Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

28 May 2020*

(Reference for a preliminary ruling — Directive (EU) 2015/1535 — Standards and technical regulations — Wind generators — Directive 2006/123/EC — Concept of 'service' — Environment — Directive 2009/28/EC — Promotion of the use of energy from renewable sources — Mandatory national overall targets — National rule on the authorisation procedures applicable to plants for the production of electricity from renewable energy sources — Proportionality — Legislation of a Member State laying down restrictions on the location of wind turbines)

In Case C-727/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny w Kielcach (Regional Administrative Court of Kielce, Poland), made by decision of 12 October 2017, received at the Court on 29 December 2017, in the proceedings

**Syndyk Masy Upadłości ECO-WIND Construction S.A. w upadłości**, formerly ECO-WIND Construction S.A.,

v

**Samorządowe Kolegium Odwoławcze w Kielcach,**

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby (Rapporteur), K. Jürimäe and N. Piçarra, Judges,

Advocate General : H. Saugmandsgaard Øe,

Registrar: M. Aleksejev, head of unit,

having regard to the written procedure and further to the hearing on 6 February 2020,

after considering the observations submitted on behalf of:

– Syndyk Masy Upadłości ECO-WIND Construction S.A., by Ł. Szatkowski and M. Krasińska, radcowie prawni, and by M. Trzaskowska and A. Szufel, adwokaci,

– the Polish Government, by B. Majczyna, M. Rzotkiewicz and D Lutostańska, acting as Agents,

– the German Government, by D. Klebs, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,

* Language of the case: Polish.

– the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,

– the European Commission, by K. Herrmann, Y.G. Marinova, K. Talabér-Ritz and L. Malferrari, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1)(f) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), of Article 15(2)(a) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), and of the first subparagraph of Article 3(1) and the first subparagraph of Article 13(1) 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), as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 (OJ 2015 L 239, p. 1) ('Directive 2009/28').

2 The request has been made in proceedings between Syndyk Masy Upadłości ECO-WIND Construction S.A. w upadłości, formerly ECO-WIND Construction S.A. ('ECO-WIND'), and Samorządowe Kolegium Odwoławcze w Kielcach (Independent Appeal Board of Kielce, Poland) concerning a decision by the latter refusing to give its consent to the creation of a wind farm within the territory of the municipality of Opatów (Poland).

### Legal context

#### *European Union law*

*Directive 2015/1535*

3 Article 1(1)(c), (d) and (f) of Directive 2015/1535 provides:

'For the purposes of this Directive, the following definitions apply:

…

(c) "technical specification" means a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

…

(d) "other requirements" means a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

…

(f) "technical regulation" means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations shall include:

(i) laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,

(ii) voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,

(iii) specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

This comprises technical regulations imposed by the authorities designated by the Member States and appearing on a list drawn up and updated, where appropriate, by the Commission in the framework of the Committee referred to in Article 2.

The same procedure shall be used for amending this list'.

4 Article 5(1) of that directive provides:

'Subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard is to suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where those grounds have not already been made clear in the draft.

…'

*Directive 2006/123*

5 Recital 76 of Directive 2006/123 states:

'This Directive does not concern the application of Articles [34 to 36 TFEU] relating to the free movement of goods. The restrictions prohibited pursuant to the provision on the freedom to provide services cover the requirements applicable to access to service activities or to the exercise thereof and not those applicable to goods as such.'

6 Article 2(1) of Directive 2006/123, that article being headed 'Scope', provides that that directive is to apply to services supplied by providers established in a Member State, while Article 2(2) and (3) refer to the activities and matters to which the directive is not to apply.

7 Article 4 of that directive, headed 'Definitions', is worded as follows:

'For the purpose of this Directive, the following definitions shall apply:

1) "service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU];

…'.

8 Article 15(2) and (7) of Directive 2006/123, that article being headed 'Requirements to be evaluated', provides:

'2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

…

7. Member States shall notify the Commission of any new laws, regulations or administrative provisions which set requirements as referred to in [Article 15(6)], together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent Member States from adopting the provisions in question.

Within a period of 3 months from the date of receipt of the notification, the Commission shall examine the compatibility of any new requirements with [EU] law and, where appropriate, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.

The notification of a draft national law in accordance with Directive 98/34/EC shall fulfil the obligation of notification provided for in this Directive.'

*Directive 2009/28*

9 Recitals 14, 19 and 40 of Directive 2009/28 state:

'(14) The main purpose of mandatory national targets is to provide certainty for investors and to encourage continuous development of technologies which generate energy from all types of renewable sources …

…

(19) To ensure that the mandatory national overall targets are achieved, Member States should work towards an indicative trajectory tracing a path towards the achievement of their final mandatory targets. They should establish a national renewable energy action plan including information on sectoral targets, while having in mind that there are different uses of biomass and therefore it is essential to mobilise new biomass resources. In addition, Member States should set out measures to achieve those targets. Each Member State should assess, when evaluating its expected gross final consumption of energy in its national renewable energy action plan, the contribution which energy efficiency and energy saving measures can make to achieving its national targets. Member States should take into account the optimal combination of energy efficiency technologies with energy from renewable sources.

…

(40) The procedure used by the administration responsible for supervising the authorisation, certification and licensing of renewable energy plants should be objective, transparent, non-discriminatory and proportionate when applying the rules to specific projects. …'.

10 Article 1 of Directive 2009/28, headed 'Subject matter and scope', provides:

'This Directive establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy and for the share of energy from renewable sources in transport. … '

11 Article 3 of Directive 2009/28, headed 'Mandatory national overall targets and measures for the use of energy from renewable sources', provides:

'1. Each Member State shall ensure that the share of energy from renewable sources, calculated in accordance with Articles 5 to 11, in gross final consumption of energy in 2020 is at least its national overall target for the share of energy from renewable sources in that year, as set out in the third column of the table in part A of Annex I. Such mandatory national overall targets are consistent with the objective of at least 20% of energy from renewable sources in gross final consumption of energy in the [European Union's] gross final consumption of energy by 2020. In order to achieve the targets laid down in this Article more easily, each Member State shall promote and encourage energy efficiency and energy saving.

…

2. Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.

…'

12 Article 13(1) of Directive 2009/28, that article being headed 'Administrative procedures, regulations and codes', provides:

'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:

(a) subject to differences between Member States in their administrative structures and organisation, the respective responsibilities of national, regional and local administrative bodies for authorisation, certification and licensing procedures including spatial planning are clearly coordinated and defined, with transparent timetables for determining planning and building applications;

(b) comprehensive information on the processing of authorisation, certification and licensing applications for renewable energy installations and on available assistance to applicants are made available at the appropriate level;

(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;

…'

13 Part A of Annex I to that directive sets out the 'national overall targets [of Member States] for the share of energy from renewable sources in gross consumption of energy in 2020' and provides, for the Republic of Poland, that the share of energy from renewable sources is 15% for the year 2020.

14 Part B of Annex I to that directive sets out the method for calculating the indicative trajectory to be followed in order to achieve compliance with the overall targets set for the Member States.

### *Polish law*

15 Article 3 of the ustawa o inwestycjach w zakresie Elektrowni wiatrowych (Law on investment in wind turbines) of 20 May 2016 (Dz. U. of 2016, item 961; 'the Law on wind turbines') provides that the location of wind turbines is to be defined exclusively on the basis of the local planning plan.

16 Article 4 of the Law on wind turbines provides:

'The distance at which the following may be located and constructed:

(1) a wind turbine — from a residential building or a mixed-use building one use of which is for residential purposes; and

(2) a residential building or a mixed-use building one use of which is for residential purposes— from a wind turbine,

shall be equal to or greater than ten times the height of the wind turbine measured from ground level to the highest point of the structure, including technical elements, in particular the rotor and rotor blades (total wind turbine height).

…'

17 In accordance with Article 6 of that law, account must be taken, in particular, of the distance laid down in Article 4 of that law, by:

– municipal and regional authorities, when they establish, vote on or adopt a local plan or any changes thereto;

– the administrative bodies responsible for architecture and construction, when issuing building permits or assessing the merits of an appeal brought against an application, and

– bodies that adopt decisions on environmental conditions at the time of their adoption.

18 The Law on wind turbines entered into force 14 days after its publication, on 16 July 2016.

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

19 ECO-WIND's main activity was the generation and distribution of electricity and heating and the supply of energy-related services.

20 On 15 September 2015 ECO-WIND applied to the mayor of the town and municipality of Opatów for development consent for a wind farm project. The mayor's decision required the prior consent of the Regionalny Dyrektor Ochrony Srodowiska w Kielcach (Regional Director for Environmental Protection, Kielce, Poland) and the latter to determine the environmental conditions for the implementation of the project. On 25 November 2016 the regional director decided to refuse consent because of the failure to respect the distances laid down in the Law on wind turbines between the projected wind turbines and the existing residential buildings.

21 Therefore, by decision of 9 January 2017, the Mayor of the town and municipality of Opatów did not grant ECO-WIND's application.

22 An action having been brought before it against that decision, the Autonomous Board of Appeal of Kielce annulled the decision on the ground of the 'erroneous use by [the mayor of the town and municipality of Opatów] of legal terminology'. On the other hand, as regards the substance, the Board considered that the planned location of the wind farm at issue did not comply with the applicable national legislation. Article 4 of the Law on wind turbines requires compliance with the condition of a minimum distance between a wind turbine and a building having a residential function, equal to or greater than ten times the height of the proposed wind turbine. However, the height of the proposed wind turbines was to be at most 146 metres and they were located only at a distance of 431 metres to 703 metres from residential buildings whereas, under the national legislation, such wind turbines can be erected only at a minimum distance of 1 460 metres from the nearest residential building. In addition, the Autonomous Board of Appeal of Kielce observed that the national legislature had indicated, in the explanatory memorandum of the draft law on wind turbines, that that law did not contain technical regulations within the meaning of Article 1(1)(f) of Directive 2015/1535.

23 ECO-WIND brought an action against the decision of the Board before the Wojewódzki Sąd Administracyjny w Kielcach (Regional Administrative Court, Kielce, Poland).

24 The referring court is uncertain, first, whether Articles 3 and 4 of the Law on wind turbines may have an effect equivalent to a quantitative restriction and, therefore, be incompatible with Article 34 TFEU. Articles 3 and 4 of that legislation limit the location of wind turbines at a height of more than 100 metres to 1% of Poland and lead de facto to a limitation on the trade in wind generators. Furthermore, despite the wording of the explanatory memorandum of the draft law on wind turbines,

the referring court expresses doubts as to whether Articles 3 and 4 of that legislation constitute technical regulations, within the meaning of Article 1(1)(f) of Directive 2015/1535, which should have been notified to the Commission pursuant to Article 5 of that directive.

25 Second, the referring court is uncertain whether the limits resulting from the requirement that the installation of a wind turbine is subject to a minimum distance between that wind turbine and buildings having a residential function can be equated to territorial limits between service providers, within the meaning of Article 15(2)(a) of Directive 2006/123. That requirement could de facto have the effect of limiting geographical distances between service providers carrying out an economic activity in the field of electricity production resulting from the wind turbine.

26 Third, the referring court is doubtful whether, in the light of the principle of sincere cooperation set out in Article 4(3) TFEU and the principle of the primacy of EU law, the Law on wind turbines can be regarded as compatible with Directive 2009/28. More specifically, the referring court is uncertain whether that law could jeopardise the achievement of the objective assigned by that directive to the Republic of Poland, namely to reach the threshold of 15% of energy produced from renewable sources in gross final energy consumption in Poland in 2020.

27 In that regard, the referring court points to several indications leading it to doubt whether the Law on wind turbines is compatible with Directive 2009/28.

28 In the first place, the referring court observes that the explanatory memorandum of the draft law on wind turbines does not contain sufficient information to support the view that the requirement that the installation of a wind turbine is subject to a minimum distance between that wind turbine and buildings with a residential function is justified by an overriding reason in the public interest and that it is proportionate to the objective pursued by the national legislature. More specifically, it considers that the reference in that explanatory memorandum to the protection of health and the environment and to the interests of the inhabitants is not persuasive. In addition, it doubts whether that requirement is proportionate in so far as that distance does not correlate to requirements relating to health protection or the undermining of environmental standards and that less restrictive rules might be able to meet the objective pursued by the national legislature. The referring court observes, in that regard, that the distance between the wind turbines and buildings with a residential function might vary according to the type of technology used or according to acoustic standards.

29 In the second place, it refers to the explanatory memorandum of a proposal to amend the Law on wind turbines of 9 August 2016, from which it is apparent that the adoption of that law entailed a considerable limitation of the possibilities of constructing wind turbines in Poland and that that law runs counter to the need to develop the production of electricity from renewable energy sources.

30 In that context, the Wojewódzki Sąd Administracyjny w Kielcach (Regional Administrative Court, Kielce, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 1(1)(f) of [Directive 2015/1535] be interpreted as meaning that a statutory provision which introduces a restriction on the location of wind turbines by establishing a minimum distance between wind turbines and a residential building or mixed-use building used for residential purposes, stating that this distance is to be equal to or greater than ten times the height of the wind turbines concerned measured from ground level to the highest point of the structure, including technical elements, in particular the rotor and rotor blades, is a “technical regulation”, a draft of which should be communicated to the European Commission pursuant to Article 5(1) of that directive?

(2) Should Article 15(2)(a) of [Directive 2006/123] be interpreted as meaning that a statutory provision which introduces a restriction on the location of wind turbines by establishing a minimum distance between the location of those wind turbines and a residential building or mixed-use building used for residential purposes, stating that this distance is to be equal to or greater than ten times the height of the wind turbines concerned measured from ground level to the highest point of the structure, including technical elements, in particular the rotor and rotor blades, is a provision that makes access to a service activity or the exercise of that activity subject to territorial restrictions, in particular in the form of limits fixed according to a minimum geographical distance between providers, of which Member States are to notify the Commission pursuant to Article 15(7) of that directive?

(3) Should the first subparagraph of Article 3(1) and the first subparagraph of Article 13(1) of [Directive 2009/28] be interpreted as precluding national legislation which introduces a restriction on the location of wind turbines by establishing a minimum distance between wind turbines and a residential building or mixed-use building used for residential purposes, stating that this distance is to be equal to or greater than ten times the height of the wind turbines concerned measured from ground level to the highest point of the structure, including technical elements, in particular the rotor and rotor blades ?'

## Consideration of the questions referred

### *The first question*

31 By its first question, the referring court seeks, in essence, to ascertain whether Article 1(1)(f) of Directive 2015/1535 must be interpreted as meaning that the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function constitutes a technical regulation which must be notified under Article 5 of that directive.

32 Article 1(1)(f) of Directive 2015/1535 mentions four categories of technical regulations: (i) a 'technical specification'; (ii) 'other requirements'; (iii) 'rules on services'; and (iv) 'the laws, regulations and administrative provisions of Member States prohibiting the manufacture, importation, marketing or use of a product'.

33 In order to answer the first question, it is therefore necessary to examine whether the requirement that the installation of a wind turbine is subject to the condition of a minimum distance between it and buildings with a residential function falls within one of the four categories of technical regulations referred to in that provision.

34 In that respect, as regards, first, the category of 'rules on services', it should be noted that the referring court is uncertain whether that requirement constitutes a technical regulation because, if it is not a de facto prohibition, it is at least a de facto limitation on the marketing or use of equipment used in the production of wind power, that is to say wind generators.

35 Thus, since the referring court's concerns relate not to services but to goods, in this case wind generators, it is not necessary to examine whether that requirement falls within the category of 'rules on services' within the meaning of Article 1(1)(f) of Directive 2015/1535.

36 Second, as regards the possible classification of the same requirement as a technical regulation on the basis that it falls within the category of 'technical specifications', it should be noted that a technical specification presupposes that the national measure prescribing it refers to the product or its

packaging as such and that it therefore lays down one of the characteristics required of that product (judgments of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 57, and of 19 July 2012, *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 28).

37 In the present case, the legislation at issue in the main proceedings merely regulates the installation of wind turbines by laying down a mandatory minimum distance requirement that must be complied with for their installation. Consequently, that legislation does not refer to a product as such, in this case the wind generator, and, therefore, does not lay down one of the characteristics required of that product within the meaning of Article 1(1)(f) of Directive 2015/1535, read in the light of Article 1(1)(c) of that directive.

38 It follows that legislation such as that at issue in the main proceedings cannot fall within the category of 'technical specifications' within the meaning of Article 1(1)(f) of Directive 2015/1535.

39 Third, it must be ascertained whether the national legislation at issue in the main proceedings may fall within the category of 'other requirements', within the meaning of Article 1(1)(f) of Directive 2015/1535.

40 In that regard, it is apparent from settled case-law that that category includes legislation which lays down a condition capable of significantly influencing the composition, nature or marketing of a product (judgments of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraphs 69 to 72, and of 19 July 2012, *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 35), those 'other requirements' covering the requirements arising from consideration of the life cycle of the product in question after it has been placed on the market and relating, in particular, to its use.

41 In the present case, as was found in paragraph 37 of the present judgment, it should be noted that the requirement that the installation of a wind turbine is subject to the condition of a minimum distance between it and buildings with a residential function has no direct connection with the composition, nature or marketing of a product such as a wind generator. In that regard, even if that requirement were to lead to a restriction of the locations suitable for the installation of wind turbines, and therefore that it had an effect on the marketing of wind generators, that effect would not be sufficiently direct for that requirement to fall within the category of 'other requirements' set out in Article 1(1)(f) of Directive 2015/1535.

42 The case in the main proceedings is therefore distinguishable from the cases that gave rise to the judgment of 19 July 2012, *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495), in which the legislation at issue concerning the prohibition on issuing, renewing or amending authorisations for gaming activities outside casinos imposed conditions liable to affect the marketing of gaming machines and, therefore, was capable of directly affecting the trade in those machines (judgment of 19 July 2012, *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 36).

43 It follows that legislation such as that at issue in the main proceedings cannot fall within the category of 'other requirements', within the meaning of Article 1(1)(f) of Directive 2015/1535, read in the light of Article 1(1)(d) of that directive.

44 Fourth, it must be ascertained whether the legislation at issue in the main proceedings may be covered by the category of 'laws, regulations or administrative provisions of the Member States prohibiting the manufacture, importation, marketing or use of a product' within the meaning of Article 1(1)(f) of Directive 2015/1535.

45 That category presupposes that the measure at issue has a scope that goes clearly beyond a limitation to certain uses of the product at issue and that it is not confined to a mere restriction on its use (judgments of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 76, and of 19 July 2012, *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 31).

46 That category is particularly intended to cover national measures which leave no room for any use that could reasonably be made of the product concerned other than a purely marginal one (judgments of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 77, and of 19 July 2012, *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 32).

47 In the present case, although the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function, imposed by the national legislation at issue in the main proceedings, admittedly includes a prohibition on installing a wind turbine at a minimum distance less than ten times the total height of the planned installation from any building having a residential function, it should be noted that that legislation does not, however, prohibit economic operators from continuing to install wind turbines and, therefore, using and marketing wind generators.

48 However, at the hearing before the Court, the Commission stated, and was not contradicted by the Polish Government, that in the period from 2012 to 2016, that is to say, the period directly preceding the adoption of the Law on wind turbines, the capacities of installed wind turbines amounted to between 760 megawatts and 1 000 megawatts per annum, whereas, for the years 2017 and 2018 respectively, after the adoption of that law, those installed capacities did not amount to more than 12 megawatts and 6.7 megawatts per annum respectively.

49 In the light of that information, it is for the referring court to determine whether the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance between it and buildings with a residential function does not lead to a de facto prohibition on the marketing of wind generators, leaving room only for a use of them that is purely marginal.

50 In the light of the foregoing, the answer to the first question is that Article 1(1)(f) of Directive 2015/1535 must be interpreted as meaning that the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance between it and buildings with a residential function does not constitute a technical regulation which must be notified under Article 5 of that directive, provided that that requirement does not lead to a purely marginal use of wind generators, which it is for the referring court to determine.

### *The second question*

51 By its second question, the referring court seeks, in essence, to ascertain whether Article 15(2)(a) of Directive 2006/123 must be interpreted as meaning that national legislation which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function must be categorised as rules which make access to a service activity or the exercise of that activity subject to a territorial limit in the form, in particular, of limits fixed according to a minimum distance between service providers, which Member States must notify to the Commission, in accordance with Article 15(7) of that directive.

52 As a preliminary point, it is necessary to determine whether national legislation such as that at issue in the main proceedings falls within the scope *ratione materiae* of Directive 2006/123.

53 In that regard, it must be recalled, first, that Directive 2006/123 is applicable, in accordance with Article 2(1) thereof, to services supplied by providers established in a Member State, with the exception of the activities and matters referred to in Article 2(2) and (3) of that directive.

54 Further, under Article 4(1) of Directive 2006/123, 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU.

55 Last, recital 76 of that directive states that the restrictions which are prohibited pursuant to Article 57 TFEU cover the requirements applicable to access to service activities or to the exercise thereof and not those applicable to goods as such.

56 In the present case, it is apparent from the order for reference that, although Article 4(1) of the Law on wind turbines establishes a territorial limit with regard to the installation of wind turbines, that provision concerns the activity of producing a product, namely electricity.

57 It is settled case-law that the activity of producing a product cannot be regarded, in itself, as a service (see, to that effect, judgments of 7 May 1985, *Commission* v *France*, 18/84, EU:C:1985:175, paragraph 12, and of 11 July 1985, *Cinethèque and Others*, 60/84 and 61/84, EU:C:1985:329, paragraph 10).

58 In those circumstances, it must be held that national legislation such as that at issue in the main proceedings, which makes the installation of a wind turbine subject to compliance with a condition of a minimum distance between that wind turbine and buildings having a residential function, does not fall within the scope of Directive 2006/123.

59 At the hearing before the Court, ECO-WIND argued that the activity of producing electricity was accompanied by the provision of network regulation services and energy price security services. However, the existence of such a supply of services cannot call into question the conclusion reached in the preceding paragraph, since those services are ancillary to the principal activity of generating electricity.

60 In the light of the foregoing, the answer to the second question is that Article 15(2)(a) of Directive 2006/123 must be interpreted as meaning that legislation which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function cannot be categorised as rules which make access to, or exercise of, a service activity subject to a territorial limit in the form, in particular, of limits fixed according to a minimum distance between service providers, which the Member States must notify to the Commission in accordance with Article 15(7) of that directive.

### *The third question*

61 By its third question, the referring court seeks, in essence, to ascertain whether the first subparagraph of Article 3(1) and the first subparagraph of Article 13(1) of Directive 2009/28 must be interpreted as precluding legislation which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function.

62 In order to answer the third question, it is necessary to examine, in the first place, whether the first subparagraph of Article 3(1) of that directive precludes legislation, such as that at issue in the main proceedings, which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with residential functions.

63 In that regard, it should be borne in mind that the purpose of Directive 2009/28, as set out in Article 1 thereof, is to lay down a common framework for the promotion of energy from renewable sources by setting mandatory national overall targets for the share of energy from renewable sources in gross final consumption of energy.

64 Thus, the first subparagraph of Article 3(1) of Directive 2009/28 requires each Member State to ensure that the share of energy from renewable sources in its gross final consumption of energy in 2020 reaches a minimum threshold. As regards the Republic of Poland, it is apparent from the third column of Part A of Annex I to that directive that that threshold is set at 15% of the gross final consumption of energy in that Member State in 2020.

65 In order to reach that threshold, Article 3(2) of Directive 2009/28 provides that Member States are to introduce effectively designed measures and must comply with an indicative trajectory as set out in Part B of Annex I to that directive.

66 The Court has held that the Member States have a discretion as to the measures they consider appropriate for the purpose of reaching the mandatory national overall targets set in Article 3(1) and (2) of Directive 2009/28, read in conjunction with Annex I thereto (judgment of 20 September 2017, *Elecdey Carcelen and Others*, C-215/16, C-216/16, C-220/16 and C-221/16, EU:C:2017:705, paragraph 32).

67 The Member States have a margin of discretion as to the choice of means used and remain, in that context, free to control and develop the renewable energy sources which they consider most suited to their situation and to favour one source of renewable energy rather than another.

68 That interpretation is confirmed by the objectives pursued by Directive 2009/28. First, it is clear from recital 14 of that directive that it encourages continuous development of technologies which generate energy from all types of renewable sources. Second, it follows from recital 19 of that directive that the Member States must endeavour to follow an indicative trajectory and take into account the optimal combination of energy efficiency technologies with energy from renewable sources.

69 It follows that the first subparagraph of Article 3(1) of Directive 2009/28 does not preclude, as such, national legislation, such as that at issue in the main proceedings, which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function.

70 In the second place, it is necessary to examine whether the first subparagraph of Article 13(1) of that directive, which provides that Member States are to ensure that the national rules on authorisation procedures which apply to plants for electricity production from renewable sources are proportionate and necessary, precludes national legislation such as that at issue in the main proceedings.

71 As a preliminary point, it is necessary to determine whether the requirement under national legislation such as that at issue in the main proceedings may be covered by the first subparagraph of Article 13(1) of Directive 2009/28.

72 In the first place, it is apparent from the wording of that provision that it refers to any national rules relating to the authorisation, certification and licensing procedures which apply to plants for the production of electricity from renewable energy sources.

73 In the second place, it should be noted that, according to recital 40 of Directive 2009/28, the procedure used by the administrative authority responsible for supervising the authorisation, certification and licensing of that type of plant should be objective, transparent, non-discriminatory and proportionate when applying the rules to specific projects.

74 In the third place, it is apparent from Article 13(1)(d) of Directive 2009/28 that Member States are to take appropriate steps to ensure that their national rules governing the authorisation, certification and licensing are objective, transparent and proportionate, do not discriminate between applicants and take fully into account the particularities of each renewable energy technology.

75 It follows from the foregoing that, although Article 13(1) of Directive 2009/28 uses the expression 'any national rules relating to authorisation … procedures', on the one hand, and the words 'administrative procedures, regulations and codes' appear in its heading, on the other hand, that article does not make any distinction and does not expressly exclude rules other than procedural rules. Consequently, the first subparagraph of Article 13(1) of that directive must be interpreted as meaning that it is not limited to covering rules of a procedural nature.

76 That interpretation is confirmed by the judgment of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* (C-2/10, EU:C:2011:502, paragraphs 72 and 73), in which the Court held that the national legislation at issue in the case giving rise to that judgment, which, in essence, entailed a total and automatic prohibition on the construction of wind turbines in areas forming part of the Natura 2000 network, had to be assessed in the light of the principle of proportionality, as set out in Article 13 of Directive 2009/28, since that legislation constituted a national rule relating to the administrative procedures for the authorisation of plants producing electricity from renewable energy sources.

77 It follows that, contrary to the submissions made by the Polish Government before the Court, Article 13(1) of Directive 2009/28 does not concern only rules of a procedural nature, but also concerns other national rules governing the authorisation, certification and award of licences which apply to plants for the production of electricity from renewable energy sources.

78 In the present case, it is not disputed that legislation such as that at issue in the main proceedings constitutes a national rule governing the authorisation of wind turbine installations, since, as the Polish Government stated at the hearing before the Court, such installations cannot be authorised if they do not comply with the requirements laid down by that legislation.

79 Consequently, it must be held that the first subparagraph of Article 13(1) of Directive 2009/28 is applicable to legislation, such as that at issue in the main proceedings, which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function.

80 In those circumstances, it is for the referring court to determine whether such legislation is necessary and proportionate.

81 Accordingly, it is for that court to determine that the measures adopted by the Member State concerned do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation at issue in the main proceedings; 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, to that effect, judgment of 21 July 2011, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, C-2/10, EU:C:2011:502, paragraph 73).

82 To that end, that court must, in particular, take account, in the light of the discretion of the Member States referred to in paragraphs 66 and 67 of the present judgment, of the fact that that legislation is limited to wind turbines alone, to the exclusion of other forms of production of renewable energy, such as photovoltaic or biomass plants. In addition, account must also be taken of the fact that that legislation was adopted at national level and that it deprives the local authorities of any discretion as to whether it is possible to derogate from the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function.

83 In the light of the foregoing, the answer to the third question is that the first subparagraph of Article 3(1) and the first subparagraph of Article 13(1) of Directive 2009/28 must be interpreted as not precluding legislation which makes the installation of a wind turbine subject to compliance with

the condition of a minimum distance between that wind turbine and buildings with a residential function, provided that that legislation is necessary and proportionate in the light of the mandatory national overall target of the Member State concerned, which it is for the referring court to determine.

## Costs

84 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 (Fourth Chamber) hereby rules:

1. **Article 1(1)(f) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services must be interpreted as meaning that the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance between it and buildings with a residential function does not constitute a technical regulation which must be notified under Article 5 of that directive, provided that that requirement does not lead to a purely marginal use of wind generators, which it is for the referring court to determine.**

2. **Article 15(2)(a) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that legislation which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function cannot be categorised as rules which make access to, or exercise of, a service activity subject to a territorial limit in the form, in particular, of limits fixed according to a minimum distance between service providers, which the Member States must notify to the European Commission in accordance with Article 15(7) of that directive.**

3. **The first subparagraph of Article 3(1) and the first subparagraph of Article 13(1) 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, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 must be interpreted as not precluding legislation which makes the installation of a wind turbine subject to compliance with the condition of a minimum distance between that wind turbine and buildings with a residential function, provided that that legislation is necessary and proportionate in the light of the mandatory national overall target of the Member State concerned, which it is for the referring court to determine.**

[Signatures]