Provisional text

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 November 2018 (1)

Case C-411/17

Inter-Environnement Wallonie ASBL,
Bond Beter Leefmilieu Vlaanderen vzw
v
Conseil des ministres,
Intervener:
Electrabel SA

(Request for a preliminary ruling from the Cour constitutionnelle (Constitutional Court, Belgium))

(Request for a preliminary ruling — Environment — Espoo Convention — Aarhus Convention — Directive 2011/92/EU — Directive 92/43/EEC — Directive 2009/147/EC — Phasing out of nuclear energy — Statutory extension by 10 years of the period of industrial production of electricity by certain nuclear power stations — No environmental impact assessment — Definition of 'project' — Legislative act — Renewal of consent — Direct effect of International Conventions — Derogation from obligations — Overriding public interest — Security of supply)

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I. Introduction

1. Does the adoption of a law extending the period of industrial production of electricity by nuclear power stations require an environmental impact assessment? This question is raised before the Cour constitutionnelle (Constitutional Court, Belgium), which is therefore referring it to the Court for a preliminary ruling.

2. The Cour constitutionnelle (Constitutional Court) refers in this regard to the international Espoo (2) and Aarhus (3) Conventions, the EIA Directive (4) and the Habitats Directive, (5) which all provide for an environmental assessment, but lay down different requirements. The list of questions referred is therefore extensive.

3. However, the request for a preliminary ruling boils down to three central questions, namely, first, whether legislative measures require an environmental impact assessment, second, whether the prolongation of an already authorised activity requires an assessment, and third, whether overriding public interests can justify the continued operation of the power stations concerned in the event of any failure to fulfil assessment duties. At first sight at least, each of the abovementioned legal instruments contains different requirements on these points.

4. On account of the questions regarding the Conventions, these proceedings also give the Court another opportunity to consider the effects of international environmental law in EU law and its own role in interpreting those provisions. As Germany explained at the hearing, this is of considerable practical interest for the application of the Espoo Convention to nuclear power stations in particular because at present decisions must be taken within the scope of the Convention on extending the lifetimes of around 90 plants. Within the framework of the Convention, a special working group of the Contracting States has therefore also been established on this subject.

II. Legal framework

A. International law

5. The Espoo and Aarhus Conventions were adopted within the framework of the United Nations Economic Commission for Europe (UNECE). They were concluded for the then European Community as a mixed agreement together with the Member States.

1. Espoo Convention

6. The Espoo Convention concerns environmental impact assessment in a transboundary context. It was approved by the Council by way of an unpublished decision of 15 October 1996, which it communicated to the Court upon request. (6) That decision was based on Article 130s in conjunction with the first sentence of Article 228(2) and the first subparagraph of Article 228(3) of the EC Treaty, which were applicable at the time. Those provisions now appear in amended form in Article 192, Article 218(6)(b) and the first sentence of Article 218(8) TFEU.

7. Article 1(5) and (9) of the Espoo Convention contains relevant definitions:

‘For the purposes of this Convention,

…

5. “Proposed activity” means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure;

…

9. “Competent authority” means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity;

…’.

8. Article 2 of the Espoo Convention contains the fundamental obligations on the Contracting States:

‘1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

2. Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorise or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

…

6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities[,] and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.’

9. Appendix I, point 2 to the Espoo Convention defines thermal power stations covered by the Convention:

‘Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).’

2. Aarhus Convention

10. Article 2 of the Aarhus Convention contains relevant definitions:

‘For the purposes of this Convention,

…

2. “Public authority” means:

(a) government at national, regional and other level;

(b) ...

This definition does not include bodies or institutions acting in a judicial or legislative capacity’.

11. Article 6 of the Aarhus Convention regulates public participation in decisions on specific activities:

‘1. Each Party:

(a) shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in Annex I;

…

(c) may decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

6. Each Party shall require the competent public authorities to give the public concerned access for examination … as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure …

…

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this Article are applied *mutatis mutandis*, and where appropriate.

…’

12. The other paragraphs of that provision govern the detailed arrangements for public participation and the assessment of the environmental impact of the activity.

13. Annex I to the Aarhus Convention lists the activities which are subject to mandatory public participation under Article 6(1)(a). The fifth indent of point 1 of Annex I to the Aarhus Convention mentions ‘nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors’. The first sentence of point 22 states that ‘(a)ny change to or extension

of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to Article 6(1)(a) of this Convention'.

B. EU law

1. EIA Directive

14. Article 1(2)(a) of the EIA Directive defines project as 'the execution of construction works or of other installations or schemes' (first indent) and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources' (second indent).

15. Article 1(4) of the EIA Directive excludes acts of legislation from the scope of the directive:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

16. Article 2(1) of the EIA Directive lays down the fundamental obligation to undertake an environmental impact assessment:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.'

17. Article 2(4) of the EIA Directive permits Member States to exempt certain projects from the application of the directive:

'Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In that event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

…'

18. Under Article 4(1) of the EIA Directive, '[s]ubject to Article 2(4), projects listed in Annex I' are to be made subject to the assessment provided for. Nuclear power stations are mentioned in Annex I, point 2(a). In addition, Annex I, point 24 mentions '(a)ny change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex'.

19. Under Article 4(2) of the EIA Directive, the Member States must consider, for projects listed in Annex II, whether an environmental impact assessment must be undertaken. Annex II, point 13(a) mentions '(a)ny change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)'.

20. Article 6(4) of the EIA Directive lays down rules governing the time for public participation:

'The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.'

21. Article 7 of the EIA Directive regulates transboundary environmental impact assessment. It is to be carried out where 'a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests'.

2. Habitats Directive

22. Consent for plans and projects likely to have a significant effect on a site protected under the Habitats Directive or the Birds Directive (7) is subject to the following rules in Article 6(3) and (4) of the Habitats Directive:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

III. Facts

23. Seven nuclear power stations were brought into service in Belgium, at Doel on the Scheldt and Tihange on the Meuse, between 15 February 1975 and 1 September 1985 for an indeterminate period.

24. The location of the power stations at Doel is adjacent landside to the 'Schorren en Polders van de Beneden-Schelde' site (Natura 2000 code: BE2301336), which is protected under the Birds Directive. The Scheldt at that point is part of the 'Schelde- en Durmeëstuarium van de Nederlandse grens tot Gent' site (Natura 2000 code: BE2300006), which is protected under the Habitats Directive, and the Netherlands site 'Westerschelde & Saeftinghe' (Natura 2000 code: NL9803061). According to the request for a preliminary ruling, the Belgian site 'Bos- en heidegebieden ten oosten van Antwerpen' (Natura 2000 code: BE2100017) is also close.

25. In the Belgian site BE2300006 there are in particular 350 hectares of the priority habitat type 'Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)' (Natura 2000 code 91E0*) and a smaller presence of another priority habitat type 'Species-rich Nardus grasslands, on siliceous substrates in mountain areas (and submountain areas in Continental

Europe)' (Natura 2000 code 6230*). (8) The same priority habitat types also occur in the Belgian site BE2100017. (9) In the Netherlands site NL9803061 there are minor occurrences of the priority habitat type 'Fixed coastal dunes with herbaceous vegetation (grey dunes)' (Natura 2000 code 2130*). (10)

26. As is to be expected, for the two protected areas covering the Scheldt, there are various fish species referred to in Annex II to the Habitats Directive, such as shad (*Alosa fallax*), bitterling (*Rhodeus sericeus amarus*), freshwater sculpin (*Cottus gobio*), spined loach (*Cobitis taenia*), lampern (*Lampetra fluviatilis*) and great sea lamprey (*Petromyzon marinus*), the latter two species not being classified as fish in the narrow sense, but in the superclass of cyclostomata. (11)

27. The border with the Netherlands is a few kilometres away. Other Member States are approximately 100 kilometres (Germany and France) or more from this location.

28. In 2003, the Belgian legislature decided to cease production of electricity from nuclear energy. The Law of 31 January 2003 provided that no new nuclear power station was to be built and that the power stations in operation were to be gradually taken out of service after they had been in operation for 40 years, that is to say, between 2015 (Doel 1 and 2 and Tihange 1) and 2025. As the nuclear power stations account for more than half of total electricity production, the Law of 31 January 2003 authorised the Government to derogate from it if security of the electricity supply was threatened.

29. A Law of 18 December 2013 postponed by 10 years the date on which the Tihange 1 nuclear power station was to be taken out of service. In addition, that law abolished the Government's power to derogate from the timetable for taking the nuclear power stations out of service.

30. The Doel 1 power station ceased electricity production on 15 February 2015.

31. However, the Law of 28 June 2015 amended the date on which industrial production of electricity at the Doel 1 and Doel 2 power stations was to end in order to contribute to security of the electricity supply in Belgium. It again authorised the Doel 1 nuclear power station to produce electricity from 6 July 2015 until 15 February 2025 and postponed by 10 years, to 1 December 2025, the end of the production of electricity at the Doel 2 power station.

32. According to the request for a preliminary ruling, the conclusion of an agreement between the Belgian State and Electrabel AG ('Electrabel'), which operates the power stations, was a condition for the extension of the period of industrial production of electricity. That agreement was concluded on 30 November 2015. It contains an investment plan totalling around EUR 700 million 'for the extension of the operating life'. The measures envisaged include the changes to be made under the Fourth Periodical Safety Review and the resistance tests carried out following the accident at Fukushima.

33. Those investments underwent screening in respect of an environmental impact assessment. It was concluded that an environmental impact assessment was unnecessary because the modifications would not result in any negative radiological impacts or significant changes to the existing radiological environmental impacts. That decision was challenged before the Raad van State (Council of State, Belgium). Those proceedings were still pending at the time of the request for a preliminary ruling. (12)

34. As regards the Doel 1 power station, the Law of 28 June 2015 assumes that a new individual consent for electricity production will be issued to the operator of the power station concerned and that the consent to operate Doel 1 will be supplemented by new provisions relating to the production of electricity.

35. The applicants in the main proceedings, two associations whose objective is the protection of the environment and living conditions, brought an action before the Cour constitutionnelle (Constitutional Court) seeking annulment of the Law of 28 June 2015 because it extends by 10 years the activity of the Doel 1 and Doel 2 nuclear reactors without an environmental assessment and a procedure allowing public participation having first been carried out.

36. The two associations rely on the Espoo and Aarhus Conventions, the EIA Directive, the Habitats Directive and the Birds Directive.

IV. Request for a preliminary ruling

37. The Belgian Cour constitutionnelle (Constitutional Court) therefore refers the following questions to the Court for a preliminary ruling:

‘(1) Must Article 2(1) to (3), (6) and (7), Article 3(8), Article 5 and Article 6(1) of the Espoo Convention, and point 2 of Appendix I to that Convention, be interpreted in accordance with the explanations provided in the information document on the application of the Convention to nuclear energy related activities and the good practice recommendations on the application of the Convention to nuclear energy related activities?

(2) May Article 1(9) of the Espoo Convention, which defines the “competent authority”, be interpreted as excluding from the scope of that Convention legislative acts such as the Law of 28 June 2015 “amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply”, having regard in particular to the various assessments and hearings carried out in connection with the adoption of that law?

(3) (a) Must Articles 2 to 6 of the Espoo Convention be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 “amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply”, Article 2 of which postpones the date of deactivation and of the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

(b) Does the answer to the question in point (a) differ depending on whether it relates to the Doel 1 or the Doel 2 power station, having regard to the need, in the case of the former power station, to adopt administrative acts implementing the abovementioned Law of 28 June 2015?

(c) May the security of the country’s electricity supply constitute an overriding reason of public interest permitting a derogation from the application of Articles 2 to 6 of the Espoo Convention or suspension of the application of those provisions?

4. Must Article 2(2) of the Aarhus Convention on “access to information, public participation in decision-making and access to justice in environmental matters” be interpreted as excluding from the scope of that Convention legislative acts such as the Law of 28 June 2015 “amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply”, irrespective of whether the various assessments and hearings carried out in connection with the adoption of that law are taken into account?

5. (a) Having regard in particular to the “Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters” with respect to multi-stage decision-making, must Articles 2 and 6 of the Aarhus Convention, in conjunction with Annex I.I to that Convention, be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 “amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply”, Article 2 of which postpones the date of deactivation and of the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

(b) Does the answer to the question in point (a) differ depending on whether it relates to the Doel 1 or the Doel 2 power station, having regard to the need, in the case of the former power station, to adopt administrative acts implementing the abovementioned Law of 28 June 2015?

(c) May the security of the country's electricity supply constitute an overriding ground of public interest permitting a derogation from the application of Articles 2 and 6 of the Aarhus Convention or suspension of the application of those provisions?

6. (a) Must Article 1(2) of the EIA Directive, in conjunction with point 13(a) of Annex II to that directive, read, where appropriate, in the light of the Espoo and Aarhus Conventions, be interpreted as applying to the postponement of the date of deactivation and of the end of the industrial production of electricity of a nuclear power station, entailing, as in this instance, significant investments and security upgrades for the Doel 1 and 2 nuclear power stations?

(b) If the answer to the question in point (a) is in the affirmative, must Articles 2 to 8 and 11 of the EIA Directive and Annexes I, II and III to that directive be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 "amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply", Article 2 of which postpones the date of deactivation and the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

(c) Does the answer to the questions in points (a) and (b) differ depending on whether it relates to the Doel 1 or the Doel 2 power station, having regard to the need, in the case of the former power station, to adopt administrative acts implementing the abovementioned Law of 28 June 2015?

(d) If the answer to the question set out in point (a) is in the affirmative, must Article 2(4) of the EIA Directive be interpreted as permitting an exemption for the postponement of the deactivation of a nuclear power station from the application of Articles 2 to 8 and 11 of the EIA Directive for overriding reasons of public interest linked with the security of the country's electricity supply?

7. Must the concept of "specific act of national legislation" within the meaning of Article 1(4) of the EIA Directive be interpreted as excluding from the scope of that directive a legislative act such as the Law of 28 June 2015 "amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply", having regard to the various assessments and hearings carried out in connection with the adoption of that law, which might attain the objectives of that directive?

8. (a) Must Article 6 of the Habitats Directive, in conjunction with Articles 3 and 4 of the Birds Directive, read, where appropriate, in the light of the EIA Directive and the Espoo and Aarhus Conventions, be interpreted as applying to the postponement of the date of deactivation and of the end of the industrial production of electricity of a nuclear power station, entailing, as in this instance, significant investments and security upgrades for the Doel 1 and 2 nuclear power stations?

(b) If the answer to the question in point (a) is in the affirmative, must Article 6(3) of the Habitats Directive be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 "amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply", Article 2 of which postpones the date of deactivation and of the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

(c) Does the answer to the questions in points (a) and (b) differ depending on whether it relates to the Doel 1 or the Doel 2 power station, having regard to the need, in the case of the former power station, to adopt administrative acts implementing the abovementioned Law of 28 June 2015?

(d) If the answer to the question in point (a) is in the affirmative, must Article 6(4) of the Habitats Directive be interpreted as allowing grounds linked with the security of the country's electricity supply to be considered an imperative reason of overriding public interest, having regard in particular to the various assessments and hearings carried out in the context of the adoption of the abovementioned Law of 28 June 2015, which might be capable of attaining the objectives of that directive?

9. If, on the basis of the answers to the preceding questions, the national court should conclude that the contested law fails to fulfil one of the obligations arising under the abovementioned Conventions or directives, and the security of the country's electricity supply cannot constitute an imperative reason of overriding public interest permitting a derogation from those obligations, might the national court maintain the effects of the Law of 28 June 2015 in order to avoid legal uncertainty and to allow the environmental impact assessment and public participation obligations arising under those Conventions or directives to be fulfilled?'

38. Written observations have been submitted by Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen vzw and Electrabel SA, as parties in the main proceedings, the Kingdom of Belgium, the Republic of Austria, the Federal Republic of Germany, the Portuguese Republic, the Republic of Finland, the Czech Republic, the United Kingdom of Great Britain and Northern Ireland and the European Commission. Apart from the United Kingdom, those parties also took part in the hearing on 10 September 2018.

V. Legal assessment

39. The questions asked by the Cour constitutionnelle (Constitutional Court) seek the interpretation of two International Conventions entered into by the Union and two EU directives with regard to similar points of law in each case, namely whether the extension of the period of production of electricity at a nuclear power station (see under C and D) by a legislative act (see under B), as a project, requires an environmental impact assessment and whether there may be any derogation from obligations with regard to the environmental impact assessment (see under E). I will first consider each of these points of law from the perspective of the EIA Directive and then examine the extent to which the two Conventions influence the conclusion. The questions regarding the Habitats Directive merit separate analysis, however (see under F). As the answers to the questions indicate that in all likelihood there is a procedural error, I will then discuss to what extent it is possible to maintain the effects of a measure adopted in breach of the rules governing environmental impact assessment (see under G). First of all, however, it must be examined whether the EAEC Treaty precludes the application of EU law in the main proceedings (see under A).

A. The applicability of EU law to nuclear energy

40. All the legal acts to which the request for a preliminary ruling relates were based on the environmental competences existing at the time, which are now laid down in Article 192 TFEU, and in the case of the Conventions on the respective procedural rule governing the exercise of external competences which was applicable at the time.

41. However, under Article 106a(3) EA the provisions of the TFEU are not to derogate from the provisions of the EAEC Treaty. (13) It must therefore be examined, first, whether the application of the two Conventions or the two directives to the extension of the period of industrial production of electricity by nuclear power stations could result in such derogation.

42. A derogation is in any event precluded where the provisions of EU law in question concern matters not regulated in or on the basis of the EAEC Treaty. (14)

43. Particular consideration must be given in this regard to the provisions of Title II, Chapter 3 EA on health and safety in the nuclear energy sector. They are to be interpreted broadly in order to give them

practical effect. (15) The granting of official authorisations for the construction and operation of nuclear installations, in their various aspects relating to health protection against the dangers of ionising radiations for the general public, therefore comes within the scope of application of the EAEC Treaty. (16)

44. In this regard, it should first be noted that that scope of application of the EAEC Treaty with regard to the protection of the general public cannot preclude the application of the Habitats Directive, as that directive does not seek to protect the general public, but to protect natural habitats and wild species.

45. Moreover, no provisions were adopted on the basis of the provisions of the EAEC Treaty in respect of the environmental impact assessment, as foreseen in the EIA Directive and the Espoo and Aarhus Conventions. Furthermore, the environmental impact assessments provided for therein are not restricted to the protection of the general public against ionising radiation, but concern *all* significant environmental effects which could be caused by the activity in question.

46. For that matter, the Union legislature also clearly considers that the Conventions and the EIA Directive are not precluded by the EAEC Treaty, as the rules expressly provide for the assessment of the environmental effects of nuclear power stations, (17) but are not additionally based on the EAEC Treaty.

47. Although Belgium does explain that the application of EU law also may not run counter to the objectives of the EAEC Treaty, in particular the objective of security of supply under Article 2(d) EA, that provision concerns the supply of ores and nuclear fuels. It is not clear that this would be affected by an environmental impact assessment or public participation.

48. Accordingly, the other parties and the Cour constitutionnelle (Constitutional Court) rightly agree that the EAEC Treaty does not preclude the application of the Conventions and directives at issue.

B. Legislative acts in environmental impact assessment

49. Questions 2, 4 and 7 of the request for a preliminary ruling concern the fact that the period of industrial production of electricity by the Doel 1 and 2 nuclear power stations was extended by a legislative measure. The Cour constitutionnelle (Constitutional Court) therefore asks whether a legislative measure requires an environmental impact assessment under the Espoo and Aarhus Conventions and the EIA Directive.

50. Under Article 1(4) of the EIA Directive, the directive does not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of that directive, including that of supplying information, are achieved through the legislative process.

51. On the other hand, legislative acts are not expressly excluded by the Espoo Convention. Article 2(2) of the Aarhus Convention does contain a reservation for legislation. However, it is worded such as to exclude only bodies and institutions acting in *a legislative capacity*.

52. Both Conventions could therefore be understood as also covering acts of the legislature where it did not operate as a legislature, that is, in a legislative capacity, but rather as an administrative authority authorising a project. (18)

53. At first sight, such a scope of the environmental assessment, broader than that of the EIA Directive, would seem preferable; otherwise there could be a risk of circumvention that could materialise especially in the case of large-scale activities causing particular damage to the environment.

54. Such circumvention could infringe not only the two Conventions, but also a general obligation under international law to undertake an environmental assessment. According to the International Court of Justice (ICJ), all States are required to undertake an environmental impact assessment where there is a risk that the planned or proposed activity could have a significant adverse impact in a transboundary context. (19) In addition, according to a general principle of international law, as expressed for example in

Articles 27 and 46 of the Vienna Convention on the Law of Treaties, (20) States may not invoke the provisions of their internal law, including their internal distribution of competences, as justification for failure to fulfil international obligations. In EU law the same principles apply. (21) Accordingly, the reformulated exemption for specific acts of national legislation in Article 2(5) of the version of the EIA Directive as amended by Directive 2014/52/EU, (22) which is not applicable in the main proceedings, now also excludes an application to transboundary environmental impact assessment under Article 7.

55. Ultimately, however, there is no need for the Court to decide in this case what are the consequences of this inconsistency which ostensibly exists between Article 1(4) of the EIA Directive and the Espoo and Aarhus Conventions, as its interpretation of Article 1(4) prevents an infringement of the Conventions.

56. It has ruled, with regard to Article 1(4) of the EIA Directive, that it exempts projects from the assessment procedure only if two conditions are met. *First*,the details of the project must be adopted by a specific legislative act; *secondly*, the objectives of the directive, including that of supplying information, must be achieved through the legislative process. (23)

57. The first condition requires that the legislative act displays the same characteristics as the development consent specified in Article 1(2) of the EIA Directive. (24) In so far as the request for a preliminary ruling concerns this point, I will examine it in connection with the extension of the period of industrial production of electricity. (25)

58. The second condition requires the objectives of the EIA Directive to be achieved through the legislative process. It thus follows from Article 2(1) that the fundamental objective of that directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their environmental effects 'before consent is given'. (26)

59. Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. The minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment. (27)

60. In addition to supplying information, adequate public participation must also be ensured in the legislative process. As is apparent from recitals 16, 17 and 19, this is also a fundamental objective of the EIA Directive and it must also include transboundary public participation, as, according to recital 15, the directive is to ensure the implementation of the Espoo Convention.

61. The requirements of the two Conventions should therefore be met if the objectives of the EIA Directive are achieved when a legislative act is adopted.

62. The answer to Questions 2, 4 and 7 of the request for a preliminary ruling is therefore that under Article 1(4) of the EIA Directive only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the ambit of the directive. It is for the national court to verify whether the legislative act is equivalent to development consent for a project and whether the objectives of the directive are achieved in the legislative process, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. (28)

C. The extension of the period of industrial production of electricity

63. However, the objectives of the EIA Directive and of the Espoo and Aarhus Conventions have to be fulfilled only if the measure in question falls within their respective scopes. Against this background, the Cour constitutionnelle (Constitutional Court) wishes to ascertain, by Questions 1, 3(a), 5(a) and the first

part of Question 6(a), whether the extension of the period of industrial production of electricity in the two nuclear power stations is to be regarded as a project.

1. Definition of 'project' in the EIA Directive

64. The first part of Question 6(a) is thus intended to clarify whether the extension of the period of industrial production of electricity by nuclear power stations is a project within the meaning of the EIA Directive.

65. Article 1(2)(a) of the EIA Directive defines project as 'the execution of construction works or of other installations or schemes' (first indent) and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources' (second indent).

66. The Court has ruled in this regard that the definition of 'project' covers works or interventions involving alterations to the physical aspect of a site. (29) Thus, the mere renewal of an existing permit to operate a project cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of Article 1(2)(a) of the EIA Directive. (30)

67. Although this interpretation of Article 1(2)(a) of the EIA Directive is afforded by the wording of that provision, it is not consistent with the Espoo and Aarhus Conventions.

2. Definition of 'activity' in the Espoo Convention

68. Although the definition of 'activity' [German: Projekt] in the Espoo Convention is not expressly mentioned in the questions asked by the Cour constitutionnelle (Constitutional Court), it is ultimately the subject of both Question 1 and Question 3(a). Question 1 in particular does not ask whether the two documents referred to in that question are binding; they do not make such a claim at all. Instead, the question seeks to clarify whether the legal opinion expressed therein that the renewal of consent for a nuclear power station is an activity is correct. That is ultimately also the essence of Question 3(a).

(a) The Court's power of interpretation

69. An analysis of the definition of 'activity' in the Espoo Convention first presupposes that the Court actually has the power to interpret the Convention.

70. As the then European Community approved the Espoo Convention, its provisions now form an integral part of the legal order of the European Union pursuant to Article 216(2) TFEU. (31)

71. Although the Convention was concluded by the Community and all its Member States on the basis of joint competence, (32) where a case is brought before the Court in accordance with Article 267 TFEU, the Court has jurisdiction to define the obligations which the European Union has assumed and those which remain the sole responsibility of the Member States in order (for that purpose) to interpret the provisions of the Convention. (33) If it reaches the conclusion that the provision in question is one of the obligations assumed by the European Union, then it has jurisdiction to interpret that provision too.

72. The Espoo Convention makes the authorisation of certain activities subject to transboundary public participation and an assessment of their environmental effects. Since most of those provisions were transposed by the EIA Directive, in particular by Article 7, they fall within an area covered to a large extent by EU law. The Court therefore has jurisdiction to interpret at least the provisions of the Convention concerning that environmental assessment. (34)

73. Even if it were assumed that certain projects fall within the exclusive competence of the Member States, there is clearly an interest that, where a provision of EU law can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, that provision should

be interpreted uniformly in order to forestall future differences of interpretation as to the circumstances in which it is to apply. (35)

74. The Court therefore has the power to interpret the Convention in respect of the environmental assessment.

(b) Definition of 'activity' in the Espoo Convention

75. Under Article 1(5) of the Espoo Convention, 'proposed activity' means any activity or any major change to an activity. That definition is clearly circular vis-à-vis the notion of 'activity' per se, as, unlike the EIA Directive, there is no definition describing the necessary actions in more detail.

76. However, the specific activities mentioned in Appendix I to the Espoo Convention can be used to determine the definition of 'project' more precisely. (36) Only those activities fall within the scope of the Convention and can give rise to an obligation to undertake an environmental assessment.

77. There are thus some types of activity which are characterised by specific actions, such as *deforestation* of large areas (Appendix I, point 17 to the Espoo Convention) or *construction* of motorways, express roads and lines for long-distance railway traffic and of certain airports (point 7). Nevertheless, the vast majority of the types of activity covers certain kinds of installations or facilities in themselves, such as crude oil refineries (point 1), major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals (point 4) or integrated chemical installations (point 6).

78. Nuclear power stations (Appendix I, point 2 to the Espoo Convention) come under this second category. The Espoo Convention Implementation Committee rightly inferred from this that not only the construction and first operation of a nuclear reactor is an activity, but also the continued operation beyond the originally authorised lifetime of a nuclear reactor, as a significant adverse transboundary impact is likely to be caused by such operation. (37) Accordingly, the renewal of consent for a nuclear power station also constitutes an activity.

79. Belgium asserts that the consent to operate the nuclear power stations in question is not limited in time. The period of industrial production of electricity has merely been extended.

80. However, the operation of a nuclear power station is not an end in itself. It is justified only by the production of electricity. Without the extension of the period of industrial production of electricity for the Doel 1 and 2 nuclear power stations, the production of electricity could not have been resumed there and would have had to be suspended. The Doel 1 power station was even temporarily shut down for that reason until the law entered into force. The situation is therefore quite comparable with the case assessed by the Implementation Committee. (38)

81. More compelling is the Czech Republic's objection that, on the basis of the above considerations, the reassessment of the environmental impact of a nuclear power station which has already been granted consent would depend only on whether the State concerned granted consent for a limited period.

82. However, this objection does not alter the fact that the renewal of consent may cause a significant environmental impact and it is therefore consistent with not only the wording but also the objectives of the Espoo Convention to undertake an environmental impact assessment.

83. It would also be reasonable, in principle, in the case of power stations and similar installations which have been granted consent for an indefinite period, to decide periodically, after consulting the public, whether it is justified in the light of their environmental impact to continue to operate them. However, the fact that no such provision is made in the Espoo Convention does not justify the exclusion from the scope of the Convention of decisions on continued operation which are actually necessary.

84. Furthermore, it will be shown in connection with the Aarhus Convention that reconsideration of consent for nuclear power stations provided for in other legal acts can also give rise to a requirement of public participation with an environmental impact assessment. (39)

85. It should nevertheless be noted that classification as an activity within the meaning of Article 1(5) and Appendix I to the Espoo Convention, unlike projects under Article 4(1) and Annex I to the EIA Directive, does not necessarily require an environmental impact assessment as it is not irrefutably presumed in the context of Article 2(3) to the Espoo Convention that an activity under Appendix I would cause a significant adverse transboundary environmental impact and thus require an environmental impact assessment. This is underlined in particular by Article 3(7) of the Convention, which provides, in the event of disputes, for an interstate procedure in order to establish whether such an impact is likely.

86. It is suggested that a significant adverse transboundary environmental impact could be caused by the extension of the period of industrial production of electricity by a nuclear power station by, inter alia, the fact that both the risk of a serious accident and the volume of waste produced will increase accordingly in the event of an extension of the operation of a nuclear power station. If improvement measures are not taken, it is also to be feared that the risks of accident from deterioration of the installation will grow disproportionately. Therefore, the extension of the period of industrial production of electricity by nuclear power stations may cause a significant adverse transboundary environmental impact justifying an environmental impact assessment. With regard to the main proceedings, it should also be recalled that the power stations are in the immediate proximity of the Netherlands, and other Member States would probably also be affected in the event of a serious accident.

87. Furthermore, it is also reasonable to undertake an environmental impact assessment upon an extension of the period of production of electricity because in the course of the long-term operation of a power station new scientific findings are usually made concerning the associated risks, which could not be taken into account previously. (40) In addition, as Portugal asserts, an environmental impact assessment with public participation has never been undertaken for many older plants in particular.

88. On the other hand, extensions of the use of nuclear power stations by very short periods of time would not appear, as a rule, to require an environmental impact assessment as typically such extensions are not likely to cause a significant adverse environmental impact. There is no need for the Court to decide, however, where precisely the line is to be drawn, as the extension by 10 years is sufficient in any case to create a risk of such environmental impact.

89. The answer to Questions 1 and 3(a) is therefore that the extension of the period of industrial production of electricity by 10 years is an activity within the meaning of Article 1(5) and Appendix I, point 2 to the Espoo Convention which requires a transboundary environmental impact assessment pursuant to Article 2(3) because it may cause a significant adverse transboundary environmental impact.

3. Definition of 'project' in the Aarhus Convention

90. Question 5(a) concerns the application of Article 6 of the Aarhus Convention, which contains rules governing public participation with an environmental impact assessment, to the extension of the period of industrial production of electricity in a nuclear power station.

(a) Extension of the period as a 'project'

91. Article 6(1)(a) of the Aarhus Convention provides that Article 6 is to be applied to decisions on whether to permit proposed activities listed in Annex I. The term 'activity' corresponds to the term 'project' used in the EIA Directive.

92. The fifth indent of point 1 of Annex I to the Aarhus Convention mentions 'nuclear power stations' and no threshold is defined with respect to commercial use. Unlike in the Espoo Convention, there is no

requirement for an assessment whether such a project causes a significant adverse environmental impact in a specific case.

93. The law at issue granted consent for the production of electricity at the two nuclear power stations for a further 10 years. As Belgium and Electrabel state, the power stations also have consent to operate for an indefinite period which was not called into question by the time limit on the production of electricity. As has already been explained in connection with the Espoo Convention, (41) however, the production of electricity is the reason for the operation of nuclear power stations. The authorisation of the production of electricity at a nuclear power station is therefore also to be regarded as an authorisation of the activity 'nuclear power stations' in accordance with the fifth indent of point 1 of Annex I to the Aarhus Convention.

94. As regards the fact that the renewal of existing consent is at issue, Article 6(1)(a) of the Aarhus Convention is not restricted to initial consent for an activity. In principle, that provision thus also covers renewed consent for an activity.

95. It is true that the Aarhus Convention contains special rules governing reconsideration of (Article 6(10)) and changes to (Annex I, point 22) consent. However, as I will explain below, those provisions do not prevail over the application of Article 6(1)(a) and the fifth indent of point 1 of Annex I to the extension of the period of industrial production of electricity.

(b) Reconsideration of consent as a 'project'

96. Article 6(10) of the Aarhus Convention could at first glance be a *lex specialis* in relation to Article 6(1)(a). Under that provision, each Party is to ensure that, when a public authority *reconsiders* or *updates* the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of the article are applied *mutatis mutandis*, and where appropriate. Those paragraphs lay down detailed rules for public participation with an environmental impact assessment.

97. It is true that the extension of the period of industrial production of electricity was linked to a reconsideration and update of the operating conditions, namely to the agreed improvement measures. For this very reason, public participation with an environment impact assessment could be necessary. (42)

98. Nevertheless, reconsidering or updating consent for nuclear power stations is ultimately not a specific case of consent for a nuclear power station by way of extending the period of production of electricity. Article 6(10) of the Aarhus Convention is not therefore a *lex specialis* in relation to Article 6(1)(a).

99. This possible requirement of public participation with an environment impact assessment based on a reconsideration or update of consent for a nuclear power station does, however, rebut the Czech Republic's objection that applying the notion of 'project' to the renewal of consent is inconsistent because it does not cover nuclear power stations granted consent for an indefinite period. (43) The regular verification of the safety of nuclear power stations provided for in Article 14 of the Vienna Convention on Nuclear Safety (44) and Article 6(2) of Directive 2009/71/Euratom (45) can give rise to public participation with an environment impact assessment through Article 6(10) of the Aarhus Convention. Furthermore, Belgium explains that its authorities undertake an environmental impact assessment in the event of such reconsideration. For other major installations the Directive on industrial emissions (46) also establishes duties of reconsideration.

(c) Change or extension as a 'project'

100. The first sentence of point 22 of Annex I to the Aarhus Convention provides that any *change* toor *extension* of activities, where such a change or extension in itself meets the criteria/thresholds set out in the annex, is subject to Article 6(1)(a). This could also constitute a *lex specialis* in relation to Article 6(1)(a) in conjunction with the fifth indent of point 1 of Annex I.

101. The extension of the period of industrial production of electricity by a power station would be an extension in time of that activity and the agreed improvement measures come under the notion of 'change'. Because no thresholds are set for the commercial production of electricity in nuclear power stations, that provision thus also requires public participation. (47)

102. However, the first sentence of point 22 of Annex I to the Aarhus Convention is not a *lex specialis* in relation to the fifth indent of point 1 of Annex I for the case of the extension of the period of production of electricity, since extending the period of operation of an installation is different from a 'simple' change or extension in that without the extension in time the activity would be suspended.

(d) Interim conclusion

103. The answer to Question 5(a) is therefore that the extension of the period of industrial production of electricity by certain nuclear power stations is to be regarded, on the one hand, as consent for an activity within the meaning of Article 6(1)(a) and the fifth indent of point 1 of Annex I to the Aarhus Convention and, on the other, as a change to and extension in time of the operation of nuclear power stations within the meaning of Article 6(1)(a) and the first sentence of point 22 of Annex I in conjunction with the fifth indent of point 1.

4. Inconsistency between the previous interpretation of Article 1(2)(a) of the EIA Directive and the two Conventions

104. Accordingly, the Espoo and Aarhus Conventions require a transboundary environmental impact assessment or public participation with an assessment of the environment impact of the extension of the period of industrial production of electricity by certain nuclear power stations. However, the *previous interpretation* of the definition of 'project' in Article 1(2)(a) of the EIA Directive excludes such a measure from the scope of the directive.

(a) Interpretation of the definition of 'project' in the EIA Directive in conformity with international law

105. Because the EIA Directive is intended to implement much of the Convention, (48) it is desirable, however, to interpret it in accordance with the Convention. (49) Furthermore, the EU's powers must be exercised with due regard for international law; consequently, EU secondary law must in principle be interpreted in accordance with the EU's obligations under international law. (50)

106. Article 1(2)(a) of the EIA Directive allows scope for an interpretation satisfying the requirements of the two Conventions, as renewal of consent could be classified under *other interventions in the natural surroundings and landscape*.

107. It can be seen that the previous interpretation of Article 1(2)(a) of the EIA Directive did not appear to be absolutely compelling for the Court, moreover, from the fact that it considered it necessary, in the first of the two relevant judgments at least, to base its conclusion that the directive was not applicable to the project in question additionally on the relevant project type in Annex I. In that case it was the *construction* of airports under point 7(a). (51) The mere renewal of consent to operate in the absence of any construction measures certainly cannot, however, be regarded as the construction of an airport. The project type 'nuclear power stations', on the other hand, is not limited to construction.

108. In the light of the international obligation to undertake a transboundary environmental impact assessment, which stems from both the Espoo Convention and the case-law of the ICJ, (52) it therefore seems imperative to include at least the renewal of consent which may cause a significant adverse transboundary impact within the meaning of the Espoo Convention under the definition of 'project' in the EIA Directive, as Germany proposed at the hearing.

109. Even going beyond this, however, for purely domestic cases the broader interpretation of the definition of 'project' is more consistent with the purpose of the EIA Directive and the Aarhus Convention of ensuring an assessment of the environmental impact of projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location. In this regard, the extension of the operation of an installation may, of course, have significant effects on the environment, not only as a result of continued operation, but also because of the altered environmental conditions in the surrounding area. In addition, new scientific findings may be available at the time when a decision on extension is taken.

110. Lastly, it should be borne in mind that recognition of renewal of consent as a project does not in itself require an environmental impact assessment to be undertaken as only the types of project in Annexes I and II associated with a degree of risk to the environment are subject to an environmental impact assessment under the EIA Directive. Only in this context should it be discussed whether certain extensions are substantial enough to justify an assessment.

111. The answer to Questions 1, 3(a), 5(a) and the first part of Question 6(a) is therefore that, contrary to previous case-law, the definition of 'project' under Article 1(2)(a) of the EIA Directive includes the extension by 10 years of the period of industrial production of electricity by a nuclear power station.

112. If this conclusion is reached and there is a departure from previous case-law, consideration might be given to limiting the effects of a judgment along such lines in order to limit risks to the legal certainty of measures taken, in reliance on the Court's previous case-law, without an environmental impact assessment. (53) However, only very few activities would probably be at risk of proceedings being brought for infringement of the EIA Directive because EU law does not preclude time limits for bringing proceedings. (54) Furthermore, it is perfectly possible that doubts could have developed over reliance on the Court's case-law because of the two Conventions and the practice of the respective Compliance Committees. I therefore consider that there is no need to limit the effects of the judgment.

(b) The direct effect of the Espoo and Aarhus Conventions

113. If, however, the Court should adhere to its case-law regarding the definition of 'project' in Article 1(2)(a) of the EIA Directive, the question then arises whether the Espoo and Aarhus Conventions have direct effect at least in respect of the definition of projects which require an environmental impact assessment.

114. Provisions in an agreement concluded by the European Union and its Member States with non-member countries are directly applicable when, regard being had to their wording and to the purpose and nature of the agreement, or its 'nature and broad logic', they contain clear and precise obligations which are not subject, in their implementation or effects, to the adoption of any subsequent measure. (55)

115. Measures such as the EIA Directive do not preclude a direct application of those agreements as, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union. (56)

116. In this case, however, it is not necessary to reconsider the validity of the EIA Directive by reference to the two Conventions, but merely to identify, with the aid of the Conventions, a gap in the definition of 'project' and to fill that gap through direct recourse to the definition of 'project' in the Conventions.

117. In this regard, the question is not whether further implementing acts, such as the regulation of a procedural framework, are required for an environmental impact assessment to be undertaken. That framework is already established by the EIA Directive and its transposition in the Member States. It needs merely be applied to projects which are covered by the two Conventions but not by the EIA Directive. (57) This is how the Court proceeds in respect of projects which fall under Article 6(1)(b) of the Aarhus Convention, and are not therefore expressly listed in the Annex to the Convention, but may nevertheless have a significant effect on the environment and therefore must be examined. (58)

118. The purpose and nature of the Conventions do not preclude such direct application.

119. In this regard, the environmental regulatory purpose of the Conventions is of fundamental importance. Thus, Article 1 and the seventh recital in the preamble to the Aarhus Convention stress the right of every person to live in an environment adequate to his or her health and well-being. According to the seventh recital in the preamble, there is even a duty to protect and improve the environment, both individually and in association with others, for the benefit of present and future generations. For that reason, recitals 8, 13 and 18 of the preamble underline the need to ensure effective judicial protection with regard to the enforcement of environmental law. This must include the opportunity to rely on rules of international environmental law which, like the rights of participation under the Espoo Convention, benefit individuals.

120. Accordingly, it is also stated in the explanations for the proposed Global Pact for the Environment that, unlike mere declarations, international environmental agreements typically seek to establish justiciable, directly applicable rights. (59)

121. In the event that, in respect of the extension of the period of production of electricity in nuclear power stations, the Court adheres to its interpretation of the definition of 'project' under Article 1(2)(a) of the EIA Directive, I therefore propose that it find that the EIA Directive is nevertheless applicable to such extension because it constitutes a project within the meaning of Article 1(5) and Appendix I to the Espoo Convention and Article 6(1)(a) and Annex I to the Aarhus Convention.

5. Status as a project by virtue of other works

122. Lastly, the first part of Question 6(a) addresses a further possibility which may lead to recognition as a project in the main proceedings. A project and consent within the meaning of Article 1(2) of the EIA Directive also exist where a decision is taken in connection with renewal of consent on an 'upgrade programme' which involves a change to or extension of a project through works or interventions involving alterations to its physical aspect and may have significant adverse effects on the environment. (60)

123. In so far as such an upgrade programme is a condition for renewal of consent, consideration would have to be given to the longer-term operation of the project in question, in addition to the direct effects of the upgrade, both with regard to the need for an assessment and in the assessment itself.

124. Irrespective of whether the Court concurs with the proposals regarding the interpretation of Article 1(2)(a) of the EIA Directive in conformity with international law or regarding the direct application of the definition of 'project' in the Espoo and Aarhus Conventions, the extension of the period of industrial production of electricity by a nuclear power station therefore constitutes consent for a project within the meaning of Article 1(2)(a) where it involves consent for works or interventions altering or extending the installation.

125. In practical terms, this means that the Cour constitutionnelle (Constitutional Court) must examine how closely the proposed measures to improve the nuclear power stations in question are connected with the statutory extension of the period of production of electricity. If the construction measures are a condition for the extension, it constitutes a single project. (61) If the measures were merely taken on the occasion of the extension, they would not form part of the same project.

D. Other questions regarding the application of the EIA Directive

126. The second part of Question 6(a) should clarify which type of project in Annex I or II to the EIA Directive the extension of the period of production of electricity, possibly in connection with improvement measures, should be classified, as without such classification there is no obligation to undertake an assessment. Question 6(b) concerns the time of the assessment.

1. Classification under the Annexes to the EIA Directive

127. If the Court concurs with my proposed view that an extension of the period of production of electricity is a project, that project should be classified under Annex I, point 2(b) to the EIA Directive,

which mentions nuclear power stations. The same would apply in the case of a direct application of the definition of 'project' in the Aarhus and Espoo Conventions.

128. If, however, a project within the meaning of the EIA Directive were to be assumed only on account of a connection with improvement measures, this could constitute a change to an existing nuclear power station project. The Cour constitutionnelle (Constitutional Court) apparently considers that Annex II, point 13(a) to the EIA Directive is relevant in that case. That provision mentions any change to or extension of projects listed in the two Annexes, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment. Their environmental effects would have to be assessed, if necessary, in accordance with Article 4(2), that is, only if they may have significant adverse effects on the environment.

129. However, Annex II, point 13(a) expressly does not apply to changes or extensions included in Annex I. Point 24 of Annex I to the EIA Directive — in accordance with the Aarhus Convention (62) — mentions any change to or extension of projects listed in that Annex where such a change or extension in itself meets the thresholds, if any, set out in that Annex. Such a change would be subject to an environmental impact assessment under Article 4(1) regardless of whether it is established that it could have significant adverse effects on the environment.

130. The reference to thresholds does not mean that Annex I, point 24 to the EIA Directive is applicable only to types of project for which thresholds are set. Rather, that provision was endowed with a condition and an exception to that condition. The condition is that thresholds are met. However, it applies only if thresholds are actually set.

131. As *no* thresholds are set for commercial nuclear power stations, any change to or extension of such an installation thus requires an environmental impact assessment in principle. If the extension of the period of industrial production of electricity by the two nuclear power stations is to be regarded as a project within the meaning of Article 1(2)(a) of the EIA Directive on account of its link with the improvement works, it would therefore be subject to a mandatory environmental impact assessment under Article 4(1) and Annex I, point 2(b) and point 24.

132. It could be asked whether the obligation to assess changes or extensions of installations for which no thresholds have been set needs to be restricted, having regard to the purpose of the EIA Directive, as it is intended to ensure that the environmental effects of projects which are likely to have significant effects on the environment (Articles 1(1) and 2(1)) are assessed. In the case of nuclear power stations too, there will be changes where such effects can be definitively ruled out. In the case of such measures there could be doubts as to the purpose of an environmental impact assessment. On the other hand, Annex I, point 24 cannot be interpreted in the same way as Annex II, point 13(a), where the possibility of significant adverse effects on the environment must be established, as the former provision would otherwise be deprived of its effectiveness.

133. In the final analysis, however, it is clear in the present case that the extension by 10 years of the period of industrial production of electricity in conjunction with the improvement measures may have significant environmental effects. (63) Accordingly, there is no need to settle the question of a restrictive interpretation of Annex I, point 24 to the EIA Directive.

134. It must therefore be stated with regard to the second part of Question 6(a) that the extension by 10 years of the period of industrial production of electricity by commercial nuclear power stations, which is linked with structural improvement measures, must, as a change to a nuclear power station, be made subject to an assessment of its environmental effects in accordance with Article 4(1) and Annex I, point 24 in conjunction with point 2(b) to the EIA Directive if the extension is not already to be regarded in itself as consent for a project in accordance with Annex I, point 2(b).

2. Time of the assessment

135. The time of the environmental impact assessment could be of crucial importance to the proceedings before the Cour constitutionnelle (Constitutional Court). If that assessment needs to be undertaken only when consent is granted for the improvement measures, it cannot be ruled out that the related questions are to be settled in the parallel proceedings before the Belgian Raad van State (Council of State), (64) which concern that consent. If, on the other hand, the environmental effects had to be assessed prior to the adoption of the Law concerning the extension, that would be a matter for the Cour constitutionnelle (Constitutional Court), which deals with the law.

136. Where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment. (65) Where a principal decision is taken and then an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. (66)

137. The Court did rule with regard to the EIA Directive, (67)as it was originally in force, that the assessment should be carried out in the course of the procedure relating to the implementing decision if those effects are not identifiable until the time of that procedure. (68) That case-law could be understood to mean that in the present case an environmental impact assessment need not be undertaken until the agreement concerning the improvement measures or even subsequent construction permits because it is not until these decisions that it is possible to identify precisely and definitively the environmental effects.

138. Subsequent to this case-law, however, it was laid down in Article 6(4) of the EIA Directive, following the amendments to the EIA Directive by Directive 2003/35 to implement the Aarhus Convention, that public participation must take place when all options are open before the decision on the request for development consent is taken. If, however, the legislature has already decided on the extension of the period of industrial production of electricity, all options are no longer open at the time of the consent for specific improvement measures.

139. Preparations must therefore be made for the decision on the extension of the period of industrial production of electricity by certain nuclear power stations such that sufficient account can be taken of its environmental effects.

140. Otherwise it would be possible to circumvent the consideration of environmental effects in the more important principal decision. Furthermore, the Strategic Environmental Assessment Directive illustrates the possibility of an environmental assessment being undertaken before all the details of subsequent projects are known.

141. Consequently, the need to adopt administrative acts implementing the Law of 28 June 2015 for the Doel 1 nuclear power station, which does not exist for the Doel 2 nuclear power station, also does not lead to any differences in the answers to the questions concerning the EIA Directive and the two Conventions.

142. The answer to Question 6(b) is therefore that in the case of a decision concerning the extension of the period of industrial production of electricity by certain nuclear power stations, which is connected with structural improvement measures, public participation must take place in accordance with Article 6(4) of the EIA Directive as early as possible, when all options are open, that is to say, before the decision on the extension is taken.

E. Derogation from the duty of assessment on grounds of security of electricity supply and legal certainty

143. Question 3(c), Question 5(c), Question 6(d) and Question 9 asked by the Cour constitutionnelle (Constitutional Court) concern the possibility of derogating from the obligation to undertake an environmental impact assessment on grounds of security of electricity supply or legal certainty.

1. Derogation on the basis of the specific exemption in the EIA Directive

144. By Question 6(d), the Cour constitutionnelle (Constitutional Court) wishes to ascertain whether Article 2(4) of the EIA Directive permits an exemption from the obligation to undertake an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power station for overriding reasons of public interest linked with the security of the country's electricity supply.

145. Article 2(4) of the EIA Directive states that Member States may, in exceptional cases, exempt a specific project, without prejudice to Article 7, in whole or in part from the provisions laid down in that directive.

146. As is also noted by the Cour constitutionnelle (Constitutional Court), it is possible under that provision to dispense with the domestic environmental impact assessment, but not the transboundary assessment regulated in Article 7. The original version of the EIA Directive (69) did not contain this reservation for the transboundary environmental impact assessment. It was supplemented by the Council by Directive 97/11/EC (70) in order to ensure that the exemption would not affect the reinforced transboundary consultation requirements in Article 7, (71) which, according to recitals 12 and 13 of Directive 97/11, stem from the Espoo Convention.

147. Furthermore, Article 2(4)(a) to (c) contains other criteria with which a Member State must comply if it wishes to rely on that exemption.

148. It must, in particular, first consider whether another form of assessment would be appropriate (point (a)) and also make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption, and the reasons for granting it (point (b)). In addition, the Member State must inform the Commission (point (c)).

149. These conditions must be satisfied in the first instance formally, that is to say, the competent authorities must engage in the consideration provided for in point (a) and then undertake the 'other form of assessment' mentioned, make the abovementioned information available to the public concerned and inform the Commission.

150. However, these are not mere formal requirements. Rather, by their nature, they seek to realise the objectives of the EIA Directive as far as possible within the framework of another form of assessment.

151. As is clarified by, in particular, the 23rd recital in the English and French versions of the EIA Directive but also, for example, the wording of Article 2(4)(a) in the English or German version, a form of assessment other than the environmental impact assessment may only be carried out if this is appropriate. I understand this condition to mean that there must be overriding reasons precluding an assessment under the EIA Directive. Another possible reason, aside from security of electricity supply, is the avoidance of legal uncertainty, which is mentioned in Question 9. If, however, a transboundary environmental impact assessment is necessary under Article 7 on account of transboundary environmental effects, which must absolutely be undertaken — as could be the case in the main proceedings — it would seem highly unlikely that there may be reasons precluding a domestic environmental impact assessment in such cases.

152. It should also be noted that the failure to undertake an environmental impact assessment in good time does not really appear, as a rule, to be capable of justifying a failure to apply the EIA Directive. Belgium does mention short-term problems in other power stations. However, in principle, electricity demand was foreseeable in the long term with the result that the necessary measures could have been taken in good time. In addition, it does not appear to be ruled out a priori that Belgium could have covered its electricity demand at least temporarily through supplies from other Member States.

153. In summary, it must be stated that Article 2(4) of the EIA Directive permits an exemption from the obligation to undertake an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power station for imperative reasons of public interest linked with the

security of the country's electricity supply and/or the avoidance of legal uncertainty if another form of assessment would be appropriate and the public concerned and the Commission are informed in accordance with Article 2(4)(b) and (c). On the other hand, it is not permissible under Article 2(4) to dispense with a transboundary environmental impact assessment under Article 7.

2. Derogation from the Espoo Convention

154. Because the transboundary environmental impact assessment under the EIA Directive may not be dispensed with, there is no need to answer Question 3(c), which asks whether the Espoo Convention permits a derogation.

3. Derogation from the Aarhus Convention

155. On the other hand, it seems possible a priori that Article 2(4) of the EIA Directive permits derogations from the environmental impact assessment which are more extensive than the possible derogations from public participation under Article 6 of the Aarhus Convention. An inconsistency of this kind could also constitute a gap in the transposition of that Convention in EU law.

156. The Aarhus Convention does not provide for an exemption for reasons of security of electricity supply and legal certainty, but only an exemption for national defence in Article 6(1)(c), which is not applicable, however. Articles 54 to 64 of the Vienna Convention on the Law of Treaties, which contain rules on termination or suspension of the operation of treaties, are also not relevant.

157. In addition, the state of necessity is a justification recognised by customary law for failure to comply with international obligations, (72) although it is subject to very strict conditions. It has been codified by the International Law Commission such that non-compliance must be the only way for the State to safeguard an essential interest against a grave and imminent peril. (73) These conditions are also applied by the ICJ. (74)

158. It does not seem inconceivable to recognise risks for security of supply or legal certainty as a grave and imminent peril to an essential interest of Belgium. However, it would also have to be proved that non-compliance with the obligations under the Aarhus Convention was the only way to counter such a peril.

159. It would thus also have to be examined in this connection whether timely public participation with an environment impact assessment would have been impossible.

160. The security of the country's electricity supply and the avoidance of legal uncertainty do not therefore constitute imperative reasons of public interest permitting a derogation from the Aarhus Convention or suspension of the application of its provisions if it was possible to take the necessary measures to comply with the Convention in good time.

4. Consequences for the interpretation of the possibility of derogation under the EIA Directive

161. Thus it appears at first sight that the EIA Directive allows a derogation which is possibly not permitted by the Aarhus Convention.

162. In order to avoid such an inconsistency, the requirements for the state of necessity in international law must be integrated into the interpretation of Article 2(4) of the EIA Directive. This can be done by the consideration provided for in Article 2(4)(a) of the EIA Directive to determine whether another form of assessment would be appropriate. Appropriateness may therefore be accepted only where the conditions for the state of necessity in international law are also met.

163. The answer to Question 3(c), Question 5(c), Question 6(d) and Question 9 is therefore that Article 2(4) of the EIA Directive permits an exemption from the obligation to undertake an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power

station if another form of assessment is necessary 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, and the public concerned and the Commission are informed in accordance with Article 2(4)(b) and (c). On the other hand, it is not permissible under Article 2(4) to dispense with a transboundary environmental impact assessment under Article 7.

F. Question 8 — Article 6(3) and (4) of the Habitats Directive

1. Question 8(a) — Definition of 'project' in the Habitats Directive

164. By Question 8(a), the Cour constitutionnelle (Constitutional Court) wishes to know whether Article 6 of the Habitats Directive applies to the extension of the period of industrial production of electricity by a nuclear power station.

165. Under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. If such an assessment should be necessary, it would include public participation in accordance with Article 6 of the Aarhus Convention. (75)

166. It must therefore be clarified in particular whether the extension of the period of industrial production of electricity by nuclear power stations is a plan or project within the meaning of that provision.

167. It is true that the Habitats Directive does not define 'project'. The Court has ruled, however, that the definition of 'project' in Article 1(2)(a) of the EIA Directive is relevant in defining the concept of plan or project as provided for in the Habitats Directive, which seeks, as does the EIA Directive, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment. (76)

168. It is not possible, however, to treat 'project' in the two directives in exactly the same way because the assessment under the Habitats Directive is inextricably linked to the consent requirements for plans and projects which are likely to have a significant effect on protected areas. The competent authorities may agree to a plan or programme only if the impact assessment contains complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works likely to have an effect on the protected area concerned. (77) On the other hand, the EIA Directive does not lay down any substantive rules for consent for a project. (78)

169. I therefore understand this statement by the Court regarding the meaning of the 'project' in the EIA Directive in the context of Article 6(3) of the Habitats Directive to mean that in any case projects within the meaning of that definition are also projects for the purposes of the first sentence of Article 6(3) of the Habitats Directive. However, I assume that the concept of project in the Habitats Directive is not thereby exhaustively defined. (79)

170. Accordingly, if the Court concurs with my view and the extension in itself is to be regarded as a project within the meaning of the EIA Directive or if the Cour constitutionnelle (Constitutional Court) concludes that the extension together with the improvement measures forms a project, a project therefore also exists within the meaning of Article 6(3) of the Habitats Directive. However, even if no project exists under the EIA Directive, that does not preclude the application of Article 6(3) of the Habitats Directive.

171. The Court has thus also held that it is not permitted to exclude from the duty of assessment certain categories of projects on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites. (80) In the subsequent examination of the different exclusions provided for in national law, it did not give detailed consideration as to whether they relate to

projects within the meaning of Article 1(2) of the EIA Directive. Instead, the likelihood of a significant effect on the protected sites was sufficient to reject the exclusions for the activities in question. (81)

172. The definition of 'project' in Article 1(2)(a) of the EIA Directive therefore does not definitively delimit the concept of 'project' under the first sentence of Article 6(3) of the Habitats Directive. Rather, the crucial factor is whether the activity concerned is likely to have a significant effect on a protected site.

173. Thus, the remaining risk of protected areas being affected by a serious accident in one of the power stations in particular points to the existence of a project within the meaning of Article 6(3) of the Habitats Directive. Furthermore, the operation of the cooling mechanism is likely to have an effect on fish and cyclostomata particularly, (82) for which both Belgium and the Netherlands protect the Scheldt. On the basis of the available information, it cannot be ruled out that other damage is also possible.

174. The answer to Question 8(a) is therefore that the extension of the period of industrial production of electricity by a nuclear power station is to be regarded as a project within the meaning of the first sentence of Article 6(3) of the Habitats Directive even if that extension would not constitute a project as such within the meaning of the EIA Directive or on account of its connection with works to improve the installation.

2. Question 8(b) — Legislative act

175. Question 8(b) concerns the fact that the extension of the period of industrial production of electricity by a nuclear power station is brought about by a legislative act.

176. This does not, however, call into question the application of Article 6(3) of the Habitats Directive. That provision must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned. (83)

3. Question 8(c) — Doel 1 and Doel 2

177. From the answer to Question 8(b), it follows for Question 8(c) that the questions contained in points (a) and (b) should not be answered any differently for the two nuclear power stations Doel 1 and Doel 2.

4. Question 8(d) — Exemption for security of supply

178. Lastly, in Question 8(d), the Cour constitutionnelle (Constitutional Court) asks whether Article 6(4) of the Habitats Directive permits, for reasons of security of electricity supply, the postponement of the end of the industrial production of electricity of a nuclear power station.

179. Under the first subparagraph of Article 6(4) of the Habitats Directive, the Member State must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature.

(a) Conditions for the application of Article 6(4) of the Habitats Directive

180. The question is therefore based on the premiss of a negative assessment of the implications for the site as, if there had been a positive assessment, the project could already have been granted consent pursuant to the second sentence of Article 6(3) of the Habitats Directive.

181. Furthermore, as an exception to the criterion for consent laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) must be interpreted strictly and can be applied only after the implications of a plan or project have been analysed in accordance with Article 6(3). (84) Accordingly, knowledge of the implications, in the light of the conservation objectives relating to the site in question, is a necessary prerequisite for the application of Article 6(4) of that directive, since, in the absence thereof,

no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site concerned must be precisely identified. (85)

182. The Cour constitutionnelle (Constitutional Court) must therefore examine, first of all, whether the various studies and consultations conducted in connection with the adoption of the Law extending the period of industrial production of electricity by the two nuclear power stations satisfy the requirements for an impact assessment under Article 6(3) of the Habitats Directive.

183. If the necessary assessments were conducted, it can be examined whether security of electricity supply constitutes an imperative reason of overriding public interest in relation to damage to the protected areas.

(b) Security of electricity supply

184. As far as the public interest in security of electricity supply is concerned, this is one of the aims of Union policy on energy under Article 194(1)(b) TFEU. Member States also have the fundamental right under Article 194(2) TFEU to determine themselves the choice between different energy sources and the general structure of their energy supply.

185. Accordingly, the Court has recognised within the scope of free movement of capital for, inter alia, undertakings active in the petroleum, telecommunications and electricity sectors that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public security reason and therefore may justify an obstacle to the free movement of capital. (86)

186. However, public security may be invoked only for ensuring a minimum supply (87) as the requirements of public security must, as a derogation from the fundamental principle of free movement of capital, be interpreted strictly, with the result that their scope cannot be determined unilaterally by each Member State without any control by the Union institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. (88)

187. These considerations should also apply in principle to Article 6(4) of the Habitats Directive. It should be noted, however, that this provision, unlike the derogations from free movement of capital under Article 65(1) TFEU, expressly includes reasons of an economic or social nature.

188. It follows that not only minimum supply is a possible imperative reason of overriding public interest but, more generally, sufficient supply to satisfy demand. However, public security may be invoked only for the interest in ensuring a minimum supply.

189. This distinction between the general interest in security of electricity supply and the particular interest in a minimum supply is particularly important because under the second subparagraph of Article 6(4) of the Habitats Directive the only considerations which may be raised are those relating to human health or public safety or to beneficial consequences of primary importance for the environment where the site concerned hosts a priority natural habitat type and/or a priority species. Other imperative reasons of overriding public interest may be raised only further to an opinion from the Commission.

190. With regard to that provision, the Court has ruled that the security of supply in the energy sector, in that case the supply of coal, does not fall under the second subparagraph of Article 6(4) of the Habitats Directive. (89) I understand this to mean that the Court was thereby addressing only the general interest in security in supply, which does not attain the level of the interest in ensuring public security.

191. As has already been stated, various protected areas mentioned by the Cour constitutionnelle (Constitutional Court) host priority habitats (90) and it does not appear to be ruled out a priori that they may also be damaged by the power stations. For that reason, the Cour constitutionnelle (Constitutional Court) must consider whether the operation of the two nuclear power stations in question only serves the general interest in security of supply or is in fact necessary to guarantee a minimum supply. In the former case, reliance on Article 6(4) of the Habitats Directive requires an opinion from the Commission.

192. Furthermore, that assessment is necessary because the requirements relating to the absence of alternative solutions may differ depending on whether the more substantial interest in ensuring a minimum supply or the less substantial general interest in security of supply is relevant.

193. It seems appropriate for a Member State to wish to ensure the minimum supply in its own territory. (91) On the other hand, it is not unreasonable to refer the Member States, for the general interest in security of supply, to the possibility of importing electrical energy. (92)

(c) Interim conclusion

194. The answer to Question 8(d) is therefore that the public interest in ensuring a minimum supply of electricity constitutes a reason of public safety within the meaning of the second subparagraph of Article 6(4) of the Habitats Directive, while the further-reaching public interest in security of electricity supply is to be regarded as a reason of an economic nature within the meaning of the first subparagraph of Article 6(4).

G. Maintenance of the effects of the Law extending the period of industrial production of electricity by the Doel 1 and Doel 2 nuclear power stations

195. On the basis of the above considerations, there are indications that the rules at issue were infringed on the adoption of the Law extending the period of industrial production of electricity by the Doel 1 and Doel 2 nuclear power stations and that this is not justified by security of electricity supply or legal certainty. Nevertheless, I do not rule out the possibility in this case of maintaining the effects of that law. The basis for this is the case-law developed by the Court in relation to the maintenance of measures adopted in breach of the Strategic Environmental Assessment Directive.

1. Case-law within the scope of the Strategic Environmental Assessment Directive

196. Within the scope of the Strategic Environmental Assessment Directive the Court has considered it possible to take into consideration overriding public interests in connection with the consequences of procedural infringements of rules on the environmental assessment of measures. This stems from the fact that the Strategic Environmental Assessment Directive, like the Espoo and Aarhus Conventions and the EIA Directive and the Habitats Directive, does not contain any rules relating to those consequences. (93)

197. Therefore, the detailed procedural rules governing actions brought for failure to fulfil the obligation to undertake an environmental assessment before the decision on a certain activity, subject to the principles of equivalence and effectiveness, fall within the procedural autonomy of the Member States. (94)

198. The requirements of the principle of effectiveness follow in this case from the Member States' obligation under the principle of cooperation in good faith laid down in Article 4(3) TEU to nullify the unlawful consequences of a breach of EU law. (95) Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the decision taken in breach of the obligation to carry out an environmental assessment. (96) The fundamental objective of a rule governing the environmental assessment would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing the activity concerned from being implemented in the absence of an environmental assessment. (97)

199. Furthermore, measures to suspend or annul such decisions are necessary on account of the substantive dimension of the fundamental right to effective judicial protection enshrined in the first paragraph of Article 47 of the Charter. That fundamental right is invoked mainly on account of its procedural requirements, but they are merely a means to an end, namely to guarantee an *effective* remedy. However, a remedy is effective only if the finding of infringements of the law has appropriate consequences. (98) It would hardly be compatible with this if challenged acts continued to be applicable even in the case of infringements of the law.

200. Accordingly, I have already taken the view that it is appropriate, as a rule, to halt the operations of a plant if its consent is revoked or suspended on grounds of an infringement of the EIA Directive (99) and the Court also clearly considers this to be the typical consequence of such a finding. (100)

201. The Court nevertheless ruled in *Inter-Environnement Wallonie and Terre wallonne* that a national court can, given the existence of an overriding consideration relating to the protection of the environment, exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of a national measure which it has annulled on grounds of infringement of the Strategic Environmental Assessment Directive. (101)

202. In *Association France Nature Environnement*, the Court even interpreted the earlier judgment to the effect that it intended to afford, case by case and by way of exception, a national court the power to restructure the effects of annulment of a national provision held to be incompatible with EU law. (102) That interpretation seems to be misleading, however, in so far as it might run counter to settled case-law according to which the Court *alone* may provisionally suspend the temporal application of EU law, whose application takes precedence. (103)

203. In fact, the judgment in *Inter-Environnement Wallonie and Terrewallonne* relates only to cases in which domestic measures are not substantively contrary to EU law, but have merely been adopted in breach of the rules on environmental assessment. Consequently, those measures are not inapplicable because they are contrary to EU law, whose application takes precedence. Rather, they are vitiated by a *procedural error*, the consequences of which are not expressly regulated, as has been stated. This explains the latitude which the Court has allowed national courts and the Court did not therefore go any further in *Association France Nature Environnement*.

204. The Court originally (104) permitted in this context only the maintenance of the effects of measures which correctly transpose the Nitrates Directive (105) and this was subsequently extended to the transposition of EU law in the field of environmental protection in general. (106) Furthermore, this case-law can be understood to mean that the avoidance of adverse environmental effects, irrespective of the transposition of EU environmental law, could justify maintaining the effects of measures adopted in breach of the Strategic Environmental Assessment Directive. (107)

205. It must therefore be stated that a national court can, given the existence of an overriding consideration relating to the protection of the environment, exceptionally be authorised to make use of a national provision empowering it to maintain certain effects of a national measure which it has annulled on grounds of infringement of the procedural requirements of the Strategic Environmental Assessment Directive.

2. Application to other environmental assessments

206. Applying this case-law in the present case would extend it considerably.

207. Such extension could not really be limited to the procedural requirements of the Espoo and Aarhus Conventions, the EIA Directive and the Habitats Directive in the long term. Rather, it would be conceivable in the case of a large number of procedural rules of EU law. Furthermore, the set of possible justifications would be extended far beyond environmental protection to *other public interests* if security of supply or avoidance of legal uncertainty were considered sufficient.

208. However, as a rule, some of the justification for the maintenance of plans and programmes which are subject to the Strategic Environmental Assessment Directive would be lacking since, unlike those measures, individual decisions do not in principle leave a legal vacuum (108) if they are annulled or suspended. Normally consent is merely cancelled and the activity in question may not therefore be carried out.

209. Nevertheless, such decisions are not necessarily contrary in substance to EU law when they are adopted in breach of procedural requirements of EU law. EU law does not therefore preclude national legislation which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law. (109)

210. Bearing in mind this possibility, it could be disproportionate in some cases, on the basis of a finding of a procedural error, to eliminate the effects of the decision concerned, with the result that the activity at issue can no longer be carried out at least temporarily. Rather, it could be necessary to weigh up the conflicting interests and, in some cases, to maintain the effects of the decision until it is subsequently regularised.

211. However, a good degree of caution must be exercised.

212. The possibility of a posteriori regularisation is limited to exceptional cases and may not offer the opportunity to circumvent EU law or dispense with applying it. (110) However, there would be a danger of circumvention especially if before regularisation the effect of decisions adopted in breach of procedural rules was maintained too generously.

213. It must also be ensured that maintenance of the effects of a decision taken without the necessary environmental assessment does not result in environmental damage which the environmental assessment is specifically intended to prevent.

214. Consequently, the effects of such a decision may be maintained only if, 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 the retrospective carrying out of the environmental assessment. If, however, there is reasonable doubt as to such confirmation, maintaining the effects should be ruled out. Crucial to the assessment are the substantive conditions for the exercise of the activity in question, in this case, aside from the applicable rules governing the operation of nuclear power stations, Article 6 of the Habitats Directive for example.

215. Furthermore, maintaining the effects should not mean that additional faits accomplis are created, for example by project developers making further investments or causing additional environmental damage.

216. Faits accomplis weaken the effectiveness of an environmental assessment that is carried out retrospectively. The main function of the assessment, when used in good time, is to influence the decision concerning the project such that environmental damage is minimised as far as possible. For this reason, it is to be undertaken, under Article 6(4) of the Aarhus Convention and Article 6(4) of the EIA Directive, as early as possible, when all options are open. If it is merely carried out retrospectively, it can perform this function only to a very limited extent because many decisions have already been taken. Modifying those decisions in the light of the retrospective assessment is even less attractive when they have actually already been implemented.

217. Only in so far as a confirmation of the contested decision is taken to exist and no further faits accomplis are created is it possible to weigh up the interest in the effective enforcement of the rules on the environmental assessment against the interests in maintaining the effects of the decision.

218. It would not be surprising if the Cour constitutionnelle (Constitutional Court) conducts this weighing up in the main proceedings, as they relate to the continuation of an activity which has already taken place for around 40 years.

219. As regards the weighing up itself, it must be considered whether the interest in security of supply in particular falls within the narrower area of minimum supply described above, which is to be attributed to the more important public safety, or within the broader area of general security of supply, which is to be attributed to economic interests. This has lower importance. (111)

220. In summary, it must therefore be stated that 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

– that decision is as soon as possible regularised a posteriori by rectifying the procedural error,

– 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,

– as far as possible no additional faits accomplis are created, and

– overriding public interests in maintaining the effects prevail over the interest in the effectiveness of the obligation to undertake the environmental assessment and the fundamental right to effective judicial protection.

VI. Conclusion

221. I therefore propose that the Court should rule as follows:

1. The answer to Questions 2, 4 and 7 of the request for a preliminary ruling is that under Article 1(4) of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the ambit of the directive. It is for the national court to verify whether the legislative act is equivalent to development consent for a project and whether the objectives of the directive are achieved in the legislative process, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates.

2. The answer to Questions 1, 3(a), 5(a) and the first part of Question 6(a) is that, contrary to previous case-law, the definition of ‘project’ under Article 1(2)(a) of Directive 2011/92 includes the extension by 10 years of the period of industrial production of electricity by a nuclear power station.

   In the event that in respect of the extension of the period of production of electricity in nuclear power stations the Court adheres to its interpretation of the definition of ‘project’ under Article 1(2)(a) of Directive 2011/92, I propose that it find that the directive is nevertheless applicable to such extension because it constitutes a project within the meaning of Article 1(5) and Appendix I to the Espoo Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 6(1)(a) and Annex I to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

   Irrespective of whether the Court concurs with the proposals regarding the interpretation of Article 1(2)(a) of Directive 2011/92 in conformity with international law or regarding the direct application of the definition of ‘project’ in the Espoo and Aarhus Conventions, the extension of the period of industrial production of electricity by a nuclear power station constitutes consent for a project within the meaning of Article 1(2)(a) where it involves consent for works or interventions altering or extending the installation.

3. The answer to Question 6(b) is that an extension by 10 years of the period of industrial production of electricity by commercial nuclear power stations, which is linked with structural improvement measures, must, as a change to a nuclear power station, be made subject to an assessment of its environmental effects in accordance with Article 4(1) and Annex I, point 24 in conjunction with point 2(b) to Directive 2011/92 if the extension is not already to be regarded in itself as consent for a project in accordance with Annex I, point 2(b).

   The answer to the third part of Question 6(a) is that in the case of a decision concerning the extension of the period of industrial production of electricity by certain nuclear power stations, which is connected with structural improvement measures, public participation must take place in accordance with Article 6(4) of Directive 2011/92 as early as possible, when all options are open, that is to say, before the decision on the extension is taken.

4. The answer to Question 3(c), Question 5(c), Question 6(d) and Question 9 is that Article 2(4) of Directive 2011/92 permits an exemption from the obligation to undertake an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power station if another form of assessment is necessary 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, and the public concerned and the Commission are informed in accordance with Article 2(4)(b) and (c). On the other hand, it is not permissible under Article 2(4) to dispense with a transboundary environmental impact assessment under Article 7.

5. The answer to Question 8(a) is that the extension of the period of industrial production of electricity by a nuclear power station is to be regarded as a project within the meaning of the first sentence of Article 6(3) of Directive 92/43/EEC even if that extension would not constitute a project as such within the meaning of the EIA Directive or on account of its connection with works to improve the installation.

   The answer to Question 8(b) is that Article 6(3) of Directive 92/43 does not allow a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

   The answer to Question 8(d) is that the public interest in ensuring a minimum supply of electricity constitutes a reason of public safety within the meaning of the second subparagraph of Article 6(4) of Directive 92/43, while the further-reaching public interest in security of electricity supply is to be regarded as a reason of an economic nature within the meaning of the first subparagraph of Article 6(4).

6. 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

   – that decision is as soon as possible regularised a posteriori by rectifying the procedural error,

   – 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,

   – as far as possible no additional faits accomplis are created, and

   – overriding public interests in maintaining the effects prevail over the interest in the effectiveness of the obligation to undertake the environmental assessment and the fundamental right to effective judicial protection.

7. The answer to Question 3(b), Question 5(b), Question 6(c) and Question 8(c) is that the need to adopt administrative acts implementing the Law of 28 June 2015 for the Doel 1 nuclear power station,

which does not exist for the Doel 2 nuclear power station, does not affect the answers to the questions referred for a preliminary ruling.

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1 Original language: German.

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

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

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4 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).

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5 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).

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6 Council Document 8931/96 of 17 July 1996.

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7 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).

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8 Standard data form, http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BE2300006

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9 Standard data form, http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=BE2100017

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10 Standard data form, http://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=NL9803061

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11 See footnotes 8 to 10.

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12 Pages 39 to 40 of the request for a preliminary ruling.

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13 Judgment of 12 February 2015, *Parliament* v *Council* (C−48/14, EU:C:2015:91, paragraph 38).

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14 See to that effect judgments of 29 March 1990, *Greece* v *Council* (C−62/88, EU:C:1990:153, paragraph 17), and of 12 April 2005, *Commission* v *United Kingdom* (C−61/03, EU:C:2005:210, paragraph 44); and Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994 (EU:C:1994:384, paragraph 24).

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15 Judgments of 10 December 2002, *Commission* v *Council* (Nuclear Safety Convention, C−29/99, EU:C:2002:734, paragraph 78), and of 27 October 2009, *ČEZ* (C−115/08, EU:C:2009:660, paragraph 100).

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16 Judgment of 27 October 2009, *ČEZ* (C−115/08, EU:C:2009:660, paragraph 105). See also judgment of 10 December 2002, *Commission* v *Council* (Nuclear Safety Convention, C−29/99, EU:C:2002:734, paragraph 89).

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17 Appendix I, point 2 to the Espoo Convention, fifth indent of point 1 of Annex I to the Aarhus Convention and Annex I, point 2(b) to the EIA Directive.

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18 See, with regard to the application of the Aarhus Convention to similar measures in the United Kingdom, Aarhus Convention Compliance Committee, Findings and recommendations of 23 October 2013, Ewing v United Kingdom (ACCC/C/2011/61, ECE/MP.PP/C.1/2013/13, Hybrid Bill, paragraph 54). With regard to this committee, see my Opinion in *Edwards* (C−260/11, EU:C:2012:645, point 8). See, by contrast, however, judgments of 18 October 2011, *Boxus and Others* (C−128/09 to C−131/09, C−134/09 and C−135/09, EU:C:2011:667, paragraph 50), and of 16 February 2012, *Solvay and Others* (C−182/10, EU:C:2012:82, paragraph 43).

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19 Judgments of the ICJ of 20 April 2010, Pulp Mills on the River Uruguay (Argentina v Uruguay), I.C.J. Reports 2010, p. 14, paragraph 204, and of 16 December 2015, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), I.C.J. Reports 2015, p. 665, paragraph 104.

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20 Concluded on 23 May 1969 (*United Nations Treaty Series*, Vol. 1155, p. 331).

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21 See for example judgments of 5 May 1970, *Commission* v *Belgium* (77/69, EU:C:1970:34, paragraph 15) and of 9 December 2003, *Commission* v *Italy* (C−129/00, EU:C:2003:656, paragraph 29); and Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 86).

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22 Directive of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1).

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23 Judgments of 16 September 1999, *WWF and Others* (C−435/97, EU:C:1999:418, paragraph 57); of 18 October 2011, *Boxus and Others* (C−128/09 to C−131/09, C−134/09 and C−135/09, EU:C:2011:667, paragraph 37); and of 17 November 2016, *Stadt Wiener Neustadt* (C−348/15, EU:C:2016:882, paragraph 26).

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24 Judgments of 16 September 1999, *WWF and Others* (C−435/97, EU:C:1999:418, paragraph 58); of 18 October 2011, *Boxus and Others* (C−128/09 to C−131/09, C−134/09 and C−135/09, EU:C:2011:667, paragraphs 38 and 39); and of 17 November 2016, *Stadt Wiener Neustadt* (C−348/15, EU:C:2016:882, paragraph 27).

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25 See below, point 63 et seq.

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26 Judgments of 18 October 2011, *Boxus and Others* (C−128/09 to C−131/09, C−134/09 and C−135/09, EU:C:2011:667, paragraph 41), and of 17 November 2016, *Stadt Wiener Neustadt* (C−348/15, EU:C:2016:882, paragraph 29).

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27 Judgments of 18 October 2011, *Boxus and Others* (C−128/09 to C−131/09, C−134/09 and C−135/09, EU:C:2011:667, paragraph 43), and of 17 November 2016, *Stadt Wiener Neustadt* (C−348/15, EU:C:2016:882, paragraph 30).

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28 See judgment of 18 October 2011, *Boxus and Others* (C−128/09 to C−131/09, C−134/09 and C−135/09, EU:C:2011:667, paragraph 48).

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29 Judgments of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C−275/09, EU:C:2011:154, paragraph 24), and of 19 April 2012, *Pro-Braine and Others* (C−121/11, EU:C:2012:225, paragraph 31).

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30 Judgments of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C−275/09, EU:C:2011:154, paragraph 24), and of 19 April 2012, *Pro-Braine and Others* (C−121/11, EU:C:2012:225, paragraph 32).

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31 Judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C−240/09, EU:C:2011:125, paragraph 30); of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C−470/16, EU:C:2018:185, paragraph 46); and of 11 July 2018, *Bosphorus Queen Shipping* (C−15/17, EU:C:2018:557, paragraph 44).

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32 Declaration by the European Community concerning its competence under Article 17(5) of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland) (Council document 8931/96, Annex B, also available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII−4&chapter= 27&lang=en#EndDec).

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33 Judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C−240/09, EU:C:2011:125, paragraph 31 and the case-law cited).

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34 See judgments of 19 March 2002, *Commission* v *Ireland* (C−13/00, EU:C:2002:184, paragraph 20); of 7 October 2004, *Commission* v *France*, C−239/03, EU:C:2004:598, paragraphs 29 to 31); of 8 March 2011, *Lesoochranárske zoskupenie* (C−240/09, EU:C:2011:125, paragraph 36); and of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraph 102).

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35 Judgments of 8 March 2011, *Lesoochranárske zoskupenie* (C−240/09, EU:C:2011:125, paragraph 42), and of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C−470/16, EU:C:2018:185, paragraph 50).

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36 The Court took a similar approach in the judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C−275/09, EU:C:2011:154, paragraphs 26 to 28), in order to substantiate its interpretation of ‘project’ in the EIA Directive.

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37 Report of the thirtieth session of the Implementation Committee, 14 August 2014, ECE/MP.EIA/IC/2014/2, Annex (Rivne nuclear power plant), paragraph 37.

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38 Ibid., paragraphs 41 to 45.

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39 See below, point 98.

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40 Report of the thirtieth session of the Implementation Committee, 14 August 2014, ECE/MP.EIA/IC/2014/2, Annex (Rivne nuclear power plant), paragraph 42.

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41 See above, point 80.

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42 See Aarhus Convention Compliance Committee, Findings and recommendations of 12 May 2011, Global 2000 [Friends of the Earth Austria] v Slovakia (ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, Mochovce nuclear power plant, paragraphs 55 to 57).

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43 See above, point 81.

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44 OJ 1999 L 318, p. 21, approved by Commission Decision 1999/819/Euratom of 16 November 1999 concerning the accession to the 1994 Convention on Nuclear Safety by the European Atomic Energy Community (Euratom) (OJ 1999 L 318, p. 20).

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45 Council Directive of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations (OJ 2009 L 172, p. 18).

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46 See Article 21 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

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47 Aarhus Convention Compliance Committee, Findings and recommendations of 12 May 2011, Global 2000 [Friends of the Earth Austria] v Slovakia (ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, Mochovce nuclear power plant, paragraph 58). See also UNECE, *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*, paragraph 40(f), and Task Force on Public Participation in Decision-making, *Report on the fourth meeting* (18 June 2013), ECE/MP.PP/WG.1/2013/6, paragraphs 56 and 57.

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48 See, on the one hand, Declaration by the European Community concerning its competence under Article 17(5) of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland) (Council document 8931/96, Annex B, also available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter= 27&lang=en#EndDec) and recital 15 of the EIA Directive and, on the other, Directive 2003/35/EC 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).

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49 See judgments of 8 March 2011, *Lesoochranárske zoskupenie* (C−240/09, EU:C:2011:125, paragraph 42), and of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C−470/16, EU:C:2018:185, paragraph 50).

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50 Judgments of 24 November 1992, *Poulsen and Diva Navigation* (C−286/90, EU:C:1992:453, paragraph 9); of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C−402/05 P and C−415/05 P, EU:C:2008:461, paragraph 291); of 21 December 2011, *Air Transport Association of America and Others* (C−366/10, EU:C:2011:864, paragraph 123); and of 11 July 2018, *Bosphorus Queen Shipping* (C−15/17, EU:C:2018:557, paragraph 44).

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51 Judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C−275/09, EU:C:2011:154, paragraphs 26 to 28).

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52 See above, point 54.

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53 See, with regard to the limitation of the effects of a judgment, judgments of 2 February 1988, *Blaizot and Others* (24/86, EU:C:1988:43, paragraphs 28 and 30); of 15 March 2005, *Bidar* (C−209/03, EU:C:2005:169, paragraphs 66 to 69); and of 9 November 2010, *Volker and Markus Schecke and Eifert* (C−92/09 and C−93/09, EU:C:2010:662, paragraph 93).

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54 Judgment of 17 November 2016, *Stadt Wiener Neustadt* (C−348/15, EU:C:2016:882, paragraphs 41 and 42).

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55 Judgments of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 14), and of 8 March 2011, *Lesoochranárske zoskupenie* (C−240/09, EU:C:2011:125, paragraph 44 and the case-law cited).

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56 Judgments of 10 January 2006, *IATA and ELFAA* (C−344/04, EU:C:2006:10, paragraph 35); of 3 June 2008, *The International Association of Independent Tanker Owners and Others* (C−308/06, EU:C:2008:312, paragraph 42); of 21 December 2011, *Air Transport Association of America and Others* (C−366/10, EU:C:2011:864, paragraph 50); and of 16 July 2015, *ClientEarth* v *Commission* (C−612/13 P, EU:C:2015:486, paragraph 33).

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57 See, with regard to the direct application of directives, judgments of 18 October 2001, *Gharehveran* (C−441/99, EU:C:2001:551, paragraphs 41 to 44), and of 6 September 2018, *Hampshire* (C−17/17, EU:C:2018:674, paragraph 62).

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58 Judgments of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C−243/15, EU:C:2016:838, paragraphs 57 and 59), and of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C−664/15, EU:C:2017:987, paragraphs 38 and 39).

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59 Group of Experts for the Pact (Fabius et al.), White Paper, Toward a Global Pact for the Environment, sections 4.2.1 and 4.2.2 (http://pactenvironment.emediaweb.fr/wp-content/uploads/2017/07/White-paper-Global-Pact-for-the-environment.pdf).

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60 Judgment of 19 April 2012, *Pro-Braine and Others* (C−121/11, EU:C:2012:225, paragraph 33).

61 See judgment of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraphs 44 to 48).

62 See point 6.2.6 of the Explanatory Memorandum for Commission Proposal COM/2000/0839 final, which led to Directive 2003/35 (cited in footnote 48).

63 See above, point 86.

64 Section B.9.2 of the request for a preliminary ruling.

65 Judgments of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 53); of 28 February 2008, *Abraham and Others* (C−2/07, EU:C:2008:133, paragraph 26); and of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others* (C−275/09, EU:C:2011:154, paragraph 33).

66 Judgments of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 52), and of 28 February 2008, *Abraham and Others* (C−2/07, EU:C:2008:133, paragraph 26).

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

68 Judgments of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 52), and of 28 February 2008, *Abraham and Others* (C−2/07, EU:C:2008:133, paragraph 26).

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

70 Council Directive of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5).

71 Common Position (EC) No 40/96, (OJ 1996 C 248, p. 75 (88)).

72 Judgment of the ICJ of 25 September 1997, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, paragraph 51.

73 Article 25(1)(a) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

74 Judgment of the ICJ of 25 September 1997, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, paragraph 52.

75 Judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C−243/15, EU:C:2016:838, paragraphs 46 and 49).

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76 Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C−127/02, EU:C:2004:482, paragraph 26), and of 14 January 2010, *Stadt Papenburg* (C−226/08, EU:C:2010:10, paragraph 38). Worded slightly differently in the judgment of 17 July 2014, *Commission* v *Greece* (C−600/12, not published, EU:C:2014:2086, paragraph 75).

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77 Judgments of 11 April 2013, *Sweetman and Others* (C−258/11, EU:C:2013:220, paragraph 44); of 21 July 2016, *Orleans and Others* (C−387/15 and C−388/15, EU:C:2016:583, paragraph 50); and of 17 April 2018, *Commission* v *Poland* (Białowieża Forest) (C−441/17, EU:C:2018:255, paragraph 114).

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78 Judgments of 13 December 2007, *Commission* v *Ireland* (C−418/04, EU:C:2007:780, paragraph 231), and of 14 March 2013, *Leth* (C−420/11, EU:C:2013:166, paragraph 46).

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79 See judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C−293/17 and C−294/17, EU:C:2018:882, paragraphs 65 and 66), and my Opinions in *Waddenvereniging and Vogelbeschermingsvereniging* (C−127/02, EU:C:2004:60, point 31) and in *Coöperatie Mobilisation for the Environment and Others* (C−293/17 and C−294/17, EU:C:2018:622, points 114 to 118).

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80 Judgment of 10 January 2006, *Commission* v *Germany* (C−98/03, EU:C:2006:3, paragraph 41). See also judgment of 26 May 2011, *Commission* v *Belgium* (C−538/09, EU:C:2011:349, paragraph 41).

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81 Judgment of 10 January 2006, *Commission* v *Germany* (C−98/03, EU:C:2006:3, paragraphs 42 to 44). Now also the Judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C−293/17 and C−294/17, EU:C:2018:882, paragraph 67).

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82 See judgment of 26 April 2017, *Commission* v *Germany* (Moorburg) (C−142/16, EU:C:2017:301, paragraph 30).

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83 Judgment of 16 February 2012, *Solvay and Others* (C−182/10, EU:C:2012:82, paragraphs 69 and 70). Also the judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C−43/10, EU:C:2012:560, paragraph 100 et seq.) concerning the authorisation of a project by way of legislation.

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84 Judgments of 21 July 2016, *Orleans and Others* (C−387/15 and C−388/15, EU:C:2016:583, paragraph 60 and the case-law cited), and of 17 April 2018, *Commission* v *Poland* (Białowieża Forest) (C−441/17, EU:C:2018:255, paragraph 189).

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85 Judgments of 21 July 2016, *Orleans and Others* (C−387/15 and C−388/15, EU:C:2016:583, paragraph 61 and the case-law cited), and of 17 April 2018, *Commission* v *Poland* (Białowieża Forest) (C−441/17, EU:C:2018:255, paragraph 191 and the case-law cited in both).

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86 Judgments of 13 May 2003, *Commission* v *Spain* (C−463/00, EU:C:2003:272, paragraph 71), and of 26 March 2009, *Commission* v *Italy* (C−326/07, EU:C:2009:193, paragraph 69).

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87 Judgments of 10 July 1984, *Campus Oil and Others* (72/83, EU:C:1984:256, paragraphs 35 and 47); of 4 June 2002, *Commission* v *France* (C−483/99, EU:C:2002:327, paragraph 47); and of 4 June 2002, *Commission* v *Belgium* (C−503/99, EU:C:2002:328, paragraph 46).

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88 Judgments of 14 March 2000, *Église de scientologie* (C−54/99, EU:C:2000:124, paragraph 17); of 4 June 2002, *Commission* v *France* (C−483/99, EU:C:2002:327, paragraph 48); and of 4 June 2002, *Commission* v *Belgium* (C−503/99, EU:C:2002:328, paragraph 47).

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89 Judgment of 24 November 2011, *Commission* v *Spain* (Alto Sil/Spanish brown bear) (C−404/09, EU:C:2011:768, paragraphs 193 and 195). See also the Opinion of the Commission of 24 April 2004 under Article 6(4) of the Habitats Directive concerning the Prosper Haniel Colliery (http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/prosper_haniel_en.pdf).

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90 See above, points 25.

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91 See the judgments cited in footnotes 86 and 87.

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92 See to that effect, in particular, judgments of 20 December 2017, *Eni and Others* (C−226/16, EU:C:2017:1005, paragraph 45) and of 20 March 2018, *Commission* v *Austria* (C−187/16, EU:C:2018:194, paragraph 87).

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93 See, with regard to the EIA Directive, judgment of 26 July 2017, *Comune di Corridonia and Others* (C−196/16 and C−197/16, EU:C:2017:589, paragraph 34).

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94 Judgments of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 67), and of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraph 45).

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95 Judgments of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 64 and the case-law cited), and of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraph 43 and the case-law cited).

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96 Judgments of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 65); of 3 July 2008, *Commission* v *Ireland* (C−215/06, EU:C:2008:380, paragraph 59); of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraph 46); and of 26 July 2017, *Comune di Corridonia and Others* (C−196/16 and C−197/16, EU:C:2017:589, paragraph 35).

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97 Judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraphs 46 and 47).

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98 See for example judgments of the ECtHR of 19 March 1997, *Hornsby v. Greece* (18357/91, CE:ECHR:1997:0319JUD001835791, paragraphs 40 and 41), and of 8 April 2004, *Assanidze v. Georgia* (71503/01, CE:ECHR:2004:0408JUD007150301, paragraphs 181 and 182).

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99 My Opinion in *Comune di Corridonia and Others* (C−196/16 and C−197/16, EU:C:2017:249, point 41).

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100 Judgment of 7 January 2004, *Wells* (C−201/02, EU:C:2004:12, paragraph 58).

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101 Judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraph 58).

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102 Judgment of 28 July 2016, *Association France Nature Environnement* (C−379/15, EU:C:2016:603, paragraph 34).

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103 Judgments of 17 May 1990, *Barber* (C−262/88, EU:C:1990:209, paragraph 41); of 8 September 2010, *Winner Wetten* (C−409/06, EU:C:2010:503, paragraph 67); and of 28 July 2016, *Association France Nature Environnement* (C−379/15, EU:C:2016:603, paragraph 33).

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104 Judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraph 59).

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105 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).

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106 Judgment of 28 July 2016, *Association France Nature Environnement* (C−379/15, EU:C:2016:603, paragraph 39).

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107 Judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraphs 57 and 58), and of 28 July 2016, *Association France Nature Environnement* (C−379/15, EU:C:2016:603, paragraphs 34 to 36).

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108 Judgments of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C−41/11, EU:C:2012:103, paragraph 56), and of 28 July 2016, *Association France Nature Environnement* (C−379/15, EU:C:2016:603, paragraph 38).

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109 Judgments of 3 July 2008, *Commission* v *Ireland* (C−215/06, EU:C:2008:380, paragraph 57); of 15 January 2013, *Križan and Others* (C−416/10, EU:C:2013:8, paragraph 87); of 17 November 2016, *Stadt Wiener Neustadt* (C−348/15, EU:C:2016:882, paragraph 36); and of 26 July 2017, *Comune di Corridonia and Others* (C−196/16 and C−197/16, EU:C:2017:589, paragraphs 37 to 43).

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110 Judgments of 3 July 2008, *Commission* v *Ireland* (C-215/06, EU:C:2008:380, paragraph 57); of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 87); of 17 November 2016, *Stadt Wiener*

Neustadt (C-348/15, EU:C:2016:882, paragraph 36); and of 26 July 2017, *Comune di Corridonia and Others* (C-196/16 and C-197/16, EU:C:2017:589, paragraph 38).

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111 See, with regard to the strategic environmental assessment, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103, paragraph 57). See also above, points 180 to 190.