a residential zone, an agricultural zone or zones of economic activity). The contested order sets a permitted night-time noise limit which, other than in summer and in residential zones and rural residential zones, is not as strict as the general conditions applicable to all installations.

III – **Facts and the request for a preliminary ruling**

22. The Walloon Government has adopted various initiatives relating to wind turbines and, in that connection, also published an environmental report on which members of the public were able to submit their views. So far, however, none of those initiatives has resulted in the enactment of binding legislation.

23. Instead, the Walloon Government adopted the contested order, which the applicants in the main proceedings (Mr D'Oultremont and others) are challenging before the Belgian Conseil d'État (Council of State). The matter in dispute is, in particular, whether that order ought to have been the subject of a strategic environmental assessment.

24. In the course of those proceedings, the Council of State has therefore referred the following question to the Court:

'Are Articles 2(a) and 3(2)(a) of the SEA Directive to be interpreted to the effect that a regulatory order containing various provisions on the installation of wind turbines, including measures on safety, inspection, site restoration and financial collateral and permitted noise levels set having regard to town and country planning zones, such provisions setting a framework for the grant of administrative consent allowing a developer to install and operate installations which are automatically subject under national law to an assessment of their effects on the environment, must be considered to be a 'plan or programme' within the meaning of those articles?'

25. Written observations have been submitted and oral argument presented by Mr D'Oultremont and others, the Fédération de l'Énergie d'origine renouvelable et alternative ASBL (Belgian Federation for renewable and alternative energies, 'EDORA'), the Kingdom of Belgium, the Kingdom of the Netherlands and the European Commission. The French Republic also participated in the hearing which took place on 7 April 2016.

13 — Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as last amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1).

IV – **Analysis**

26. By its request for a preliminary ruling, the Council of State wishes to ascertain whether an order which contains provisions on the construction and operation of wind power installations and thus prescribes a framework for the grant of development consents for those installations constitutes a plan or a programme within the meaning of the SEA Directive.

27. Article 2(a) of the SEA Directive states that, for the purposes of that directive, 'plans and programmes' means plans and programmes as well as any modifications to them which are subject to preparation and/or adoption by an authority or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.

28. As I have already stated in relation to another case, that provision does not define those two terms but merely qualifies them: for the purposes of the directive, the expression 'plans and programmes' refers to plans and programmes which satisfy certain — additional — requirements. [14]

29. Those two terms, which are central to the SEA Directive, are also not comprehensively defined in the Court's first judgment relating to that directive, in *Terre wallonne and Inter-Environnement Wallonie*, which was also given in response to a request from the Belgian Council of State. The Court confined itself rather to stating that action programmes under the Nitrates Directive, [15] as a result both of the characteristics they display and of the actual intention of the EU legislature, are 'plans and programmes'. [16]

30. The reason for such restraint in the definition of the two terms 'plans and programmes' lies in the fact that, although those terms are used to describe a large number of different measures both in connection with the SEA Directive and elsewhere in EU law, their specific meaning in the future application of the SEA Directive was as yet impossible to foresee with any certainty, at least at that time. The fact that, in Directive 2003/35/EC, [17] the EU legislature had already indicated that action programmes under the Nitrates Directive were plans and programmes within the meaning of the SEA Directive, [18] did not make defining those terms any easier either.

31. The request for a preliminary ruling and the parties to the proceedings are now calling for that loophole to be closed, however, and, with that in mind, have discussed various possible definitions.

32. The fact that, in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, the Court, relying on a finding concerning the objectives of the SEA Directive in the judgment in *Inter-Environnement Bruxelles and Others*, [19] has since defined the meaning to be ascribed to the expression plan or programme has so far been overlooked. According to that finding, a plan or programme is a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny ('the Court's definition'). [20]

14 — See my Opinion in Joined Cases *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120, point 38).

15 — Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1).

16 — Judgment of 17 June 2010 in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, paragraph 42).

17 — Directive of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

18 — See my Opinion in Joined Cases *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120, point 26).

19 — Judgment of 22 March 2012 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 30).

20 — Judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 95).

33. Furthermore, the Court has held that, given the (general) objective of the SEA Directive, which consists in providing for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly. [21]

34. Where there is any doubt, the distinction between the two terms in question and other measures should therefore be drawn by reference to the specific objective laid down in Article 1 of the SEA Directive to the effect that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment. [22]

35. In accordance with the Court's definition, the contested order lays down criteria and detailed rules for the development of wind power installations and subjects the implementation of an unspecified number of wind power projects to rules and procedures for scrutiny. That its provisions may have significant environmental effects is obvious. For that reason alone, it would seem highly advisable for that order to be subject to an environmental assessment including public participation. In particular, on a broad interpretation of the conditions for the application of the SEA Directive, the foregoing factors indicate that the contested order is to be regarded as a plan or programme.

36. It is clear from the request for a preliminary ruling, however, that the Council of State considers that a plan or programme may have to relate to a more strictly circumscribed geographical area (see Section A) and/or must embody a comprehensive and coherent approach, providing practical and coordinated arrangements (see Section B). In addition, some of the parties to the proceedings have called for a plan or programme to be distinguished from other more general provisions (see Section C).

A – *The need for the measure to be area-specific*

37. In its reasoning concerning the need for the measure constituting a plan or programme to be area-specific, the Council of State relies on provisions contained in the Annexes to the SEA Directive. In accordance with those provisions, the environmental report to be prepared as part of an environmental assessment must specify the environmental characteristics of areas likely to be significantly affected (Annex I(c)). Area-specific factors must also be taken into consideration in the assessment of whether there are likely to be significant environmental effects (fifth to seventh indents of Annex II(2)). Land use plans were presumably the blueprint for those provisions.

38. To much the same effect, the Court's definition of the terms 'plans and programmes' could be taken to mean that a plan or programme must relate to a specific area, since the measure in question must be concerned with the 'development of [in German, *the*] land'. [23]

39. On such an interpretation, it is doubtful whether the contested order would exhibit an adequate connection with specific areas. Its primary connection with a specific area lies in the fact that it applies to the entire Walloon Region. Only the noise limit values contained in that order exhibit a closer connection with specific areas because they apply to different types of town and country planning zones.

21 — Judgments of 22 March 2012 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 37), and 10 September 2015 in *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 50).

22 — See, to that effect, judgments of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 40), and 22 March 2012 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 30).

23 — Emphasis added.

40. However, neither the SEA Directive nor the Court's definition give any indication of the criteria to be used to determine whether an area is sufficiently delimited to constitute the subject of a plan or programme.

41. Moreover, on closer examination, the area-specific requirements laid down in the annexes can also reasonably be applied to provisions which, like the contested order, apply to a whole region or to certain types of area within a region.

42. This is particularly apparent in the case of the noise limit values. These are obviously based on assumptions about the sensitivity of each area type, which correspond in turn to particular zones within the Walloon Region, such as, for example, all residential areas. Those assumptions can be presented and examined as part of the assessment of the possible environmental effects on those areas.

43. Ultimately, the same is true of the provisions applicable to the entire Walloon Region because they are based on considerations with respect to environmental effects and sensitivities within that region which can also be presented and made the subject of debate. The process of preparing such provisions could (and should) include forecasting where in the region as a whole such projects can be expected to arise and, on that basis, what impact those provisions will have. Ideally, the consideration and discussion of these factors as part of the public participation exercise will have the effect of improving the proposed provisions, to the extent, for example, that, in the case of certain places, such projects are either prohibited or made subject to particularly stringent requirements, while, elsewhere, the applicable requirements can be relaxed.

44. For that reason, moreover, there are parallels between the contested order and the action programmes, recognised as plans or programmes, provided for in the Nitrates Directive, which, although they must in principle be drawn up only for 'vulnerable zones',[24] can nonetheless be applied to the entire territory of a Member State, in accordance with Article 3(5) of that directive.

45. I therefore propose that the definition of the terms 'plans and programmes' within the meaning of the SEA Directive be clarified to the effect that they do not have to relate to the development of a specific area but [may relate to] the development of areas or land in general.

B – *The completeness of the prescribed framework for projects*

46. The request for a preliminary ruling also supports the inference that, while the contested order relates to a specific economic sector, that is to say the operation of wind parks, it does not set out a complete framework for that sector, in the sense of a full set of coordinated measures. The Council of State is therefore unsure whether measures which prescribe only parts of a framework for the grant of consents for projects can be regarded as a plan or a programme.

47. The need for a complete framework might be supported by the Court's definition of 'plans and programmes'. That definition refers to [in German, *the*] 'criteria and detailed rules for the development'.[25] This could be taken to mean that, in principle, all of the criteria and detailed rules for the development must be included in the plan or programme, in other words that a complete framework must be prescribed.

24 — Judgment of 17 June 2010 in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, paragraphs 36 and 47).

25 — Emphasis added.

48. Strictly speaking, however, that question has less to do with the interpretation of the terms 'plans and programmes' within the meaning of Article 2(a) of the SEA Directive and more to do with the question of whether such a measure is subject to an environmental assessment under Article 3(2)(a) or Article 3(4). For those provisions stipulate that the plan or programme in question must set the framework for the future grant of development consents for projects if it is to be subject to environmental assessment. The scheme of the SEA Directive therefore permits plans and programmes which do not prescribe a framework, on the understanding, however, that, by extension, they do not therefore require an environmental assessment.

49. This is confirmed by Article 3(2)(b) of the SEA Directive. That article concerns a second group of plans and programmes which, although subject to an environmental assessment, do not necessarily prescribe a framework for the grant of development consents for projects. These are plans or programmes which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6(3) of the Habitats Directive.

50. Irrespective of whether the need to prescribe a framework is linked to the terms 'plans and programmes' or whether this is a separate condition of certain obligations to carry out an environmental assessment, however, it must be clarified whether that framework must be complete. After all, without that clarification, the Council of State will be unable to give judgment in the dispute, pending before it, as to whether the contested order requires an environmental assessment.

51. In that connection, Belgium and EDORA take the view that a plan or programme must embody a comprehensive and coherent approach, providing practical and coordinated arrangements. What is more, the Court has indeed held that this is one of the characteristics of action programmes under the Nitrates Directive, when it classified them as plans and programmes within the meaning of the SEA Directive. [26]

52. However, the Court's finding to that effect relates only to the action programmes that were the subject of those proceedings and is clearly drawn from the older case-law concerning the requirements for water programmes, to which Belgium also refers. [27]

53. The EU law requirements applicable to plans and programmes intended to achieve specific objectives laid down in EU law derive, of course, from those very objectives themselves. In the case of action programmes under the Nitrates Directive, for example, they derive from the objective of limiting the land application of nitrates. Such measures must be framed in such a way as to ensure that the objectives in question can be achieved. As a rule, this requires that the measures embody a comprehensive and coherent approach, providing practical and coordinated arrangements.

54. The definition of plans and programmes within the meaning of the SEA Directive, on the other hand, is not dictated by the objectives of the measure in question. It must be governed by the objective of the SEA Directive, which is to ensure that decisions on plans or programmes which are liable to have significant effects on the environment are first subject to an environmental assessment. [28] It makes no difference to the objective thus pursued by the SEA Directive what objective is pursued by the measure concerned or whether, with the former objective in mind, that measure embodies a comprehensive and coherent approach, providing practical and coordinated arrangements, or is concerned only with a particular aspect of a problem area.

26 — Judgment of 17 June 2010 in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, paragraph 47).

27 — Judgment of 21 January 1999 in *Commission* v *Belgium* (C-207/97, EU:C:1999:17, paragraph 40). See also the judgment, cited by the Netherlands, of 4 July 2000 in *Commission* v *Hellenic Republic* (C-387/97, EU:C:2000:356, paragraph 76), concerning waste disposal planning measures.

28 — Judgments of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 40), and 22 March 2012 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 30).

55. Moreover, restricting the application of the SEA Directive to measures embodying a comprehensive and coherent approach would encourage authorities to circumvent the obligation to carry out an assessment by splitting such comprehensive measures into a number of part measures each of which, considered in isolation, would not be comprehensive and would not therefore require an assessment. As the Commission submits, however, the Court has already rejected such practices aimed at circumventing the EIA Directive.[29] That position must also apply in relation to the SEA Directive.

56. It follows that neither the Court's definition nor Article 3(2)(a) and Article 3(4) of the SEA Directive can be interpreted as meaning that a plan or programme must embody a comprehensive and coherent approach of that kind. Rather, the strategic environmental assessment procedure must also be capable of being applied to a measure which prescribes only part of the framework for the subsequent grant of development consents for projects and, as such, is concerned only with particular aspects of a land development initiative, where the development provided for in that measure may have significant environmental effects.

57. For that reason, I would propose that the Court's definition be clarified to the effect that plans or programmes within the meaning of the SEA Directive do not have to lay down *the* criteria and detailed rules for the development of land, it being sufficient for them to lay down criteria and detailed rules of some form. Furthermore, Article 3(2)(a) of the SEA Directive does not presuppose that the plan or programme concerned prescribes a complete framework for the grant of development consents for projects.

C – *Differentiation from general provisions*

58. Lastly, various parties to the proceedings have attempted to distinguish plans and programmes from more general provisions such as the contested order, which, in their view, is not subject to the SEA Directive. The central plank of their argument is that certain international agreements apply less stringent requirements to public participation and environmental assessment in the case of policies and general legislation than in the case of plans or programmes (see Section 2). Before analysing that line of argument, however, I should like to recall that plans and programmes may also be legislative and do not for that reason alone automatically fall outside the scope of the SEA Directive (see Section 1).

1. The legislative nature of plans or programmes

59. It follows not least from the first indent of Article 2(a) of the SEA Directive that plans and programmes may be adopted through a legislative procedure by Parliament or government.

60. Conversely, the SEA Directive does not contain any provision corresponding to Article 2(5) of the EIA Directive. This states that, in cases where a project is adopted by a specific act of national legislation, Member States may exempt that project from the provisions relating to public consultation.[30]

61. Accordingly, the Court has held, in relation to action programmes under the Nitrates Directive, that, whilst not every legislative measure constitutes a plan or a programme within the meaning of the SEA Directive, the mere fact that such a measure is adopted by legislative means does not exclude it from the scope of that directive.[31]

29 — Judgment of 21 September 1999 in *Commission* v *Ireland* (C-392/96, EU:C:1999:431, paragraph 76).

30 — See my Opinion in Joined Cases *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:120, point 40).

31 — Judgment of 17 June 2010 in *Terre wallonne and Inter-Environnement Wallonie* (C-105/09 and C-110/09, EU:C:2010:355, paragraph 41).

62. The Court's later definition of plans and programmes also clearly includes legislative measures, since laws can be measures defining criteria and detailed rules for land development or land use and rules and procedures for the scrutiny of projects.

63. The scope of the terms 'plans and programmes' in the SEA Directive cannot therefore be delimited by excluding measures adopted in the form of laws.

2. The content of the measure

64. For that reason, some of the parties to the proceedings distinguish between plans and programmes and other measures on the basis of their content.

65. So far as concerns the relationship between plans and programmes, on the one hand, and individual projects, on the other, such a distinction is made necessary by the relationship between the SEA Directive and the EIA Directive. It makes no sense for the environmental effects of a measure to be assessed twice, that is to say under both directives.[32] That is just one of the reasons why the EIA Directive is *lex specialis* with regard to individual projects.[33]

66. In order to distinguish plans and programmes not only from individual projects but also, at the other end of the spectrum, from (even) more general rules, some of the parties to the proceedings rely on Articles 7 and 8 of the Aarhus Convention and on the Kiev Protocol.

67. The types of measure concerned are defined in greatest detail in the Aarhus Convention. The first to third sentences of Article 7 of that Convention provide for appropriate arrangements to be made for public participation in connection with plans and programmes relating to the environment. In addition, the fourth sentence of Article 7 requires the Contracting Parties to endeavour to make provision for public participation in connection with policies relating to the environment. Lastly, in accordance with Article 8, the Contracting Parties are to strive to promote public participation during the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

68. The Kiev Protocol, which is specifically concerned with strategic environmental assessment, draws the same distinction. While the rules governing plans and programmes are largely the same as those under the SEA Directive, the Protocol also contains an Article 13, which deals expressly with policies and legislation. In their preparation, the Contracting Parties are required only to endeavour to take environmental concerns into consideration.

69. It seems inconceivable, however, that those international agreements should provide a blueprint for the SEA Directive so far as concerns the definition of the terms plan and programme. Neither the Aarhus Convention nor the Kiev Protocol formed part of EU law at the time when the SEA Directive was adopted. Although the Convention existed, it is not mentioned in the SEA Directive; in particular, it is not the purpose of that directive to implement the Convention. While recital 7 of the directive predates the Protocol, which was concluded later, and, according to a declaration issued at the time when the Protocol was ratified, serves to implement it, it does not follow even from this that the Protocol requires that the directive be interpreted restrictively.

70. Moreover, the SEA Directive differs from those two international agreements inasmuch as it does *not* contain any special provisions in relation to policies or general legislation that would call for them to be distinguished from plans and programmes.

32 — See judgments of 22 September 2011 in *Valčiukienė and Others* (C-295/10, EU:C:2011:608, paragraph 62), and 10 September 2015 in *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 58).

33 — See my Opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2011:651, point 151).

71. Furthermore, a restrictive interpretation of the terms plan and programme on that basis would be incompatible both with the principle of the broad interpretation of the conditions governing the application of the SEA Directive [34] and with the overarching objective of subjecting measures capable of having significant environmental effects to an environmental assessment. [35] It is not surprising that those two considerations carry less weight in the case of international agreements with third countries. Those countries — unlike the European Union under Article 3(3) TEU, second sentence, Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights — are not necessarily obliged to strive for a high level of protection of the environment. Environmental agreements with third countries may therefore contain compromises which fall short of the level of protection within the EU. [36]

72. There is therefore no obligation to transpose the types of measure constituting plans or programmes under the Aarhus Convention and the Kiev Protocol to the older SEA Directive.

73. It would be more appropriate to be guided by the second sentence of Article 2(7) of the Espoo Convention, which became part of EU law during the negotiations on the SEA Directive and is therefore more reliable as a possible source of inspiration for that directive than the aforementioned agreements. According to the authentic versions of that provision (English, French and Russian), the Contracting Parties must, to the extent appropriate, endeavour to apply the principles of environmental impact assessment to policies, plans and programmes. Under that provision, all three types of measure are treated equally.

74. Consequently there is no reason to restrict the Court's definition of the terms 'plans and programmes' in relation to policies or legislation.

75. Moreover, Belgium's submission that the contested order is comparable with general binding rules within the meaning of Article 6 of the Directive on industrial emissions, [37] which do not require an environmental assessment, does nothing to alter that position.

76. In this regard, it is true that the directive on industrial emissions does not provide for an environmental assessment or for public participation where such provisions are adopted by the Member States. Also, unlike action programmes under the Nitrates Directive, there is no other EU measure which indicates that those provisions are to be classified as plans or programmes.

77. That said, however, it is not inconceivable that general binding rules within the meaning of Article 6 of the directive on industrial emissions are in fact plans or programmes requiring an environmental assessment under the SEA Directive. After all, such provisions define criteria and detailed rules for land development or land use as well as rules and procedures for the scrutiny of projects. What is more, they are obviously capable of having significant environmental effects.

78. Furthermore, even action programmes under the Nitrates Directive must impose a limit on the application of nitrogen, in accordance with Annex III(2) to that directive.

79. Consequently, general limits can also form part of 'plans and programmes' within the meaning of the SEA Directive.

34 — Judgments of 22 March 2012 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 37), and 10 September 2015 in *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 50).

35 — Judgments of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 40), and 22 March 2012 in *Inter-Environnement Bruxelles and Others* (C-567/10, EU:C:2012:159, paragraph 30).

36 — See judgments of 14 July 1998 in *Safety Hi-Tech* (C-284/95, EU:C:1998:352, paragraph 48) and *Bettati* (C-341/95, EU:C:1998:353, paragraph 46).

37 — Directive 2010/75/EU of the European Parliament and the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

D – *Concluding remarks*

80. The obligation to carry out a strategic environmental assessment of the contested order is subject to other conditions additional to its classification as a plan or programme.

81. In that regard, the Council of State takes the view that the contested order is a measure which is 'required' by legislative, regulatory or administrative provisions, as provided for in the second indent of Article 2(a) of the SEA Directive. What is more, it is common ground that that order concerns the energy sector, referred to in Article 3(2)(a), and the grant of development consents for projects subject to the EIA Directive, that is to say wind power installations within the meaning of Annex II(3)(i).

82. EDORA is of the view that the provisions contained in the contested order will not have any significant environmental effects. Strictly speaking, however, this is not a prerequisite for the obligation to carry out an environmental assessment under Article 3(2)(a) of the SEA Directive. It is true that the opposite might be inferred from a reading of the judgment in *Dimos Kropias Attikis*. In that event, however, the examination of the potential for significant environmental effects would be confined to the question of whether it can be excluded, on the basis of objective information, that that plan or project will have a significant effect on the site concerned. [38] It seems unlikely that this is readily feasible in the context of setting limit values, in particular where these relate to noise generation and shadow flicker.

83. The Council of State may nonetheless have to examine whether the environmental assessment and public participation exercise carried out in connection with the other initiatives of the Walloon Region to regulate use of wind power also included the environmental effects of the contested order, as EDORA contends. After all, since the SEA Directive does not in principle require that an assessment of environmental effects be performed twice, a separate environmental assessment of that order might have been superfluous. [39] If, however, Mr D'Oultremont and others is correct in their submissions that the contributions to the public participation process were not analysed, that process cannot replace a specific environmental assessment of the contested order.

V – **Conclusion**

84. I therefore propose that the Court's answer to the request for a preliminary ruling should be as follows:

(1) A 'plan or programme' within the meaning of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment is a measure which defines criteria and detailed rules for land development or land use and which subjects implementation of one or more projects to rules and procedures for scrutiny.

(2) Article 3(2)(a) of Directive 2001/42 does not presuppose that the plan or programme concerned prescribes a complete framework for the grant of development consents for projects.

(3) An order containing various provisions on the installation of wind turbines, including measures on safety, inspection, site restoration and financial collateral as well as noise levels set by reference to town and country planning zones, which prescribe at least part of the framework for the grant of administrative development consents for installations referred to in Annex II(3)(i) to Directive

38 — Judgment of 10 September 2015 in *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 47).

39 — Judgment of 10 September 2015 in *Dimos Kropias Attikis* (C-473/14, EU:C:2015:582, paragraph 58).

2011/92/EU on the assessment of the effects of certain public and private projects on the environment must be classified as a 'plan or programme' within the meaning of Directive 2001/42.