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Court of Justice of the European Union

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Advocate General's Opinion in Case C-411/17
Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen
ASBL v Conseil des ministres (Belgium)

Advocate General Kokott sees grounds for taking the view that the Belgian Law on the extension of the lifetime of the Doel 1 and 2 nuclear power stations was adopted without the necessary prior environmental impact assessments

However, the possibility of maintaining the effects of the law governing the extension on the grounds of security of supply is not ruled out

In 2003, the Belgian legislature decided to cease electricity production from nuclear energy. No new nuclear power station was to be built and the power stations in operation were to be gradually decommissioned after they had been in operation for 40 years, that is to say, between 2015 and 2025. Accordingly, the Doel 1 nuclear reactor on the Schelde (near Antwerp and the Dutch border) ceased electricity production in mid-February 2015 and the nearby nuclear reactor Doel 2 was also scheduled to cease electricity production in the same year.

At the end of June 2015, however, electricity production at Doel 1 was again authorised by way of legislation for approximately ten years (until 15 February 2025) and the cessation of electricity production at Doel 2 was postponed for ten years (until 1 December 2025).

This extension of lifetime was tied to the condition that the operator Electrabel would invest approximately €700 million in, in particular, the security of the reactors. An environmental impact assessment (EIA) was not considered necessary for these investments because, according to a preliminary examination, the modifications would not result in any negative radiological impacts or significant changes to the existing radiological environmental impacts.

Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, two Belgian associations which advocate for the protection of the environment and living conditions, have brought an action before the Belgian Constitutional Court seeking annulment of the law providing for the extension, as the extension had occurred without an environmental assessment or a procedure allowing for public participation. They rely on the Espoo Convention on environmental impact assessment in a transboundary context¹ and the Aarhus Convention on public participation in environmental matters,² as well as on the EIA Directive,³ the Habitats Directive⁴ and the Birds Directive⁵ (Doel borders on a number of European nature and bird protection sites).

The Belgian Constitutional Court has sought the Court's interpretation of these conventions and directives. In essence it seeks to ascertain whether the adoption of a law to extend the period of industrial production of electricity by nuclear power stations requires an examination as to environmental impacts.

¹ 1991 Convention on environmental impact assessment in a transboundary context (OJ 1992 C 104, p. 7).

² 1998 Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 4), approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

³ 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 2011 L 26, p. 1).

⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

⁵ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended most recently by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 193).

In her Opinion today, Advocate General Juliane Kokott proposes that the Court answer this question categorically in the affirmative.

She sees grounds for taking the view that, with the enactment of the law extending the period of industrial production of electricity by the Doel 1 and Doel 2 nuclear power stations, the EU legal provisions concerning environmental assessments have been infringed and that this is not justified on grounds of security of electricity supply or of legal certainty.

Nevertheless, she does not rule out in this case the possibility of maintaining the effects of the law.

This is because, in her view, national courts may exceptionally maintain temporarily the effects of a decision taken in breach of a duty under EU law to undertake an environmental assessment if (i) that decision was as soon as possible regularised *a posteriori* by rectifying the procedural error, (ii) on the basis of the available information and the applicable provisions, it is highly likely that the decision will be confirmed in the same form following regularisation, (iii) as far as possible no additional faits accomplis are created, and (iv) overriding public interests in maintaining the effects would prevail over the interest in the effectiveness of the obligation to undertake the environmental assessment and the fundamental right to effective judicial protection.

Specifically: Advocate General Kokott next discusses in her Opinion the **general question of whether statutory measures require an environmental impact assessment**. She emphasises that the EIA Directive does not apply to statutory measures if the objectives of the Directive are achieved in the legislative process. First and foremost of these is the objective of ensuring that projects likely to have significant effects on the environment by virtue of, inter alia, their nature, scope or location are made subject to an assessment with regard to their environmental effects 'before consent is given', but there is also the objective of supplying information and that of public participation. If a legislative act fulfils these criteria and therefore does not come under the EIA Directive – something the Belgian Constitutional Court must examine in the main proceedings in the present case – the requirements of the Espoo and Aarhus Conventions may, in the view of the Advocate General, also be satisfied.

Advocate General Kokott then goes on to deal with the **question of whether the extension of the period of industrial production of electricity by nuclear power stations requires an environmental assessment**. She concludes that the Espoo and Aarhus Conventions require a transboundary environmental impact assessment or public participation with an assessment of the environmental impact of the extension of the period of industrial production of electricity by certain nuclear power stations. In the light of this she takes the view that the EIA Directive, contrary to previous case-law on the definition of 'project', should be interpreted as requiring an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power station for ten years. Such an assessment, including public participation, must, in principle, be carried out prior to the decision to extend and not just when consent for the planned improvement measures is given. Moreover, an environmental impact assessment is also necessary under the Habitats Directive.

Finally, Advocate General Kokott examines the **question of whether overriding grounds of public interest may justify a derogation from what is, in principle, the existing duty to carry out an assessment**. In this respect the Advocate General concludes that the EIA Directive permits a derogation from the obligation to carry out an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power station in order to avert a grave and imminent peril to an essential interest of the Member State concerned, such as security of electricity supply or legal certainty, where the public concerned and the Commission are informed. By contrast, it is not permissible to dispense with a transboundary environmental impact assessment. Further, the public interest in ensuring a minimum supply of electricity may be regarded as a ground of public safety and the further-reaching public interest in security of

electricity supply may be regarded as a ground of an economic nature within the meaning of the Habitats Directive which may constitute justification for the carrying out of a project in spite of a negative impact assessment of the site. It is doubtful, however, whether the decision not to carry out an environmental impact assessment was necessary in the case in the main proceedings.

In conclusion, the Advocate General proposes that the Court should extend the existing case-law on the exceptional continued validity of plans and programmes adopted in infringement of the Strategic Environmental Assessment Directive to the consent for projects in which the decision was made without having regard for the EIA Directive.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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

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