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Case note

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Fear of the Dark? The CJEU adds electricity shortage to the reasons justifying an ex post regularization of projects without an EIA

Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, EU:C:2019:622

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Abstract

In July 2019, the CJEU delivered its judgment on the case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*. The case relates to the protracted debate on the production and use of nuclear energy in Belgium, which at present culminated with the legislative extension of the operation of two nuclear power stations. The CJEU ruled that the extension should have only been granted after an assessment on the stations' impact on the environment had been carried out and, thus, the national measures were in breach of EU law. However, it is here argued that the judgment does not settle the dispute: it only initiates its second phase. Accordingly, this contribution focuses on the judgment's expected implications for EU law and for the national constitutional order.

Keywords

Constitutional law, Directive 2011/92, EIA, energy law, European Law

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1. Introduction

In July 2019, the Court of Justice of the European Union ('CJEU') delivered its judgment on the case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*. The case relates to the protracted debate on the production and use of nuclear energy in Belgium, which at present culminated with the legislative extension of the operation of two nuclear power stations, namely Doel 1 and Doel 2. The relevant legislation was challenged before the Constitutional Court of Belgium ('Constitutional Court') on the grounds that it is not in compliance with the procedural requirements for an assessment of the environmental impact set down by the Environmental Impact Assessment ('EIA') Directive,[1] the Habitats Directive,[2] the Birds Directive,[3] as well as by the Espoo Convention[4] and the Aarhus Convention.[5]

Subsequently, the Constitutional Court referred to the CJEU for the interpretation of the relevant provisions with regard to the foregoing extension of the operation of the two nuclear power stations.

The CJEU ruled that the extension should have only been granted after an assessment on the impact on the environment had been carried out and, thus, the national measures were not in conformity with the abovementioned legal acts. However, interestingly, the CJEU also permitted Belgium to maintain certain effects or even regularize the unlawful measures taken.

Accordingly, it is argued that the judgment does not settle the dispute, but only initiates its second phase. Within this context, this contribution presents the factual background of the case and the rationale of the CJEU judgment, and comments on the expected implications of it for EU law and for the national constitutional order.

2. The relevant facts of the case

Since 2003, the production of electricity by the fission of nuclear fuels in nuclear power stations is an ending story in Belgium. As a matter of fact, the Belgian legislator adopted the Law of 31 January 2003[6] that prohibits the construction of any new nuclear power stations next to the seven nuclear reactors which were – and still are – in operation (four reactors in Doel and three reactors in Tihange). In addition, the law provided for the phasing out of nuclear energy for the industrial production of electricity through a timetable detailing a gradual shutdown of the nuclear power plants in Belgium. Following Article 4 of the Law of 31 January 2003, all nuclear power stations shall be deactivated 40 years after the date on which they were brought into service for the

1. 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, [2012] OJ L 26/1.
2. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7.
3. Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7.
4. UN Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991. The Espoo Convention was approved on behalf of the European Community by Council Decision of 27 June 1997.
5. UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998. The Aarhus Convention was approved on behalf of the Community by Council Decision 2005/370/EC of 17 February 2005.
6. See Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of industrial production of electricity, Moniteur Belge of 28 February 2003, p. 9879.

industrial production of electricity. Consequently, the oldest reactors, Doel 1 and Doel 2, should have been out of service as of 15 February 2015 and 1 December 2015 respectively.

Nevertheless, the combination of several circumstances made the Belgian Government decide on 18 December 2014 to continue to operate the Doel 1 and Doel 2 power stations for an additional period of ten years until 2025. Therefore, the Law of 28 June 2015[7] has amended Article 4 of the Law of 31 January 2003, which now stipulates that the Doel 1 nuclear power station – which was out of service from 15 February 2015 – may resume electricity production upon entry into force of the Law of 28 June 2015. It shall be deactivated and may no longer produce electricity as of 15 February 2025. Lastly, Article 4 was also amended in order to postpone the deactivation of the Doel 2 nuclear power station until 1 December 2025, instead of 1 December 2015. In fact, these alterations by the Law of 28 June 2015 extend the operation time of both nuclear power stations by a decade for the industrial production of electricity. The Law of 28 June 2015 entered into force on 6 July 2015.

During the parliamentary proceedings leading to the adoption of the Law of 28 June 2015, a number of scientific studies were taken into account. These studies indicated that the closure of both power stations in 2015, as envisaged by the law of 31 January 2003, could potentially lead to a problematic situation in relation to security of electricity supply.[8]

The explanatory memorandum of the Law of 28 June 2015 specified that the extension of the operation of both nuclear power plants would have to comply with several requirements within the framework of ten-year safety reviews, which cover, *inter alia*, the measures set out in a 'Long Term Operation Plan' ('LTO-plan'). The LTO-plan sets out: i) the measures to be taken due to the prolongation of industrial electricity production at the two power stations, ii) the adjustments that have to be made to the action plan on stress tests, and iii) the approvals needed from Federal Nuclear Control Agency. 8 Nonetheless, following the adoption of the law in question, the agency confirmed that no EIA would be carried out in respect of the changes envisaged by the operator under the LTO-plan.

Two Belgian environmental protection associations, the Inter-Environnement Wallonie and the Bond Beter Leefmilieu Vlaanderen, have sought annulment of the Law of 28 June 2015 before the Constitutional Court. Their main argument was based on the fact that no prior environmental impact assessment was carried out before the adoption of the law concerned, contrary to the requirements of various supranational legal acts and international conventions.

Nonetheless, several questions emerged regarding the interpretation of the relevant legal acts and conventions, such as whether the obligation to comply with the procedural requirements for an EIA that are set down by them are applicable to the legislative extension of the operation of two nuclear power stations, whether an EIA had to be carried out before the adoption of the law concerned and whether the security of the country's electricity supply forms an overriding ground of public interest permitting derogation from this obligation. Therefore, the Constitutional Court decided to request for a preliminary ruling concerning the interpretation of the relevant international conventions and European legislative acts.[9]

7. See 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, Moniteur Belge of 6 July 2015, p. 44423 ('the Law of 28 June 2015').
8. See Explanatory Memorandum of a draft law concerning provisions on the security of supply in the field of energy, Belgian Chamber of Representatives (17 March 2015) no. DOC 54 0967/001, p. 4-6.
   X.Ibid., p. 7-8.
9. See Belgian Constitutional Court 22 June 2017, no. 82/2017, Moniteur Belge of 16 August 2017, p. 79897.

The Belgian Constitutional Court traditionally has a rather open-minded approach towards initiating a judicial dialogue with the CJEU,[10] which was exemplified also in the present proceedings. In this instance, the Belgian Constitutional Court referred in total nine preliminary questions to the CJEU, the most important being: 1) whether the Espoo Convention, the Aarhus Convention,[11] the EIA Directive, the Habitats Directive and the Birds Directive have to be interpreted in the sense that an EIA is obligatory for already existing facilities, like the nuclear power plants of Doel 1 and 2, that are allowed to continue operation many years beyond its originally projected lifetime without any physical alterations, and 2) in case the answer to the first question is affirmative, whether the foregoing legal acts allow that a possible procedural error be healed *ex post* and certain effects of the unlawful behaviour be maintained on account of overriding considerations relating to the security of the electricity supply. The CJEU decision was delivered on 29 July 2019.

3. The Court's decision

The first issue the Court dealt with was the applicability of the EIA Directive. Accordingly, the CJEU examined whether the measures at issue constituted a project under the definition of Article 1(2)(a) of the EIA Directive. The CJEU has constantly interpreted the term project as referring to 'works or interventions involving alterations to the physical aspect of the site'.[12]

Therefore, in principle, extending the period of production of electricity by a nuclear power station and deferring the deactivation and ceasing production date are not projects. Nevertheless, and quite importantly, the CJEU clarified that one should also examine whether such measures are inextricably linked with the execution of works for the upgrade or the extension of a project. The evidence submitted shows that major works are required on both nuclear power stations involved. Such construction measures seem to be a condition for the granting of the extension and not to be merely taken *occasione data*, because of the opportunity afforded by the statutory extension of the period of production of electricity.[13] Thus, the CJEU concluded that the measures under scrutiny cannot be artificially dissociated from the works, and that they 'together constitute a single project within the meaning of the [EIA Directive], subject to findings of fact that are for the referring court to make'.[14,15]

10. See e.g. L. Lavrysen et al., 'Developments in Belgian constitutional law. The year 2016 in review', 15 *International Journal of Constitutional Law* (2017), p. 778 and J. Spreutels, 'Questions préjudicielles à la Cour de justice de l'Union européenne: l'expérience de la Cour constitutionnelle de Belgique', *Réunion trilatérale des Cours constitutionnelles de Belgique, de la République tchèque et de Lettonie* (2016), https://www.const-court.be/public/stet/n/stet-2016-010n.pdf, p 1-3.
11. The EU has approved both the Espoo Convention and the Aarhus Convention in 1997 and 2005 respectively, and thus rendered them an integral part of the supranational legal order. Consequently, the CJEU has the power to interpret them, albeit they are legal acts of international law. See Opinion of Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, EU:C:2018:972, para. 70. See also Case C-240/09 *Lesoochranárske zoskupenie*, EU:C:2011:125, para. 30.
12. Case C-121/11 *Pro-Braine and Others*, EU:C:2012:225, para. 31; Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others*, EU:C:2011:154, para. 24.
13. Opinion of Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 125.
14. Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 71.
15. See also Opinion of Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 69 et seq. Advocate General Kokott acknowledges that the CJEU case law has only accepted as project works involving intervention to the physical landscape, but she argues that such an interpretation is

Since the measures at hand were found to constitute a project, the CJEU examined whether Article 4 of the EIA Directive required that an EIA should have been conducted prior to their adoption. The answer is given by Annex I, which includes a catalogue of projects for which an EIA is necessary. Point 2(b) of Annex I includes nuclear power stations and other nuclear reactors, while Point 24 of the same requires an EIA to be carried out for changes to or extensions of projects listed in other points of the Annex, as long as they 'are similar, in terms of their effects on the environment, to those posed by the project itself'.[16] Accordingly, the measures taken by the Belgian State, which comprised a ten-year extension and the execution of major renovation works, were found to be comparable, in terms of the environmental risks entailed, to putting the nuclear power stations into service for the first time.[17] As for the stage at which the EIA should have been concluded, Article 2(1) of the Directive specifies it is 'before consent is given', with the term consent being defined by Article 1(2)(c) as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. The CJEU concluded that a law, regardless of possible implementing acts, might constitute consent insofar as it defines essential characteristics of the project that are no longer a matter for debate or reconsideration. It was then stated that the factual background of the case and the evidence submitted prima facie show that the Belgian law at issue does so and thus falls within the concept of 'consent', but the CJEU clarified that ultimately it is for the national judge to determine if the national law has such properties or not.[18,19]

Next, the CJEU rejected the argument that the EIA Directive should not apply on the grounds of the exception in Article 1(4), which excludes from the Directive's scope projects determined by a specific legal act. This exception presupposes that the objectives of the Directive are achieved through the legislative process. In this case, the Belgian legislator does not seem to have been properly informed about the features of the project and the possible environmental effects.[20]

After the affirmation that the EIA Directive applies, the focus moved to the possibility of exempting the project at hand from the EIA requirement, in accordance with Article 2(4) of the Directive. Such an exemption is possible in exceptional cases and under certain preconditions: Member States shall consider other forms of assessment and they shall inform the public and the Commission accordingly. The Belgian State took the relevant measures with the aim to ensure the security of the electricity supply. The CJEU affirmed that this indeed constitutes an exceptional case justifying an exemption, but it must be proven that the risk is reasonably probable and that the project is sufficiently urgent to justify no EIA having been conducted. Based on the Commission's written observations, the CJEU noted that it is rather doubtful that Belgium met the foregoing preconditions so as to be able to invoke the exemption. Even though it is for the national court to

not in accordance with the Espoo Convention or with the Aarhus Convention. Accordingly, she put forward a broader interpretation of the term project that will align the EIA Directive with the two Convention, to which the EU is a Party.

16. Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 78.
17. Ibid., para. 79.
18. Ibid., para, 82-91.
19. Interestingly, Advocate General Kokott reached the same conclusion, but she highlighted the public participation requirement, as set down by Article 6(4) of the EIA Directive. Public participation must take place when all options are open, and this cannot be the case if the legislator has already adopted a decision. Therefore, an EIA shall be conducted prior to the legislative decision. See Opinion of Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 137-142.
20. Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 108-111.

decide whether the preconditions to rely on the exemption are fulfilled, the CJEU noted that at least one of them is apparently not met: the European Commission was not informed by the national authorities of the reasons justifying the exemption. Moreover, the exemption only applies when the project is not likely to have significant effects on the environment in another Member State[21] and, as Advocate General Kokott highlighted, the project at hand has transboundary effects, which makes the EIA necessary.[22]

Further, in paragraphs 115 to 159, the CJEU dealt with a chain of similar questions, this time vis-á-vis the Habitats Directive. Article 6(3) of this Directive provides that plans or projects that are likely to have a significant effect on a protected site 'shall be subject to appropriate assessment of [their] implications for the site' and that '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 [. . .]'. The CJEU affirmed that the notion of 'project' is broader in the Habitats Directive than in the EIA Directive and, consequently, covers all measures constituting a project under the latter: as a result, the measures at hand fall within the scope of the Habitats Directive. Additionally, given the large scale of the work entailed and the length of the extension, they are likely to significantly affect protected areas on the Scheldt river. Consequently, also according to the Habitats Directive an assessment should have taken place before the authorities agreed to the measures. Yet Article 6(4) of the Habitats Directive states that a project having negative implications might still be carried out for imperative reasons of overriding public interest. The CJEU noted that ensuring the security of energy supply constitutes such a reason, but a derogation can only be made after an assessment has taken place and has revealed the negative effects of a project, which was not the case here.

The Constitutional Court also submitted questions about the requirements derived from the Espoo and Aarhus Conventions, but the CJEU only made a brief reference to them, clarifying that the requirements contained therein are taken into account by the EIA and the Habitats Directives and, thus, there is no need for a distinct analysis.[23]

The last question asked was whether it is possible that the effects of the measures be maintained, even if the absence of an assessment is found to infringe EU law. The CJEU emphasized that although the EIA and the Habitats Directives do not specify the consequences of such an infringement, the principle of sincere cooperation of Article 4(3) of the TEU[24] requires national authorities, including courts, to take all measures provided by the national legal order that are necessary to nullify the unlawful consequences of a breach of EU law.[25]

Nevertheless, the CJEU affirmed in its previous case law that EU law does not preclude national rules that, exceptionally, permit the regularization of measures that are not in conformity with the

21. Ibid., para. 96-102.
22. Opinion of Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 151.
23. On the other hand, Advocate General Kokott in her Opinion makes a substantial analysis of the Espoo and the Aarhus Conventions and examines whether the measures under scrutiny comply with the requirements set down therein. See Opinion of Advocate General Kokott in Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 68 et seq., 113 et seq., 154et seq. and 195 et seq. See also S. Bechtel, 'AG Opinion on Case C-411/17: EIA for existing installations and the CJEU's struggle with international law', *European Law Blog* (2019), https://europeanlawblog.eu/2019/06/17/ag-opinion-on-case-c-411-17-eia-for-existing-installations-and-the-cjeus-struggle-with-international-law/.
24. Consolidated version of the Treaty on European Union, [2016] OJ C 202/13.
25. Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 169-170.

abovementioned Directives, although such a regularization shall not lead to a circumvention or non-application of EU law. In addition, a regularization presupposes that an assessment be carried out *ex post* and take into account not only the future impact, but also the impact since the time of completion of the project.[26] Furthermore, the CJEU also affirmed that it may – exceptionally, due to overriding reasons and on a case-by-case basis – authorize national courts to use provisions of national law in order to maintain certain effects of an annulled national measure. Accordingly, the CJEU concluded that security of electricity supply could justify maintaining the effects of a measure that was unlawfully adopted, but only if its annulment leads to a genuine and serious threat of disruption to the electricity supply that could not otherwise be remedied, particularly in the context of the internal market.[27]

In sum, the CJEU held that the extension of the operation of the two nuclear power stations seems to constitute a project that should be put into effect only after a prior assessment of its effects, in accordance with the EIA and the Habitats Directives. The aim of the Belgian authorities to ensure the security of electricity supply could justify a derogation from the requirements of the foregoing Directives, but special procedures should have been followed. Nevertheless, Belgium might, exceptionally and under the terms set down by the CJEU, maintain certain effects of the measures at hand or even regularize them *ex post*.

4.Comment on the implications for EU law and for the national constitutional order

The CJEU judgment built on previous case law about the need for prior assessment of a project's expected environmental effects and took two important, albeit probably anticipated, steps. First, it affirmed the broad scope of the term 'project', for the identification of which it does not suffice to look at the measures adopted on paper; one should also take into account works that may need to be executed so that the measures are actually put into effect. The fact that certain measures might relate to the continuation of the operation of already existing power stations does not in itself lead to the conclusion that there is no project involved.

Second, it made clear that EU law exceptionally allows Member States to exempt a project from the assessment requirement, but for this to happen the conditions set down by the relevant provisions shall be met and not ignored or underestimated as if they were mere formalities. Such clarifications ensure that Member States have little room for stratagems to circumvent these requirements.[28]

Nevertheless, the CJEU also confirmed previous case law by stating that Member States may resort to national provisions which, exceptionally, allow the regularization of unlawful measures adopted with no prior assessment through an *ex post* assessment that goes back to the time of completion of the project, and provided that this possibility is not used with the aim of circumventing EU law. Such a regularization was already possible pursuant to the requirements set by the EIA Directive,[29] but now the CJEU explicitly extended the doctrine to cover the Habitats Directive too.[30]

26. Ibid., para. 173-176.
27. Ibid., para. 177-179;
28. S. Bechtel, 'AG Opinion on Case C-411/17: EIA for existing installations and the CJEU's struggle with international law', *European Law Blog* (2019), https://europeanlawblog.eu/2019/06/17/ag-opinion-on-case-c-411-17-eia-for-existing-installations-and-the-cjeus-struggle-with-international-law/.
29. Joined Cases C-196/16 and C-197/16 *Comune di Corridonia*, EU:C:2017:589, para. 37-41
30. Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 176.

Still, as reasonable as it may be to allow authorities that had acted in good faith to heal procedural errors, the mere existence of the regularization possibility might pose a threat to the effectiveness of EU law, a risk the CJEU has not dealt with. Accordingly, it is hard to assess if such a window provides the parties concerned the opportunity to circumvent EU law or not, and no relevant criteria were formulated by the Court. In addition, one can notice a temporal inconsistency between a normal assessment and an *ex post* assessment that aims at healing procedural errors. More specifically, the CJEU asks that an *ex post* assessment is *ex tunc* and not *ex nunc*. It shall not only examine the future effects, but it shall go back to the time of completion of the project. Nevertheless, the Directives require that an assessment is conducted even before the authorities' decision regarding the realization of the project. This is a compromise by the CJEU, in the sense that the time of completion of a project is a later point of time comparing to the delivery of the authorities' decision about the realization of the project.[31] The inconsistency would not exist if the CJEU had adopted the same standards with the Directives. Furthermore, it might take a lengthy period for an *ex tunc* assessment to be conducted, and there might be legal actions against the assessment after its conclusion that will further delay a final decision. For instance, the case at hand related to a ten-year extension of the operation period of Doel 1 and 2; such lengthy procedures might entail that the final decision will be taken when the extension is already over.

Moreover, the judgment under scrutiny affirms that Member States have another arrow in their quiver. If they do not regularize an unlawful measure, they still have the possibility to maintain some of its effects. Of course, such a suspension of the ousting effects of EU law can only be allowed by way of exception and for overriding considerations, but it has been – and still is – unclear what such overriding reasons might be.[32] Previous case law has recognized the protection of the environment as one justification,[33] which has now been coupled with the security of electricity supply, under the condition that there is a genuine and serious threat of disruption.[34] This proves that there are more reasons justifying a derogation from the EIA and the Habitats Directives. Moreover, this expansion might raise certain concerns regarding the effectiveness of EU law. Besides, the CJEU states neither indicators nor criteria that determine if a reason is included in the list or not, and as right as it may be that environmental protection and security of energy supply constitute justifiable grounds for derogation, what is missing is the rationale that led the CJEU to its conclusion. Of course, the judgment states that it is an exclusive competence of the CJEU to decide when and under what conditions such a derogation is justifiable,[35] however, while the decision certainly cannot be arbitrary, its reason ultimately remains undetermined.

Additionally, and apart from the above, the judgment might have significant implications for the constitutional order of Belgium. The referring national court was the Belgian Constitutional Court. Within the federal legal order of Belgium, the Constitutional Court is exclusively competent for constitutional review of legislative acts adopted by the parliamentary assemblies of the various federated entities and the federal state. Nevertheless, it has also indirectly involved provisions of

31. L. Kramer, 'Ex-post environmental impact assessments can be compatible with EU law', *Client Earth* (2017), https://www.clientearth.org/ex-post-environmental-impact-assessments-can-compatible-eu-law/.
32. T. Lock, 'Are there exceptions to a Member State's duty to comply with the requirements of a Directive?: Inter-Environnement Wallonie', 50 *Common Market Law Review* (2013), p. 217-230.
33. Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne*, EU:C:2012:103, para. 55-57.
34. Ibid., para. 179.
35. Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, para. 178-179.

international and European law in its review.[36] Following the conclusion of the CJEU that the law involved might constitute a consent to the project, it seems most likely that the Constitutional Court will annul the Law of 28 June 2015 for infringement of several provisions of EU Law which required, *inter alia,* that a compulsory EIA had to take place *before* the adoption of the law concerned.

As a consequence, the Court would have to annul an act for not complying with EU obligations during the adoption process of the legislative act concerned.[37] Compliance with European (and conventional) obligations would in this case lead to an extension of the Constitutional Court's competence to review legislative acts. As a matter of fact, the Court's power to carry out constitutional review concerns merely the content of legislative provisions but it does not, in theory, extend to the law-making process.[38] The informal enlargement of the Court's scrutiny of legislative norms is based on the principle of supremacy of EU Law and only goes as far as necessary to meet EU obligations.[39]

In any event, the resulting annulment would see the Law of 28 June 2015 being wiped out *ex tunc* and the nuclear reactors involved being forced to shut down completely. To protect legal certainty, the Constitutional Court has the competence to maintain some or all of the effects the annulled norm has had.[40] Nevertheless, the preservation of the legal effects of a national legislative provision that infringes EU law has to take into account the conditions arising from EU law as clarified by the CJEU.[41] Therefore, the Constitutional Court anticipated the response of the CJEU in its referral judgment by asking whether it is possible that the effects of the measures at hand are provisionally maintained in anticipation of a new decision by the Belgian legislator, even if the absence of an EIA is found to infringe EU law.[42] Regardless of certain concerns that the answer of the CJEU might raise, the judgment provides an escape route for the Constitutional Court to annul the Law of 28 June 2015 while at the same time maintaining the effects of the act for a certain period. The CJEU concedes that the national judge may not give full retroactive effect to the annulment in order to avoid catastrophic consequences. In accordance with the views of the CJEU

36. L. Lavrysen and A. Vandaele, 'The legal consequences of Constitutional Court decisions in Belgium - Judgments in cases of actions for annulment', *Paper for the trilateral meeting between the Czech, Latvian and Belgian Constitutional Courts* (2019), http://hdl.handle.net/1854/LU-8619464; p. 1-2; L. Lavrysen et al., 15 *I-CON* (2017), p. 774, 775-777.
37. Already in 2012, the Belgian Constitutional Court decided, after it received a preliminary ruling by the CJEU, that the parliamentary procedure had to comply with additional requirements derived from EU-law to allow the legislator to take into account all parts of the project that are relevant to the assessment of the environmental impact. See Belgian Constitutional Court 22 November 2012, no. 144/2012, Moniteur Belge of 23 January 2013, p. 2887 (para B.12 and B.15.1-B.15.2) and Case C-182/10 *Solvay*, EU:C:2012:82, para. 32-33.
38. See e.g. Belgian Constitutional Court 28 February 2019, no. 33/2019, Moniteur Belge of 5 April 2019, para B.16.1; Belgian Constitutional Court 9 June 2016, no. 89/2016, Moniteur Belge of 1 August 2016, p. 46967 (para B.8.2) and Belgian Constitutional Court 19 March 2015, no. 40/2015, Moniteur Belge of 19 May 2015, p. 26419 (para B.17.1). P. Popelier, *Procederen voor het Grondwettelijk Hof* (Intersentia, 2008), p. 73-74.
39. See e.g. P. Schollen and T. Moonen, 'De impact van het Europees Unierecht op de toetsingspraktijk van het Grondwettelijk Hof', in S. Verbist and S. Lust (eds.), *Actualia rechtsbescherming tegen de overheid* (Intersentia, 2014), p. 158-161.
40. See Article 8 of the Special Act on the Constitutional Court of 6 January 1989, Moniteur Belge of 7 January 1989, p. 315.
41. Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne*, para. 56-63 and Case C-409/06 *Winner Wetten*, EU:C:2010:503, para. 67.
42. L. Lavrysen and A. Vandaele, *Paper for the trilateral meeting between the Czech, Latvian and Belgian Constitutional Courts* (2019), p. 1, 3-6.

in this case, the maintaining of certain effects should however be necessary to nullify a genuine and serious threat of disruption of the electricity supply in Belgium. As a matter of fact, if the Belgian Constitutional Court decides that the mere annulment of the act and the subsequent shutdown of the nuclear reactors entail the risk that the lights immediately go out in Belgium, it can mitigate the consequences of the annulment. This way, the Constitutional Court can allow the Belgian legislature to adopt a new act that complies *ex post* with the requirements of EU law, as clarified by the CJEU.

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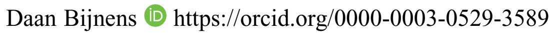
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