PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

APPLICATION BY SEGRO PROPERTIES LIMITED FOR A DEVELOPMENT CONSENT ORDER IN RESPECT OF EAST MIDLANDS GATEWAY PHASE 2

WRITTEN SUMMARY OF ORAL SUBMISSIONS AT COMPULSORY ACQUISITION HEARING 2

ON BEHALF OF

PROLOGIS UK LIMITED AND PROLOGIS UK 121 LIMITED

This document provides a written summary of the oral submissions made by Hereward Phillpot KC ("**Counsel for Prologis**"), leading counsel instructed by Howard Bassford of DLA Piper UK LLP, on behalf of Prologis UK Limited and Prologis UK 121 Limited ("**Prologis**") at Compulsory Acquisition Hearing 2 held on 12 May 2026.

Please note that due to the alignment with East Midlands Airport ("**EMA**") on many of the matters discussed, where Mark Westmoreland Smith KC ("**Counsel for EMA**") leading counsel for EMA led on submissions with which Counsel for Prologis expressly agreed, those submissions are also summarised below for completeness.

These submissions are summarised with reference to the relevant Detailed Agenda Item under which they were discussed. Where no such items are included below, it can be assumed that Prologis had no submissions to make in relation to these items.

Agenda Item 2: General Case

Updates since CAH1

1 The ExP raised the proposition, referred to in written submissions from both sides, that it is settled law that the use of compulsory acquisition powers can be properly justified in order to achieve a better scheme of development in the public interest than an alternative scheme put forward by an objector. The ExP requested case law references in support of that proposition.

2 Counsel for SEGRO referred to the decision of Mr Justice Harrison in London Borough of Bexley v Century Estates and Supermarkets Limited as authority for that proposition.

3 Counsel for Prologis confirmed that the principle is not in dispute as a matter of law: it is accepted that compulsory acquisition can, in principle, be justified on that basis. The question, as ever, is whether the test is met on the facts and evidence of the particular case. Further written submissions on this point have been made at section 4 of Prologis' Deadline 4 Submission.

4 In response to a suggestion by SEGRO that the regeneration CPO context provided a precedent for private-to-private compulsory acquisition, Counsel for EMA submitted that this analogy is not apt. In the local authority regeneration context, it is the public authority that serves as the acquiring authority using powers available under section 226. The fact that those local authorities may then partner with a commercial developer does not change the fact that it is the local planning authority that holds the powers, not the commercial developer. That is very different from circumstances in which a private developer itself seeks compulsory powers against a commercial rival.

Agenda Item 3: Specific Cases

Item 3.1 – Presentation on the Joint Application (delivered with Counsel for EMA)

5 Counsel for Prologis made preliminary submissions further to the joint letter from Prologis/EMA [REP3-062]. It was emphasised that there is a risk of erroneously framing the question set by s.122(3) as a form of beauty parade between the two schemes. That is not the case. A proper understanding of the potential public interest benefits of the two schemes, *if fully implemented*, is of course important, but it is only one element that must be fed into a much larger and multi-faceted equation. The way that element is considered as part of that equation is crucial to reaching a lawful conclusion.

6 Counsel for Prologis identified the following examples of questions that must be grappled with having formed that understanding:

6.1 How likely is it that the *potential* benefits of the DCO scheme will in fact be delivered, and delivered in full without delay, if compulsory acquisition powers are granted?

6.2 If, on the evidence, the possibility of non-delivery, partial delivery or delayed delivery of the DCO scheme is judged to be realistic, what implications does that have both for the comparison of benefits and the application of the compelling case test more generally?

6.3 What is the likelihood that similar benefits will be delivered if compulsory acquisition powers are not granted, including through independent development of the southern land?

6.4 Has the Applicant demonstrated that it undertook a proper investigation of the scope for delivering the claimed benefits without the use of compulsory acquisition powers before resorting to such a draconian measure?

6.5 What precedent would this set for state intervention to displace the outcome of normal market competition?

7 It was emphasised that those questions are examples and not exhaustive, but they serve to illustrate why a simple itemisation or side-by-side comparison of potential benefits does not in itself yield an answer to the ultimate question; namely, whether it has been demonstrated that in all the circumstances the public interest decisively demands that a commercial developer be actively deprived of his land by a commercial rival against his will.

8 Mr David Rolinson, a Chartered Town Planner at Spawforths and author of Annex B to Prologis's Deadline 3 Submission, then addressed the ExP. In summary, Mr Rolinson submitted that:

8.1 The key issue is not whether employment development should take place on the EMG2 site, but whether there is a compelling case in the public interest to justify the use of compulsory acquisition.

8.2 Prologis has either freehold ownership or legal control over the land north of Hyams Lane, which is located in close proximity to the motorway, the airport and the freight terminal. The East Midlands Freeport tax site is to become a draft employment allocation in the forthcoming Regulation 19 local plan, and is in an area of significant unmet need for employment development. The council's local plan committee has resolved to include the site as an employment allocation in the summer local plan consultation. There is no reason why the draconian powers of compulsory acquisition are required to deliver a site such as this.

8.3 The Joint Application is designed to deliver comprehensive development through a principal access corridor through the site, in accordance with the local plan as a whole.

8.4 The Joint Application is on track to go to committee in summer 2026, which will be before the ExP determines the DCO.

8.5 Some of the benefits relied upon by SEGRO are locational and common to both schemes. Some criticisms by SEGRO of the Joint Application's benefits are in fact differences of approach to achieving the same outcome. Some benefits set out by SEGRO are overstated.

8.6 The Joint Application would deliver benefits over and above the SEGRO application, specifically the on-site training hub (modelled on the Prologis DIRFT training hub) and an increased floor area of employment development on the Prologis/MAG land.

8.7 There is considerable doubt as to whether SEGRO's benefits will be delivered, having regard to the viability evidence. The Joint Application benefits would, by contrast, be delivered on an accelerated timeline.

8.8 In the absence of compulsory acquisition, development is likely to come forward on the southern land given that it is a Freeport tax site, a draft Regulation 19 local plan allocation, there is a willing landowner, and it is controlled by SEGRO.

8.9 All, or at least the vast majority, of the benefits accruing from the development of EMG2 can and are likely to be achieved without compulsory acquisition.

Agenda Item 3.2: Submissions on Compulsory Acquisition

9 Counsel for Prologis and Counsel for EMA made submissions on behalf of both Prologis and EMA (referred to together as the "**APs**"). The APs' case is that SEGRO has not demonstrated that there is a compelling case in the public interest for any of the APs' land to be taken compulsorily and that the condition in section 122(3) is therefore not satisfied. Furthermore, in respect of those parts of the APs' land proposed effectively to be set aside for future highway works not triggered by the DCO scheme, the condition in section 122(2) is not satisfied.

10 It was submitted that the case is set out extensively in the APs' Relevant Representations, Written Representations, Deadline 2 and Deadline 3 submissions, which must be read and understood in full, and that in the limited time available it was only possible to provide a brief overview of the main themes, as follows.

11 **Approach to CA test** – Prologis's submissions on the correct approach to the application of the section 122(3) test are set out in section 4 of its comments on Deadline 1 submissions. Parliament's choice of the word "compelling" is deliberate and imports into the legislation a standard that is qualitatively different from, and materially higher than, a bare balance of advantage. The public interest must decisively demand the compulsory acquisition, and if there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. For the reasons set ut in [REP2-050D] SEGRO has mischaracterised this test and sought to set the bar too low. That error must inevitably mean it has misled itself when deciding whether it would be justified to seek powers of compulsory acquisition, and that in urging the Panel and the Secretary of State to follow suit it is both failing to engage properly with the true test and inviting the decision-maker to err in law.

12 **Section 35 Direction** – In its Deadline 2 Submission, Prologis has explained in detail how and why SEGRO's application does not accord with the Section 35 Direction. Unless and until this has been resolved, the Secretary of State simply has no jurisdiction to grant development consent for the proposed development and consequently none to grant compulsory acquisition powers under the Act. In addition to representing a legal barrier to the grant of the DCO as applied for, the failure of the application to accord with the Section 35 Direction has direct implications for the compulsory acquisition case as explained in section 5 of [REP2-050D]. These submissions have subsequently been updated in Prologis' Deadline 4 Submissions.

13 **Alternatives** – This is addressed in [REP2-050D], section 3. As those written submissions explain, both timing and evidence are key. The burden is squarely on SEGRO to demonstrate that it undertook a thorough, systematic and open-minded examination of all reasonable alternatives to compulsory acquisition, including modifications to the scheme, before deciding that this measure of last resort is justified. On the evidence, no material has been produced capable of satisfying that test. Prologis has itself identified five alternatives representing pathways that could and should have been thoroughly examined before seeking compulsory acquisition powers. None of these has been identified by SEGRO as an alternative that it explored. SEGRO's belated attempt to respond to those alternatives is wholly inadequate, for the reasons explained in [REP2-050D].

14 **Delivery and Viability** – The likelihood, timing and likely extent of delivery (having regard to viability) are all important elements of the case being advanced by SEGRO. None can be accepted simply on the basis of the SEGRO's assertions. These are matters calling for detailed and reliable evidence and thorough scrutiny through the *inquisitorial* examination process. Leading counsel for Prologis emphasised the word ‘inquisitorial’ because the fairness of the PA 2008 system and its effectiveness as a means of guaranteeing the essential procedural safeguards for those whose land is proposed to be taken against their will depends critically on the actions of the ExP. The APs are doing their best to respond to the material belatedly supplied by SEGRO – and have already demonstrated in their D3 submissions that it is wholly inadequate and unreliable – but the examination process is led by the ExP and they (rather than the parties) have the procedural tools needed to probe and test the evicence. The evidence and SEGRO's own Statement of Reasons creates at least substantial doubt that the DCO scheme is viable and would be delivered if compulsory acquisition powers are granted. Mr Roberts' appraisal at Annex A of Prologis' Deadline 3 Submission demonstrates that, on the evidence, the scheme is not viable. Confirmation of the compulsory acquisition powers would therefore prevent implementation of development on the Prologis/MAG land without delivering the promised development in its place.

15 Counsel for EMA then addressed the ExP on behalf of both APs, with which submissions Counsel for Prologis expressly agreed, dealing with the comparison to the 'no-CA' world, the adverse public interest implications of the proposed compulsory acquisition, and the conclusions on the statutory tests.

16 **Comparison to the 'no-CA' world** – It was submitted that so far as the APs' land is concerned, the starting point is that there is a willing, capable and highly experienced developer actively promoting at least equivalent development on the very land that SEGRO wishes to acquire compulsorily. As Mr Rolinson explained, in the no-CA world, it is likely that planning permission will be forthcoming for the Joint Application and that it will be implemented rapidly. By the time the Secretary of State makes the decision in this case, and probably much sooner than that, NWLDC's decision on the Joint Application will have been made. Compulsory acquisition is plainly not needed to facilitate at least equivalent benefits from the development of that land.

17 Counsel for EMA added that Mr Rolinson had also explained why it is likely that development would come forward on the southern land in the no-CA world, a position which is also supported by Mr Roberts' evidence on the viability of such development.

18 Counsel for EMA submitted that, even if the generous assumption is made that the DCO scheme would be viable and delivered as and when SEGRO claims, the comparison is not between implementation of the DCO scheme and either (a) no development coming forward or (b) only the Joint Application development coming forward. More likely is that, absent compulsory acquisition powers, development would either:

19 **Alternatives** – Returning to paragraph 8 of the Guidance, all reasonable alternatives to compulsory acquisition must have been explored. As Counsel for Prologis had explained, where there are reasonable alternative ways of delivering a scheme, the applicant will not be able to show a compelling case in the public interest for compulsory acquisition powers, precisely because there is an alternative way of providing the benefits of the scheme without those powers. The decision in Prest is a good illustration of this.

20 **Private Loss** – By reference to paragraphs 12 and 13 of the Guidance, Counsel for EMA identified private loss as a further point, the viability evidence underlying it being addressed in the submissions on viability later in the hearing.

21 **Single Developer** – All that is left of SEGRO's case is the contention that a single developer is required to deliver the site-wide infrastructure. That is wrong: as explained in the APs' Relevant Representations, there are well-established and understood means of pooling developer contributions and delivering large and complex sites. The avoidance of piecemeal development therefore comes nowhere near establishing a compelling case in the public interest.

21.1 come forward more quickly overall because SEGRO enters into a joint venture arrangement with the APs to deliver the development authorised by the DCO (one of the 'DCO-based' alternatives to compulsory acquisition identified by Prologis), which would become commercially attractive to SEGRO in the absence of such powers; or

21.2 come forward more quickly on the APs' land pursuant to the Joint Application, and soon thereafter on the southern land pursuant to a separate application for planning permission.

22 Compulsory acquisition is not required to deliver development on the entirety of the land, and well-established and more proportionate alternative mechanisms exist to ensure that such development is properly co-ordinated and comprehensive.

23 In substance, the compulsory acquisition powers are sought inappropriately to provide a commercial advantage to one developer over another, rather than to secure development that would not otherwise come forward.

24 **Adverse public interest implications of the proposed CA –** the frustration of the Joint Application scheme is a substantial public interest consideration that must be weighed on the detrimental side of the balance. That harm would arise from the point at which the compulsory acquisition is granted,

but it would become permanent rather than temporary at the moment that CA powers are granted. This factor must be assessed alongside the issue of uncertainty of delivery of the DCO scheme in that scenario. SEGRO is seeking state-sanctioned expropriation of land to achieve a commercial opportunity it was unable to obtain through a fair and transparent competitive process. The purpose is to enable it to develop that land in essentially the same manner as its commercial rival. As explained in section 5 of Prologis's Written Representations, for the UK Government to authorise such a step would pose a material risk to foreign direct investment in the UK. In that important context it would set a troubling precedent and send a signal likely to chill the appetite of other investors.

25 **Dualling Land** – There was a specific and obvious failure against the test in section 122(2) in relation to Plots 1/7, 2/2 and 2/3. These are plots subject to the safeguarded area for future A453 dualling, to be secured through Requirement 31. The A453 dualling is not part of or related to the development the subject of the proposed DCO. Rather, it relates to third party future schemes and housing developments. What is proposed is compulsory acquisition over land for which the commitment made by SEGRO under Requirement 31 is to do nothing with it. That is plainly not, in the words of section 122(2), required for the DCO scheme, nor is it to facilitate or incidental to it.

26 **Need** – There is no need for compulsory acquisition powers to deliver industrial and logistics development on the APs' land. The public interest is entirely indifferent as to who delivers such benefits. There is no benefit to the public interest in SEGRO specifically delivering the benefits of logistics and industrial development that could justify the grant of compulsory acquisition powers.

27 For those reasons, CA powers over the APs land cannot be and have not been justified. There is no compelling case in the public interest.

Environmental Assessment of Displacement of Joint Application

28 The ExP raised a question as to whether the displacement of socio-economic benefits associated with the Joint Application, arising from the delivery of the DCO scheme, should be assessed as a likely significant effect in the Environmental Statement.

29 Counsel for Prologis submitted that the legal definition of "likely" for the purposes of the EIA Directive connotes a real risk rather than probability (see the decision of the Court of Appeal in *R (on the application of An Taisce (National Trust for Ireland) v Secretary of State for Energy and Climate Change)*. A real risk is one which is more than a bare possibility but does not require proof that effects will probably occur. In any given case a number of outcomes may each be "likely" as so defined, and the Environmental Statement should assess each such scenario. A copy of the An Taisce decision is appended to this summary.

30 Counsel for Prologis submitted that the socio-economic benefits of the Joint Application would be displaced on the grant of the DCO with compulsory acquisition powers, and that this is plainly a likely significant effect requiring assessment in the Environmental Statement. SEGRO's own counsel had accepted at CAH2 that implementation of the DCO scheme would displace the Joint Application's benefits, describing that displacement as "extremely probable".

31 For the reasons Prologis has explained in its Written Representations, implementation of any planning permission would only be likely once the shadow of CA has been lifted. Despite Prologis's appetite and willingness to move rapidly to build out the development once consented, the commercial risk for customers would be unlikely to be acceptable. That effect flows from the decision to approve the project, which includes all authorisations needed to carry out the 'development' proposed. This includes the grant of development consent and the necessary powers to implement that consent.

32 If planning permission has been granted by the time the Secretary of State determines the application, the issue of whether such an effect is "likely" is straightforward. Absent a decision to grant CA powers, it would be at least probable that the Joint Application development would be implemented. If a decision is still pending, the Secretary of State will need to make a judgment as to whether there is a real risk that the proposed development would be authorised and implemented in the 'no-CA' world. As Mr Rolinson's planning report demonstrates, both are highly likely.

33 In a scenario where the DCO scheme is fully delivered, the benefits of the Joint Application scheme would also be displaced by the taking of that step. That would be relevant to considering the overall socio-economic effects of the displacement on a net basis, but even on that best-case scenario for SEGRO, it is necessary to understand what has been displaced to understand how much has to be 'netted off' as an essential step towards a judgment on what might be regarded as an additional benefit of this scheme in the CA context.

34 It was stressed that this was necessary but not sufficient to allow that judgment to be made, because for the purposes of CA it must be common ground that it would remain necessary to consider what would be likely to happen to the southern land absent CA powers being granted.

35 Counsel for Prologis further submitted that the assessment of adverse socio-economic effects arising from the decision that allows the development to proceed cannot ignore the environmental effects that would flow from that decision and which would occur whether or not the proposed development is implemented. Those effects are inextricably linked to the physical works for which consent is sought.

36 The project comprises 'development' as defined, which includes physical works although it need not. Having regard to the definition of development in the legislation, it could include a change of use, or intensification. A project for EIA purposes can include continuation of an existing use. Reference was made to the decision of the European Court of Justice in *Inter-Environment Wallonie v. Conseil des Ministres*, in which the court held that a legislative act to extend the life of an existing nuclear power station engaged EIA because that legislation – whilst not itself authorising physical works - was "inextricably linked" with upgrading works that would then be needed, even though further decisions would be required. The court held, at paragraphs 71 and 72:

> *71. In the light of those various factors, measures such as those at issue in the main proceedings cannot be artificially dissociated from the work to which they are inextricably linked when assessing, in the present instance, whether they constitute a project within the meaning of the first indent of art.1(2)(a) of the EIA Directive. It must therefore be held that such measures and the upgrading work inextricably linked thereto together constitute a single project within the meaning of that provision, subject to findings of fact that are for the referring court to make.*
>
> *72. The fact that the implementation of those measures requires the adoption of subsequent acts in respect of one of the power stations concerned, such as issue of a new specific consent for the production of electricity for industrial purposes, does not change that analysis.*

37 This approach reflects the precautionary principle and the broad purposive approach the courts take to the interpretation of the EIA Directive. The language used by the ECJ – artificially dissociated – is carefully chosen. The whole EIA framework is designed to take a broad approach which ensures environmental protection/scrutiny, not a legalistic narrow approach that avoids it.

38 In this case there is similarly a single legislative act – the making of a statutory instrument in the form of a DCO – which includes development consent and other authorisations such as compulsory acquisition which are intended to enable that development to be implemented and are thus inextricably linked to it to comprise a single project for the purposes of EIA. The assessment of adverse socio-economic effects arising from the decision that allows the development to proceed cannot ignore environmental effects which would flow from that decision and occur whether or not the proposed development is implemented. Whether those environmental effects are classed as direct or indirect, they are the effects of the decision that allows the proposed development to proceed and are inextricably linked to the physical works for which consent is sought.

39 In many if not most cases adverse effects of development occur as a direct result of physical activity associated with implementing that development, but that is an issue of causation and case-specific analysis, not law. As this case illustrates that is not always so. Moreover, there is no legal principle that confines the requirement to assess to adverse effects that occur in that way.

40 This case concerns CA but the same point would apply equally to other provisions included in a DCO which need not involve development, such as stopping up or diversions of rights of way. Where a DCO requires such measures to be taken to facilitate the proposed development, the socio-economic effects arising will always fall to be assessed in the EIA process. Not to do so would be wholly artificial and would fail to reflect the actual environmental impacts of the project as experienced by those most directly affected.

41 Finally, this is a question of law, not judgment. Whilst the law makes clear that it is for the decision-maker to reach a judgment about the scope of a project and the adequacy of the environmental information, that judgment must be exercised within the legal framework. If the identification of the project – and thus the effects to be assessed – is artificially constrained by reference to an erroneous point of principle, the decision-maker will go wrong in law. A copy of the Inter-Environment Wallonie decision is appended to this summary.

42 Even if what Prologis says is the legal obligation to assess such effects stemming from the EIA Regulations is put to one side, those effects are in any event an obligatory material consideration (outside of EIA considerations) on the facts of this case.

43 If the Secretary of State were to grant the DCO as applied for without taking account of the sterilisation of socio-economic benefits in a non-delivery scenario, such a decision would plainly be unlawful for failure to take account of an obligatory material consideration. The Secretary of State cannot be sure the DCO scheme would be implemented. On the evidence, the non-delivery scenario is at least a realistic possibility, as is partial or delayed delivery. Any assessment of the case being made for CA must therefore consider the implications of a finding to that effect, and the Secretary of State will need to be advised of the ExP's conclusions and recommendation in light of those implications.

44 It follows that, one way or the other, an assessment of this issue is essential.

45 Counsel for SEGRO argued that the matter was not previously identified by it and that the panel should proceed on the basis of alternative reasoning. Counsel for Prologis responded that SEGRO cannot have it both ways: it cannot assert that the panel should consider the position in the alternative without first providing the assessment that would enable that alternative to be reliably considered.

Non-Delivery of DCO Scheme

46 The ExP asked Prologis to provide information on DCOs that have been consented but never delivered. In the time available, Prologis and EMA identified a number of examples by way of illustration, without undertaking a comprehensive or systematic exercise. It was submitted that two important contextual points should be kept in mind: first, this is a relatively unusual DCO application because it is a business and commercial scheme, and so far there are no examples of such schemes being granted a DCO and being implemented; second, a commercial scheme with no public subsidy will stand or fall on its commercial viability, and the evidence on viability is not encouraging. Written summaries of these examples have been provided in relation to Prologis' Response to Action Point 32 and so are not repeated here.

47 It was submitted that when the evidence is considered together as a whole, it is not credible for SEGRO to claim that the non-delivery scenario could not happen, or that it is not at least a realistic possibility. It should therefore be assessed accordingly.

Viability Evidence

48 Mr Peter Roberts FRICS of DWD addressed the ExP on viability matters. Mr Roberts is the author of the Viability Assessment submitted at Annex A of Prologis' Deadline 3. Mr Roberts' evidence was that SEGRO's scheme is not demonstrated to be viable on the evidence before the examination.

49 Mr Roberts explained that his assessment uses SEGRO's and Mr Cottage's own assumptions, adjusted where necessary to reflect market evidence, and re-works the appraisal to show the effect on residual land value and profit of adjusting inputs such as rents and construction costs. His

evidence was that the Prologis/MAG land falls to be valued at what the market would pay rather than what SEGRO can afford, and that, on that basis, SEGRO's scheme is not demonstrated to be viable.

Deferred Submissions

50 In the time available for the hearing it was not possible for submissions to be heard in relation to the remaining agenda items concerning (1) the potential need for SEGRO to reassess its case and revise its Statement of Reasons, and (2) Prologis' contention that development on the Southern Land would be likely under a planning application. These submissions have since been captured in Section 5 of Prologis' Deadline 4 Submission.

APPENDIX 1 - *An Taisce (National Trust for Ireland) v Secretary of State for Energy and Climate Change)*

Neutral Citation Number: [2014] EWCA Civ 1111

Case No: C1/2013/3763

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
MRS JUSTICE PATTERSON
CO/5020/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 1st August 2014

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE SULLIVAN
and
LADY JUSTICE GLOSTER

- - - - - - - - - - - - - - - - - - - -

Between:

The Queen on the Application of An Taisce (The National Trust for Ireland)	**Claimant**
- and -	
The Secretary of State for Energy and Climate Change	**Defendant**
- and –	
NNB Generation Company Limited	**Interested Party**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

David Wolfe QC, John Kenny and Blinne Ni Ghralaigh (instructed by **Leigh Day Solicitors**) for the **Appellants Jonathan Swift QC, Rupert Warren QC and Jonathan Moffett** (instructed by the **Treasury Solicitor**) for the **Respondent**
Nathalie Lieven QC and Hereward Phillpot (instructed by **Herbert Smith Freehills LLP)** for the **Interested Party**

Hearing dates: 15th & 16th July 2014

Judgment
As Approved by the Court

Lord Justice Sullivan:

Introduction

1. In this claim for judicial review the Claimant challenges the decision dated 19th March 2013 of the Defendant to make an Order ("the Order") granting development consent for the construction of a European pressurised reactor ("EPR") nuclear power station at Hinkley Point in Somerset ("HPC").

Background

2. The background to the claim is explained in considerable detail in the judgment of Patterson J [2013] EWHC 4161 (Admin) dismissing the Claimant's application for permission to apply for judicial review following a "rolled up" hearing. On the 27th March 2014 I granted the Claimant permission to apply for judicial review and ordered that the application should be retained in the Court of Appeal.

3. The judge set out the factual background in paragraphs 5-62 of her judgment. There was no challenge to this aspect of her judgment, and I gratefully adopt, and will not repeat, all of the detail that is contained in those paragraphs.

4. There is no dispute as to the legal framework, which the judge set out in paragraphs 63-79 of her judgment. Article 7 of Directive 2011/92/EU ("the EIA Directive") is of central importance in this claim, and for convenience I set out the material paragraphs:

> "1. 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, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:
>
> (a) a description of the project, together with any available information on its possible transboundary impact;
>
> (b) information on the nature of the decision which may be taken.
>
> The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.
>
> 2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in

> Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).
>
> 3. The Member States concerned, each insofar as it is concerned, shall also:
>
> (a) Arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and
>
> (b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out."

5. It is common ground that the construction of HPC is a project which falls within Annex I to the EIA Directive. An environmental impact assessment was required and was carried out, and the necessary public consultation was undertaken within the United Kingdom, in accordance with Articles 4-6 of the Directive.

6. The Defendant did not carry out transboundary consultation in accordance with Article 7 because he did not consider that the HPC project was "likely to have significant effects on the environment in another Member State." A transboundary screening assessment carried out by the Planning Inspectorate ("PINS") on the Defendant's behalf, having referred to Appendix 7E to Volume 1 of the Interested Party's Environmental Statement, which contained an assessment of potential transboundary effects, said:

> "On the basis that licensing and monitoring conditions are effective, impacts will not be significant."

The screening assessment also said, when dealing the "Probability":

> "The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place.
>
> There could be direct impacts related to the discharge of water during normal operational conditions. However, the discharge of water is expected to be controlled by appropriate licensing conditions and regular monitoring, and hence the probability of any adverse impacts is likely to be low.

> The Developer has indicated that information is included in the Government's submission to the European Commission under Article 37 of the Euratom Treaty to show that transboundary impacts from accidents during operation or decommissioning will be so low as to be exempt from regulatory control."

7. The Austrian Government wrote to the Department of Energy and Climate Change indicating that it wished to participate in the process of considering the application for the Order. It was sent a copy of the application, and its response included an expert report. The decision letter dated 19th March 2013 summarised the expert report, and the Defendant's response thereto, in paragraphs 6.6.2(ii) and (iii):

> "6.6.2(ii) The expert report focuses on nuclear safety issues and as such has been reviewed by the Office of Nuclear Regulation ("ONR"). It draws heavily on documents published by the ONR during the Generic Design Assessment of the EPR. Although broadly technically sound, it tends to overemphasise the significance of those areas where ONR has in any event determined that more work needs to be done during any subsequent construction and commissioning of a power station based on the EPR (i.e. such as at Hinkley Point) as part of its own regulatory processes.
>
> 6.6.2(iii) The Austrian expert contends that in assessing the likely environmental effects of HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (involving significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However, in my view such accidents are so unlikely to occur that it would not be reasonable to "scope in" such an issue for environmental impact assessment purposes."

8. The Claimant contends that there was a failure to comply with Article 7 of the Directive. The Defendant failed to consult the public in the Republic of Ireland in accordance with Article 7 because:

   (1) He misdirected himself as to the meaning of "likely" within Article 7 by "scoping out" severe nuclear accidents on the basis that they were very unlikely (Ground 1 "likelihood"); and

   (2) Even if he was correct as to the meaning of "likely", the Defendant erred in relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents (Ground 2 "regulatory regime").

9. Before considering these two grounds, it is necessary to understand the reference in the decision letter to "very low probability" severe accidents. The Austrian Expert

Report had said that severe accidents with high releases of caesium-37 cannot be excluded, and there would be a need for official intervention in Austria after such an accident, but the report recognised that the calculated probability of such an accident is below 1E-7/a, which means that such an accident would not be expected to occur more frequently than once in every 10 million years of reactor operation: see paragraph 53 of Patterson J's judgment.

Discussion

Ground 1 Likelihood

10. The words "likely to have significant effects on the environment" occur in a number of places in the EIA Directive: in recitals (7) and (9), in Articles 1(1), 2(1) and 7(1), and in a slightly different formulation – "likely significant effects of the proposed project on the environment" – in Annex IV. In similar vein, an Environmental Statement must include "the data required to identify and assess the main effects which the project is likely to have on the environment": see Article 5(3).

11. Two points should be made at the outset of any consideration of what is meant by "likely" in Article 7(1). It is now common ground that:

    (1) The words "likely to have significant effects on the environment" must have the same meaning throughout the EIA Directive (not least because the environmental information to be supplied to the authorities and the public in the other Member State under Article 7 is the information that must be provided under Article 6 to the public in the Member State in which the project is located); and

    (2) Whatever that meaning might be, in the context of the EIA Directive the word "likely" does not mean, as an English lawyer might suppose, more probable than not.

12. The CJEU has not ruled on the meaning of "likely to have significant effects on the environment" in the EIA Directive. The Domestic authorities were considered by Patterson J in paragraphs 123-126 of her judgment. None of those authorities is binding on this Court. In *R (Morge) v Hampshire County Council* [2010] EWCA Civ 608 [2010] PTSR 1882, Ward LJ recorded the parties' agreement that "likely" connotes real risk and not probability (paragraph 80). In *R (Bateman) v South Cambridgshire District Council* [2011] EWCA Civ 157 Moore-Bick LJ expressed the view in paragraph 17 that "something more than a bare possibility is probably required, though any serious possibility would suffice", but he did not find it necessary to reach a final decision on the question (paragraph 19).

13. The Claimant's submission that a project is "likely to have significant effects on the environment" if such effects "cannot be excluded on the basis of objective evidence" is founded on the decision of the Grand Chamber of the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Bogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij ("Waddenzee").* *Waddenzee* was concerned with the Habitats Directive, Article 6 of which materially provides:

> "1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex 1 and the species in Annex II present on the sites.
>
> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this 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 theron, 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." (emphasis added)

14. In paragraphs 42-44 of its judgment the Grand Chamber said:

> "42. As regards Article 2(1) of Directive 85/337 [now Article 2(1) of the EIA Directive], the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment … are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, paragraph 85).
>
> 43. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in

> accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.
>
> 45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects." (emphasis added)

15. On behalf of the Claimant, Mr. Wolfe QC, understandably, placed much emphasis upon the Grand Chamber's interpretation of the "essentially similar" text of Article 6(3) of the Habitats Directive; and the fact that the Grand Chamber had drawn an analogy with the judgment in the *United Kingdom* case in which the Court was considering the meaning of likelihood in a very different context: the United Kingdom's response to the BSE crisis, and a Directive which required notification of

> "any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health."

This demonstrated, he submitted, that the Grand Chamber's approach to the likelihood of significant harm in any context where environmental concerns, including the protection of human health, were in issue was based on first principles, and was not confined to the specific characteristics of the Habitats Directive.

16. While the text of Article 2(1) of the EIA Directive and Article 6(3) of the Habitats Directive is essentially similar, and both Directives are concerned with environmental protection, there is in my view a clear distinction between the two Directives. The scope of the EIA Directive is wide ranging, it ensures that any project which is likely to have significant effects on the environment is subject to a process of environmental impact assessment. The EIA Directive does not prescribe what decision must be

taken by the competent authority – to permit or to refuse – if the environmental impact assessment concludes that the proposal is likely to have significant effects on the environment. The Habitats Directive is more focussed, it protects particular areas of Community importance, which have been defined as "special areas of conservation", and which must be maintained at, or restored to, "favourable conservation status": see Articles 2 and 3. In order to achieve this aim Article 6(3) provides that, subject only to "imperative reasons of overriding public interest" (see Article 6(4)), where there has been an "appropriate assessment":

> "the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned." (emphasis added)

17. Thus, where there has been an "appropriate assessment" Article 6(3) imposes a very strict test for approval. The Grand Chamber said that competent authorities may approve a plan or project:

> "55…… only after having made sure that it will not adversely affect the integrity of the site.
>
> 56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.
>
> 57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.
>
> 58 In this respect it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211. paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.
>
> 59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others*

[2003] ECR I-8105, paragraphs 106 and 113)." (emphasis added)

18. In order to achieve this very high level of protection for special areas of conservation an equally stringent approach is required at the screening stage when the competent authority is deciding whether an "appropriate assessment" is required: see paragraph 70 of the Opinion of Advocate General Kokott [2004] ECR 1-7405. It is for this reason that in a case falling within the Habitats Directive an "appropriate assessment" must be carried out unless the risk of significant effects on the site concerned can be "excluded on the basis of objective information." Reading the *Waddenzee* judgment as a whole, it is clear that significant effects can be excluded on the basis of objective evidence if "no reasonable scientific doubt remains as to the absence of such effects."

19. Standing back from a detailed analysis of the text of the two Directives, there is no obvious reason why such a strict approach should apply to the screening stage in the EIA Directive, which merely seeks to ensure that any likely significant effects on the environment are identified and properly taken into account in the decision making process. Even if significant environmental effects are identified, and are not merely likely, but are certain to occur, the EIA Directive does not require that approval for an EIA project within either Annex I or II of the EIA Directive must be refused in the absence of some overriding public interest. The Grand Chamber referred to the precautionary principle in *Waddenzee* (see paragraph 44), but it was applying that principle in the context of the Habitats Directive, where the objective is the protection of the integrity of particular sites designated for their conservation importance. In the wider context of environmental protection a "real risk" test embodies the precautionary principle: see *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, per Beatson LJ at paragraph 21.

20. I have already mentioned the fact that, by contrast with the Habitats Directive, the EIA Directive has a broad scope: it applies to all "projects which are likely to have significant effects on the environment" (Article 1); and the Environmental Statements prepared for all such projects must include information about all of the likely significant effects (Article 5), and must be subject to public consultation (Article 6). While the claimant stresses the need for any likely environmental effect to be "significant", it seems to me that adopting the Claimant's approach to the meaning of likelihood – that a significant environmental effect is "likely" if it cannot be excluded on the basis of objective evidence – would inevitably have the effect of both (a) materially increasing the number of projects within Annex II which would have to be the subject of an EIA; and (b) increasing the number of "likely" significant effects that would have to be included in all Environmental Statements, and consulted upon.

21. Many Environmental Statements for major projects which are now prepared on a "real risk" basis are already very lengthy. If, in addition to being required for more Annex II projects, Environmental Statements had to deal with every possible significant environmental effect, however unlikely, unless it could be excluded on the basis of objective evidence, there is a real danger that both the public when consulted and decision takers would "lose the wood for the trees", thereby causing the EIA process to become less effective as an aid to good environmental decision making: see *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2012] 3 CMLR 29, per Pill LJ at paragraph 46; and *Bateman* per Moore-Bick LJ at paragraph 19.

22. In addition to these wider policy considerations, it is necessary to consider the text of the EIA Directive as a whole. I accept the submission of Mr. Swift QC on behalf of the Defendant that the Claimant's approach to likelihood is inconsistent with the selection criteria that are set out in Annex III, which must be taken into account when a decision is being taken as to whether an Annex II project shall be made subject to an environmental impact assessment, ie. whether it is likely to have significant effects on the environment. The selection criteria include "Characteristics of the Potential Impact". The potential significant effects of projects must be considered in relation to the criteria set out in points 1 and 2 [the characteristics and the location of projects] and having regard in particular to:

> "(a) the extent of the impact (geographical area and size of the affected population);"
>
> (b) the transfrontier nature of the impact:
>
> (c) the magnitude and complexity of the impact;
>
> (d) the probability of the impact;
>
> (e) the duration, frequency and reversibility of the impact". (emphasis added)

Mr Swift submits, rightly in my view, that the need to have regard to "the probability of the impact" would be redundant if the test of likelihood was whether the risk of any impact, however improbable, could be excluded on the basis of objective evidence.

23. For these reasons, I consider that the differences between the scope, purpose and text of the two environmental Directives are such that it is unduly simplistic to say that, because one part of the text in both Directives is "essentially similar", the meaning of that part of the text in the context of Article 6(3) of the Habitats Directive as determined by the Grand Chamber in *Waddenzee* can simply be carried over into the EIA Directive. The "real risk" test adopted in the domestic authorities (above) incorporates the protective principle in the context of the EIA Directive.

24. Mr Wolfe submitted that even if we were minded to conclude that the Defendant had not erred in his approach to likelihood for the purposes of Article 7, a reference to the CJEU was required because this Court could not be convinced that applying the "real risk" test in the context of the EIA Directive would be correct as a matter of EU law: see *CILFIT (Srl) v Ministry of Health* [1982] ECR 1-3415 at paragraphs 16-20. In support of that submission he relied, in addition to the Grand Chamber's judgment in *Waddenzee* (above), upon five considerations, as follows:

(a) the German text of Article 7(1);

(b) the Russian text of the Convention on Environmental Impact Assessment in a Transboundary context, ("the Espoo Convention");

(c) the interpretation of the Espoo Convention by that Convention's Implementation Committee;

(d) the Aarhus Convention; and

(e) Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive").

25. While both (a) and (b) support the proposition that "likely" in Article 7(1) has a broader meaning than "more likely than not", they do not support the Claimant's proposition that "likely" in Article 7(1) means "cannot be excluded no matter how unlikely." In *Waddenzee* [2004] ECR 1-7405 Advocate General Kokott explained in paragraph 69 of her opinion:

> "As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive "könntė (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely "likely", which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear."

26. There is no dispute that Article 7 of the EIA Directive gives effect to the Espoo Convention: see recital (15) to the EIA Directive. The English language version of the Convention uses the word "likely". The Claimant obtained a translation of the Russian version of the Espoo Convention (of which there are three authentic texts, English, French and Russian). The translator states that the word "may" in the expression "may cause a significant adverse transboundary impact", "fails to convey the meaning of likelihood and expresses a mere possibility which can be either high or low." In a further statement, the translator explains that the Russian word for "may" "includes something which cannot be excluded or ruled out." It seems that the Russian word for "may" conveys a flexible concept of possibility which ranges from a high possibility at one end of the spectrum to a possibility which cannot be excluded. As with the German text of the EIA Directive, the Russian text would not constrain the CJEU to adopt the lowest level of possibility inherent in the Russian version of the Espoo Convention. I will deal with the view expressed by the Implementation Committee after I have considered whether any assistance can be obtained from the Aarhus Convention and the SEA Directive.

27. There is no dispute that the EIA Directive must be construed so as to give effect to the Aarhus Convention. Recital (20) to the EIA Directive records the fact that:

> "Article 6 of the Aarhus Convention provides for public consultation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which <u>may</u> have a significant effect on the environment." (emphasis added)

In broad terms, Annex I to Aarhus lists the kinds of projects that are listed in Annex I to the EIA Directive, while Annex II projects in the EIA Directive may fall within the second part of Article 6(1) of Aarhus. While the word "may" indicates a lower

threshold than "likely" (used in the sense of more likely than not), it does not indicate that the test for public consultation across the board – for all activities which may have a significant effect on the environment – is so low as to include any activity where a significant effect on the environment, however unlikely, cannot be excluded.

28. Article 3(2) of the SEA Directive requires an environmental assessment for all plans and programmes (a) which are prepared for certain purposes and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive; and (b) "which in view of the likely effect on sites [special areas of conservation] have been determined to require an [appropriate] assessment pursuant to Article 6 or 7 of [the Habitats Directive]." In the latter case, the CJEU has held that an environmental assessment is required if a significant effect on the site cannot be excluded: see Case C-177/11 *Syllogos Ellinon Poleodomon kai Khorotakton v Y pourgos Perivallontos, Khorotaxias & Dimosion Ergon and Others.* This decision of the CJEU merely applies the *Waddenzee* approach to plans or programmes which are likely to have a significant effect on sites of Community importance, which have been designated as special areas of conservation by the Member States: see paragraphs 19-23 of the judgment. It does not address the issue in the present case: whether the *Waddenzee* approach to likelihood should be carried over into the EIA Directive.

29. For these reasons, I am not persuaded that any of these considerations assists the Claimant's case. Against this background, I turn to the views expressed by the Implementation Committee ("the Committee"). The judge dealt with this issue in paragraphs 132-142 of her judgment. In summary, the Claimant had relied upon the endorsement by the Parties to the Espoo Convention at their Fourth Meeting of the findings of the Committee in Annex I that Ukraine had not complied with the Convention in, what for convenience I will call the "Danube Black Sea" case. In paragraph 54 in Part III of the Committee's report "Consideration and Evaluation", preceding its "Findings" in Part IV, the Committee said:

> "Article 3, paragraph 1. of the Convention stipulates that Parties shall notify any Party of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. The Committee is of the opinion that, while the Convention's primary aim, as stipulated in Article 2, paragraph 1, is to "prevent, reduce and control significant adverse transboundary environmental impact from proposed activities", even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with Article 3. This would be in accordance with the *Guidance on the Practical Application of the Espoo Convention*, paragraph 28, as endorsed by decision III/4 (ECE/MP.EIA/6 annex IV). <u>This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty. This interpretation is based on the precautionary and prevention principles</u>." (emphasis added)"

30. The judge concluded that the Meeting of the Parties was not purporting to determine the legal position under the Convention, but was setting out a pragmatic approach for the parties to follow, and also said that the Committee had no status to give a legal ruling: see paragraph 135 of the judgment. At the Fourth Meeting, the Parties also

asked the Committee "To promote and support compliance with the Convention including to provide assistance in this respect, as necessary." In response to that request the Committee published its Opinions, as expressed in the reports of its sessions, from 2001 to 2010. Those Opinions included its views expressed in paragraph 54 of Annex 1 to decision IV/2 (above).

31. In 2013 the European Commission published "Guidance on the Application of the Environmental Impact Assessment Procedure for large-scale Transboundary Projects." Under the heading "Need for notification" the Commission's guidance says:

> "The Espoo Convention requires that the Party of origin notifies affected Parties about projects listed in Appendix 1 and likely to cause a significant adverse transboundary impact (Article 3(2)). The notification triggers the transboundary EIA procedure. The Espoo Convention's primary aim is to '*prevent reduce and control significant adverse transboundary environmental impact from proposed activities*' (Article 2(1), but in fact the Party of origin is obliged to notify affected Parties (in accordance with Article 3 of the Espoo Convention) even if there is only a low likelihood of such impact. This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty.[17] This interpretation is based on the precautionary and prevention principles." (emphasis added)

Footnote 17 cross-refers to paragraph 54 of decision IV/2 (above).

32. As I explained when granting permission to appeal, [2014] EWCA Civ 666, the Chair of the Committee wrote a letter dated 14th March 2004 to the United Kingdom Government. The Committee had requested a copy of Patterson J's judgment, and had considered the matter between 25th and 27th February 2014 at its 30th session held in Geneva. The Committee's letter dated 14th March 2014 expressly endorsed the view that it had expressed in the Danube Black Sea case, as to the circumstances in which transboundary consultation was required by the Convention:

> "This means that notification is necessary unless a significant adverse transboundary impact can be excluded (decision IV/2, annex I paragraph 54)"

The letter continued:

> "On the above grounds, the Committee found that there was a profound suspicion on non-compliance and decided to begin a Committee initiative further to paragraph 6 of the Committee's structure and functions. In line with paragraph 9 of the Committee's structure and functions, the Committee decided that the United Kingdom should be invited to the Committee's thirty-second session (9-11 December 2014) to participate in the discussion an to present information and opinions on the matter under consideration."

33. Having read the Committee's letter, I was satisfied that there was a compelling reason for granting permission to appeal. There was a need for this Court to decide whether it was possible to give a definitive ruling as to the approach to likelihood in the EIA Directive, or whether there should be a reference of that question to the CJEU. I have explained in paragraphs 16-23 (above) why I consider that the Defendant was not required to apply the *Waddenzee* approach to the likelihood of significant transboundary environmental effects under Article 7 of the EIA Directive. This is not a court of final appeal. If we had to apply *CILFIT* I could not say that I was convinced that the other Member States and the CJEU would necessarily conclude that the "real risk" approach is the correct approach to the likelihood of significant effects on the environment for the purposes of the EIA Directive. Does this mean that a reference to the CJEU is necessary for the purpose of deciding this claim?

34. Mr. Swift acknowledged that the threshold for the likelihood of significant effects on the environment for the purposes of the EIA Directive is a very important issue, with EU-wide implications. However, both he and Miss Lieven QC on behalf of the Interested Party submitted that a reference to the CJEU was not necessary for the purpose of determining this claim for judicial review, because no matter how low the threshold for a likely significant effect on the environment might be set by the CJEU, the Defendant's decision dated 19th March 2013 would still be lawful.

35. I accept that submission. There is an artificiality in the Claimant's claim. The Defendant was not writing an academic dissertation on the concept of likelihood in the EIA Directive, he was deciding whether to grant development consent for a particular project: the construction of an EPR nuclear power station, HPC. In its submissions, the Claimant posited a stark contrast between the "real risk" and the "cannot be excluded on the basis of objective information", approaches, to the issue of likelihood in the EIA Directive. The distinction between these two approaches to likelihood is clear as a matter of abstract legal analysis, but the Defendant, unsurprisingly in the context of a proposal for the construction of a nuclear power station, did not purport to apply a "real risk" approach. The disagreement between the approach adopted by the Defendant and the approach advocated in the Austrian expert report was not a disagreement as to whether the "real risk" approach or the "cannot be excluded on the basis of objective evidence" approach should be applied to the risk of a serious nuclear accident. It was a disagreement as to the point at which the significant environmental effects of a severe nuclear accident could properly be "excluded on the basis of objective evidence." Was that point reached only when it had been demonstrated that the probability of such a severe accident was zero; or was the Defendant entitled to conclude that that point had been reached in this case because the probability of a severe accident was very remote indeed – in circumstances where the Austrian expert report had calculated the probability of such an accident to be as low as 1 in 10 million years of reactor operation?

36. The true nature of the dispute in this case – whether the exclusion of a significant environmental effect from the EIA process is permissible only if it has been demonstrated that there is no risk whatsoever of it occurring, or if exclusion is permissible where it has been demonstrated that the risk is extremely remote – emerges most clearly from the response of the Department of Energy and Climate to the letter dated 14th March 2014 from the Espoo Implementation Committee (paragraph 32 above). In its letter dated 19th June 2014 the Department maintained

that the present case was very different from the Danube Black Sea case in which there was no doubt that the Convention was engaged:

> "On any analysis, the risk of an accident occurring from the proposed new nuclear development at Hinkley Point C is extremely low. Given the very remote nature of the risk, it is difficult to quantify, and the estimates produced will depend to some extent on the accident scenarios considered. However, the literature on this issue is summarised in the European Commission's 2005 Report 'Externe – The Externalities of Energy, Methodology 2005 Update', which points to a probability of major accidents (core meltdown plus containment failure) in the UK of $4x10^{-9}$. This suggests that the potential for a major accident in the UK – the meltdown of the reactor's core along with failure of the containment structure – is one in 2.4 billion per reactor year; by comparison, it is thought that the risks of a meteorite over a kilometre hitting the earth, which could have significant global environmental impacts, could be one in 0.5 million per year. The Austrian Government also commissioned its own expert analysis of the risks of an accident from a new nuclear development at Hinkley Point C, which expressed the risk of an accident as being not expected to occur more frequently than once in every 10 million years of reactor operation. On no natural understanding of the term could such a remote risk be considered be constitute a 'likely significant effect'."

37. The Claimant's challenge to the Defendant's decision in this case does not simply depend upon the proposition that the Grand Chamber's approach in *Waddenzee* to the meaning of "likely to have a significant effect" in the Habitats Directive should be carried over into the EIA Directive, it also depends upon a very literal meaning being given to the Grand Chamber's words "cannot be excluded on the basis of objective information" in its judgment in *Waddenzee.* If a remote risk can properly be excluded, the Claimant does not challenge the Defendant's assessment that the remoteness of the risk in this case was such that it could be excluded. In order to succeed in this claim the Claimant has to establish that any risk, no matter how remote, cannot be excluded unless it has been demonstrated that there is no possibility of its occurring. It is, in effect a "zero risk" approach to the likelihood of significant environmental effects.

38. It would be surprising if the Grand Chamber had intended to impose such a high and inflexible threshold for "appropriate assessment", even in the context of the Habitats Directive. However purposive the interpretation of the Habitats Directive, its text cannot be ignored. The word "likely", and the concept of likelihood, implies at least some degree of flexibility. There comes a point when the probability (to use the word in Annex III to the EIA Directive) of a significant effect is so remote that it ceases to be "likely", however broad the concept of likelihood. In *Waddenzee* the Grand Chamber said that, following an appropriate assessment, a project could be authorised only if the competent authority "have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as

to the absence of such effects…." (see paragraph 17 above). Thus, certainty was equated with the absence of reasonable scientific doubt.

39. Even if the *Waddenzee* approach to likelihood is carried over into the EIA Directive, it must be open to a competent authority to conclude that the risk of a significant adverse effect on the environment is so remote (eg if it is more remote than the risk of a meteorite of over a kilometre hitting the earth) that there is "no reasonable scientific doubt" as to the absence of that adverse effect for the purpose of the EIA Directive. The competent authority does not have to be satisfied that there is no risk, however remote, that a severe nuclear accident will occur in order to be satisfied that there is "no reasonable scientific doubt" that such an accident will not occur. This approach is consistent with the guidance that is contained in the Planning Inspectorate's *Advice note 12: Development with significant transboundary impacts consultation.*

40. I do not accept Mr. Wolfe's submission that the Defendant failed to follow this advice from the Planning Inspectorate. When dealing with "Screening", and with those cases in which it is necessary for the Secretary of State to determine whether or not a proposed development is likely to have significant effects on the environment in another EEA State, the Advice note say this:

> "In reaching a view, the precautionary approach will be applied and following the court's reasoning in the Waddenzee case such that 'likely to have significant effects' will be taken as meaning that there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect…"

Mr. Wolfe emphasised the reference to the CJEU's reasoning in *Waddenzee*; but the Advice note continues:

> "As a rule of thumb (taking the precautionary approach), unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following [Nationally Significant Infrastructure Projects] as likely to have significant transboundary impacts:
>
> - nuclear power stations; and
>
> - off-shore generating stations in a Renewable Energy Zone."

I accept Mr. Swift's submission that evidence that the risk of a severe nuclear accident is not merely unlikely, but extremely remote, is capable of being "compelling evidence" that a proposed nuclear power station is not likely to have significant transboundary effects, since it is common ground that such effects would be likely to occur only if there was such an accident.

41. The contrast between the evidential basis for the low level of risk in the present case and the extent of the scientific uncertainty in the *United Kingdom* case to which the CJEU referred by way of analogy in its judgment in *Waddenzee* (see paragraph 14 above) is instructive. In the *United Kingdom* case the Spongiform Encephalopathy Advisory Committee ("SEAC") had said that "it was not in a position to confirm

whether or not there was a causal link between BSE and the recently discovered variant of Creutzfeldt-Jacob disease, a question which required further scientific research" (paragraph 14). A similar position had been adopted by the Scientific Veterinary Committee of the European Union: while it was not possible on the available data to prove that BSE was transmissible to humans, in view of the possibility of such transmission, which the committee had always considered, it had recommended certain precautionary measures and that research on the question of transmissibility of BSE to humans be continued (paragraph 13). The recitals to the Directive that was challenged by the United Kingdom reflected the extent of the scientific uncertainty:

> "Whereas under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible; whereas a risk of transmission cannot be excluded; whereas the resulting uncertainty has created serious concern among consumers; ... "

42. In the present case, it is common ground that the probability of a severe nuclear accident is very low indeed. There may be an issue as to just how low that probability is (see the correspondence with the Implementation Committee, paragraph 36 above) but there is no doubt that the Defendant was entitled to describe it in his decision as a "very low probability". The issue, therefore, is whether the risk of a significant effect on the environment can properly be excluded on the basis of a very low probability, or only upon the basis of a zero probability. In this case we are concerned with a proposal for a nuclear power station, and the environmental consequences of a severe nuclear accident. In that context, for obvious reasons, "very low probability" means very low probability indeed, far below the levels of probability (or "risk") that might be regarded as acceptable in the context of other developments. Although Annex I to the EIA Directive includes other inherently dangerous projects, eg chemical installations for the production of explosives, where only the remotest of risks will be acceptable, the Directive covers a very wide range of projects in Annexes I and II. In the context of very many, if not most, of the projects listed in the Directive, it is difficult to see how it could seriously be contended that a significant effect on the environment which would not be expected to occur more frequently than once in every 10 million years could not properly be excluded from environmental impact assessment on the basis of objective information.

43. Annex III requires the Member States to consider both the magnitude and complexity of an environmental impact and the probability of such an impact when deciding whether an Annex II project is likely to have significant effect on the environment (see paragraph 22 above). As a matter of common sense, the greater the potential impact, the lower will be the level of probability at which the competent authority will decide that it should be subjected to the environmental impact assessment process: see Miller v North Yorkshire County Council, [2009] EWHC 2172 (Admin) per Hickinbottom J at paragraphs 31 and 32. This leaves an area of judgment for the competent authority – balancing the severity of any potential environmental harm against the probability of it occurring. It recognises the fact that some significant effects on the environment, eg a significant radiological impact, are much more significant than others. Given the wide range of projects covered by the EIA Directive and the express requirement to consider the probability of any impact, I am satisfied that, even if it is appropriate to apply the "cannot be excluded on the basis of

objective evidence" approach to the likelihood of significant effects on the environment in the EIA Directive, there is no realistic prospect of the Claimant's "zero risk" approach being adopted by the CJEU. I would add that our attention was not drawn to any decision of a Court in which the Claimant's approach to exclusion has been adopted. However purposive the interpretation of the EIA Directive, a "zero risk" approach to likelihood would be an interpretative step too far and would frustrate, rather than further the purpose of the Directive.

44. In reaching that conclusion, I have not ignored the views expressed by the Committee in its letter dated 14th March 2014. They provide the only possible support for a "zero risk" approach to the point at which a serious environmental impact may be excluded from the EIA process. While I respect the Committee's view, it is not the function of the Committee to give an authoritative legal interpretation of the Convention. The correspondence with the Committee makes it clear that there is a dispute as to the proper interpretation of the Convention. Article 15 makes provision for the settlement of such disputes. If the dispute cannot be resolved by negotiation between the Parties it may be either submitted to the International Court of Justice, or referred to arbitration in accordance with the procedure set out in Appendix VII to the Convention.

45. The Committee does have an important role in promoting best practice under the Convention, and it is noteworthy that its conclusion in paragraph 54 of Annex I to decision IV/2 - that even a low likelihood of a significant adverse transboundary environmental impact would trigger the obligation to notify affected parties in accordance with Article 3 of the Convention [Article 7 of the EIA Directive] - is expressly based upon its "*Guidance on the Practical Application of the Espoo Convention*", as endorsed by decision III/4. Thus, it would appear that the views expressed by the Committee are based upon a combination of its advice as to what would be best practice, and its view as to what is the legal position, under the Convention. I intend no criticism of the Committee when I say that, insofar as its decision in paragraph 54 of Annex I to decision IV/2 moves from advice as to what would be best practice to a statement of what the legal position is, it is not based upon any legal analysis (that is not surprising, the Committee is not a legally qualified body). Even if a "low likelihood" of a significant transboundary effect not merely should (as a matter of good practice), but does (as a matter of law) trigger the obligation to notify any affected party, the Committee will still have to consider the issue raised in this case: whether a "likelihood" may be so very low that it can be excluded for the purpose of transboundary consultation, or whether exclusion is permissible only when all risk has been eliminated. Of critical importance for present purposes, the Committee understandably focuses simply upon the terms of the Espoo Convention, and does not consider the need for the words "likely to have significant effects on the environment" to have a consistent meaning throughout the EIA Directive. For these reasons, the views expressed by the Committee in its letter dated 14th March 2014 do not persuade me that it is necessary for this Court to make a reference to the CJEU in order to determine this claim.

Ground 2

46. The judge dealt with this issue in paragraphs 177-193 of her judgment. She concluded in paragraph 193:

> "In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon."

I agree with the judge. Had this ground of challenge stood alone I would not have granted the Claimant permission to apply for judicial review.

47. There is no dispute that the Defendant was in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents: see *Gateshead Metropolitan Council v Secretary of State for the Environment* [1995] Env LR 37.

48. Many major developments, particularly the kind of projects that are listed in Annex I to the EIA Directive, are not designed to the last detail at the environmental impact assessment stage. There will, almost inevitably in any major project, be gaps and uncertainties as to the detail, and the competent authority will have to form a judgement as to whether those gaps and uncertainties mean that there is a likelihood of significant environmental effects, or whether there is no such likelihood because it can be confident that the remaining details will be addressed in the relevant regulatory regime. In paragraph 38 of his judgment in *R (Jones) v Mansfield District Council* [2004] 2 P & CR 14, Dyson LJ (as he then was) adopted paragraphs 51 and 52 of the judgment of Richards J (as he then was) which included the following passage:

> "It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."

49. This is precisely what happened on the facts of the present case. The elaborate regulatory regime for nuclear power stations is described in the Witness Statements filed on behalf of the Defendant and the Interested Party. For present purposes, it is sufficient to note that by the time the Defendant made his decision dated 19th March 2013 the Office for Nuclear Regulation ("ONR") had issued a nuclear site licence, and both the ONR and the Environment Agency had completed the Generic Design Assessment (GDA) process, including a severe accident analysis, for the EPR, the type of reactor to be used at HPC. All of the GDA issues had been addressed, and the ONR had issued a Design Acceptance Confirmation ("DAC"). The ONR had said

that it was confident that the design was "capable of being built and operated in the UK, on a site bounded by the generic site envelope, in a way that is safe and secure". Site specific matters not covered by the GDA process would still need to be considered, but the ONR was confident that they could, and would, be addressed under the site licence conditions. As the ONR explained:

> "Whilst the GDA process, leading to the issue of a DAC, is not part of the licensing assessment, the successful completion of GDA does provide confidence that ONR will be able to give permission for the construction, commissioning and operation of a nuclear power station based on that generic design."

50. In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and reliance upon "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments… on elements of the project still subject to design changes….", which was not.

51. There is no basis for this distinction, which is both unrealistic and unsupported by any authority. The distinction is unrealistic because elements of many major development projects, particularly the kind of projects within Annex I to the EIA Directive, will still be subject to design changes, and applying Mr. Wolfe's approach those projects will not have "already been designed" at the time when an environmental impact has to be carried out. The detailed design of many Annex I projects, in particular nuclear power stations, is an immensely complex, lengthy and expensive process. To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. The promoters of such projects would be unlikely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission. If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process.

52. In support of his submission Mr. Wolfe relied on the decision of the CJEU in Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] ECR 1-5613. *Bozen* was concerned with whether there was a power under Article 4(2) of the EIA Directive to exclude from the environmental impact assessment process, from the outset and in their entirety, certain classes of projects falling within Annex II (paragraph 35). Unsurprisingly, the CJEU decided that it was not permissible to exempt whole classes of projects in advance from the obligation to carry out a screening exercise. The criteria and/or the thresholds mentioned in Article 4(2) must "facilitate examination of the actual characteristics of any given project" (paragraph 37 emphasis added). No project should be exempt from environmental

assessment "unless the specific project excluded could, on the basis of a comprehensive assessment be regarded as not being likely to have [significant effects on the environment]." (paragraph 45 emphasis added)

53. *Bozen* was not concerned with the level of detail that is required about a project if, as in the present case, an environmental assessment is carried out. The CJEU was not asked to, and did not address the issue raised by Ground 2 in the present case: at what point may the competent planning authority conclude that it has sufficient information about the "actual characteristics" of a project, and/or that the environmental assessment is sufficiently "comprehensive", to enable it to decide that a significant environmental effect is not likely because any outstanding details will be satisfactorily addressed by the relevant pollution regulator.

54. I have considered Ground 2 upon the basis that, as submitted by the Claimant, it has a life of its own even if Ground 1 is rejected. In the abstract, the Claimant's submission is correct – the circumstances in which a planning authority may rely upon a pollution regulator is a separate issue – but on the facts of this case Ground 2 has no substance if Ground 1 is rejected. The Claimant does not contend that the Defendant's decision that severe nuclear accidents were very unlikely to occur was unreasonable. There has been no suggestion by any Member State, or any recognised scientific body, that such accidents are anything other than very unlikely. If Ground 1 is rejected, and it is concluded that the Claimant's "zero risk" approach is not well founded, there is nothing to suggest that the Defendant's assessment of the degree of unlikelihood of the risk of such accidents was erroneous. The views expressed by the ONR, the European Commission, the Austrian expert report and the Radiological Protection Institute of Ireland, were all to the same effect: that the risk of a severe nuclear accident is very low indeed. If the Defendant was not required to adopt a "zero risk" approach there is no basis for a submission that he should not have concluded that the risk was so unlikely that the environmental effects of such an accident should not be "scoped in" (ie should be excluded) for environmental impact assessment purposes.

Conclusion

55. A reference to the CJEU is not necessary. I would dismiss this application.

Lady Justice Gloster:

56. I agree.

Lord Justice Longmore:

57. I also agree.

APPENDIX 2 - Inter-Environment Wallonie v. Conseil des Ministres,

JUDGMENT OF THE COURT (Grand Chamber)

29 July 2019 (*)

(Reference for a preliminary ruling — Environment — Espoo Convention — Aarhus Convention — Conservation of natural habitats and of wild fauna and flora — Directive 92/43/EEC — Article 6(3) — Definition of 'project' — Assessment of the effects on the site concerned — Article 6(4) — Meaning of 'imperative reasons of overriding public interest' — Conservation of wild birds — Directive 2009/147/EC — Assessment of the effects of certain public and private projects on the environment — Directive 2011/92/EU — Article 1(2)(a) — Definition of 'project' — Article 2(1) — Article 4(1) — Environmental impact assessment — Article 2(4) — Exemption from assessment — Phasing out of nuclear energy — National legislation providing, first, for restarting industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing production at that power station, and second, for deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station — No environmental impact assessment)

In Case C-411/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Constitutional Court, Belgium), made by decision of 22 June 2017, received at the Court on 7 July 2017, in the proceedings

Inter-Environnement Wallonnie ASBL,

Bond Beter Leefmilieu Vlaanderen ASBL

v

Council of Ministers,

intervener:

Electrabel SA,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot (Rapporteur), A. Prechal, M. Vilaras, E. Regan, T. von Danwitz, C. Toader and C. Lycourgos, Presidents of Chambers, A. Rosas, M. Ilešič, J. Malenovský, M. Safjan, D. Šváby and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 10 September 2018,

after considering the observations submitted on behalf of:

– Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL, by J. Sambon, avocat,

– Electrabel SA, by T. Vandenput and M. Pittie, avocats, and by D. Arts and F. Tulkens, advocaten,

– the Belgian Government, by M. Jacobs, C. Pochet and J. Van Holm, acting as Agents, and by G. Block and K. Wauters, avocats, and F. Henry,

– the Czech Government, by M. Smolek, J. Vláčil, J. Pavliš and L. Dvořáková, acting as Agents,

– the German Government, originally represented by T. Henze and D. Klebs, and later by D. Klebs, acting as Agents,

– the Austrian Government, originally represented by C. Pesendorfer, and later by M. Oswald and G. Hesse, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, J. Reis Silva and L. Medeiros, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the United Kingdom Government, by S. Brandon, J. Kraehling, G. Brown and R. Fadoju, acting as Agents, and by D. Blundell, Barrister,

– the European Commission, by G. Gattinara, C. Zadra, M. Noll-Ehlers, R. Tricot and M. Patakia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the Convention on Environmental Impact Assessment in a Transboundary Context, concluded at Espoo (Finland) on 25 February 1991 and approved on behalf of the European Community by Council Decision of 27 June 1997 (‘the Espoo Convention’); of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded at Aarhus (Denmark) on 25 June 1998 and approved on behalf of the Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) (‘the Aarhus Convention’); of 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) (‘the Habitats Directive’); of 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 by Directive 2013/17 (‘the Birds Directive’), and of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1; ‘the EIA Directive’).

2 The request has been made in proceedings between Inter Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL, on the one hand, and the Conseil des ministres (Council of Ministers, Belgium), on the other, in relation to legislation whereby the Kingdom of Belgium, first, provided for the restarting of industrial production of electricity, for a period of almost 10 years, at a nuclear power station that had previously been shut down, and second, for deferral by 10 years of the date initially set for deactivating and ceasing industrial production of electricity at an active nuclear power station.

I. Legal context

A. International law

1. *The Espoo Convention*

3 Article 1 of the Espoo Convention, headed ‘Definitions’, provides:

‘…

(v) “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;

…

(ix) “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;

…’

4 Article 2 of the Espoo Convention 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.

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

…’

5 Article 3(8) of the Espoo Convention provides that ‘the concerned Parties shall ensure that the public of the affected Party, in the areas likely to be affected, be informed of, and be provided with possibilities for making comments or objections on, the proposed activity and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority, or, where appropriate, through the Party of origin’.

6 Article 5 of the Espoo Convention states:

‘The Party of origin shall, after completion of the environmental impact assessment documentation, without undue delay enter into consultations with the affected Party concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Consultations may relate to:

(a) Possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin;

(b) Other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity; and

(c) Any other appropriate matters relating to the proposed activity.

The Parties shall agree, at the commencement of such consultations, on a reasonable time frame for the duration of the consultation period. Any such consultations may be conducted through an appropriate joint body, where one exists.'

7 Article 6(1) of the Espoo Convention states:

'The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the comments thereon received pursuant to Article 3, paragraph 8 and Article 4, paragraph 2, and the outcome of the consultations as referred to in Article 5.'

8 Appendix I to the Espoo Convention, headed 'List of activities', refers, in point 2, to, inter alia, 'nuclear power stations and other nuclear reactors'.

9 The 'Background Note on the application of [the Espoo Convention] to nuclear energy-related activities' (ECE/MP.EIA/2011/5), issued on 2 April 2011 by the United Nations Economic Commission for Europe, mentions, among the major changes that are subject to the requirements of the Espoo Convention, 'a substantial increase in the production or storage of radioactive waste from a facility (not only NPP [nuclear power plants]), for example by 25 per cent', and 'an extension of the lifetime of a facility'.

10 In the same note, a summary of its content includes the following:

'This note attempts to reflect the diverse and sometimes conflicting views expressed on the application of the [Espoo] Convention to nuclear energy-related activities, particularly nuclear power plants. It is not a guidance note, but rather is intended to encourage debate on key issues during the panel discussion on nuclear energy-related projects to be held during the fifth session of the Meeting of the Parties to the [Espoo Convention].

The note does not necessarily reflect the views of the United Nations Economic Commission for Europe or of the secretariat.'

11 The terms of reference for the drawing up of the 'Good Practice Recommendations on the application of [the Espoo Convention] to nuclear energy-related activities', approved by the Meeting of the Parties to the Espoo Convention, 7th Session (Minsk (Belarus), 13 to 16 June 2017) state that the object of that document is to 'describe existing good practice on environmental impact assessment [of] nuclear energy-related activities'.

12 The same terms of reference state that screening will have to determine whether nuclear activities, as well as major changes to them, fall under the scope of the Espoo Convention. It is also stated that that screening 'includes considerations relating to the extension, renewal and updating of the licence (for example, extension of the operating life), such as a substantial increase in levels of production or in the production/transport/storage of radioactive waste from a facility (not only an NPP) and decommissioning'.

2. ***The Aarhus Convention***

13 Under Article 2(2) of the Aarhus Convention, the definition of 'public authority' in that Convention 'does not include bodies or institutions acting in a … legislative capacity'.

14 Article 6(1) and (4) of the Aarhus Convention, that article being headed 'Public participation in decisions on specific activities', provides:

'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;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;

…

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

15 Annex I to the Aarhus Convention, headed 'List of activities referred to in Article 6, paragraph 1 (a)', mentions, in the fifth indent of point 1, 'nuclear power stations and other nuclear reactors, including the dismantling or decommissioning of such power stations or reactors'.

16 Point 22 of that annex reads as follows:

'Any 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, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to Article 6, paragraph 1 (b) of this Convention.'

17 The 'Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters' were approved by the Meeting of the Parties to the Aarhus Convention at the fifth session (Maastricht (Netherlands), 30 June to 1 July 2014). In the part of those recommendations entitled 'Summary', it is stated that those recommendations, though 'neither binding nor exhaustive', nonetheless provide 'helpful guidance on implementing Articles 6, 7 and 8 of [the Aarhus Convention]'.

B. **EU law**

1. ***The Habitats Directive***

18 Article 2(2) of the Habitats Directive states:

'Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.'

19 Article 3(1) of that directive provides:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)].'

20 Article 6 of the Habitats Directive states:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this 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.'

21 Article 7 of the Habitats Directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive [79/409] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive [79/409], where the latter date is later.'

2. ***The Birds Directive***

22 Article 2 of the Birds Directive states:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

23 Article 3 of that directive provides:

'1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.'

24 Article 4 of the Birds Directive states:

‘1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

…

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. …

…

4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.’

25 As is stated in the first paragraph of its Article 18, the Birds Directive repealed Directive 79/409. The second paragraph of Article 18 adds that references to the latter directive are to be construed as references to the Birds Directive and are to be read in accordance with the correlation table in Annex VII to that directive.

3. ***The EIA Directive***

26 Recitals 1, 15 and 18 to 20 of the EIA Directive state:

‘(1) 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)] has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified.

…

(15) It is desirable to lay down strengthened provisions concerning environmental impact assessment in a transboundary context to take account of developments at international level. The European Community signed [the Espoo Convention] on 25 February 1991 and ratified it on 24 June 1997.

…

(18) The European Community signed [the Aarhus Convention] on 25 June 1998 and ratified it on 17 February 2005.

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.’

27 Article 1(2) and (4) of the EIA Directive provides:

‘2. For the purposes of this Directive, the following definitions shall apply:

(a) “project” means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

(b) "developer" means the applicant for authorisation for a private project or the public authority which initiates a project;

(c) "development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

…

4. 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.'

28 Article 2(1) and (4) of the EIA Directive provides:

'1. 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. These projects are defined in Article 4.

…

4. 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.

The Commission shall report annually to the European Parliament and to the Council on the application of this paragraph.'

29 Article 4(1) and (2) of the EIA Directive provides:

'1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).'

30 Article 5(3) of the EIA Directive provides that the information to be provided by a developer, for projects which, under Article 4 of that directive, must be subject to an environmental impact assessment, is to at least 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; the data required to identify and assess the main effects which the project is likely to have on the environment; an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects; a non-technical summary of the above information.

31 The first subparagraph of Article 7(1) of the EIA Directive states:

'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, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken.'

32 Annex I to that directive, headed 'Projects referred to in Article 4(1)', mentions, in point 2(b), 'Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors'.

33 The same Annex I refers, in point 24, to 'any 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'.

34 Annex II to the EIA Directive mentions, in point 13(a), 'any 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)'.

C. **Belgian law**

1. ***The Law of 31 January 2003***

35 The loi du 31 janvier 2003 sur la sortie progressive de l'énergie nucléaire à des fins de production industrielle d'électricité (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; 'the Law of 31 January 2003'), laid down a timetable for phasing out industrial production of electricity by the fission of nuclear fuels in nuclear power stations.

36 Article 2 of that law provides:

'For the purposes of this Law, the following definitions shall apply:

1° "date of entry into service for industrial purposes": date on which the formal agreement between the electricity producer, the builders and the engineering consultancy firm finalises the project phase and initiates the production phase, as follows for the existing power stations:

– Doel 1: 15 February 1975

– Doel 2: 1 December 1975

– Doel 3: 1 October 1982

– Doel 4: 1 July 1985

– Tihange 1: 1 October 1975

– Tihange 2: 1 February 1983

– Tihange 3: 1 September 1985

…’

37 Article 4 of that law, in the initial version, provided:

‘§ 1. Nuclear power stations used for the industrial production of electricity by the fission of nuclear fuels shall be deactivated 40 years after the date on which they were brought into service for industrial purposes and may no longer produce electricity thereafter.

‘§ 2. All specific operating consents and consents for the industrial production of electricity by the fission of nuclear fuels issued for an unlimited period by the King … shall expire 40 years after the date on which the production facility concerned was brought into service for industrial purposes.’

38 According to Article 9 of that law:

‘If the security of the electricity supply is threatened, the King may take the necessary measures by Royal Order, deliberated upon by the Conseil des Ministres (Council of Ministers) following an opinion from the Commission de Régulation de l’Électricité et du Gaz (Commission for the Regulation of Gas and Electricity, Belgium), without prejudice to Articles 3 to 7 of this Law, except in the event of *force majeure*. That opinion shall focus, in particular, on the effect of production price movements on security of supply.’

2. ***The Law of 28 June 2015***

39 The loi du 28 juin 2015 modifiant la loi du 31 janvier 2003 sur la sortie progressive de l’énergie nucléaire à des fins de production industrielle d’électricité afin de garantir la sécurité d’approvisionnement sur le plan énergétique (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 security of the energy supply (*Moniteur belge* of 6 July 2015, p. 44423; ‘the Law of 28 June 2015’), entered into force on 6 July 2015.

40 The explanatory memorandum to the Law of 28 June 2015 stresses, in particular, that a number of scientific studies have highlighted the potentially problematic situation in relation to security of supply, and that, given the major uncertainties surrounding restarting the Doel 3 and Tihange 2 stations, and the planned closure of thermal power stations in 2015, combined with the fact that foreign capacity cannot in the short term be integrated into the Belgian grid, the Belgian Government decided, on 18 December 2014, to continue to operate the Doel 1 and Doel 2 power stations for a further 10 years, with the proviso that the operating life of those reactors may not be extended beyond the year 2025. The memorandum specifies that the extension will be implemented in accordance with the requirements in respect of 10-year safety reviews, which cover, inter alia, the measures set out in Electrabel SA’s long-term plan for the operation of the power stations known as the ‘Long Term Operation Plan’ (‘LTO plan’), which details the measures to be taken as a result of prolonging industrial electricity production at those two power stations, the adjustments to be made to the action plan on stress tests and the approvals needed from the Agence fédérale de contrôle nucléaire (Federal Nuclear Control Agency, AFCN).

41 Article 4(1) of the Law of 31 January 2003, as amended by the Law of 28 June 2015, states:

‘The Doel 1 nuclear power station 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 from 15 February 2025. The other nuclear power stations used for the industrial production of electricity by the fission of nuclear fuels shall be deactivated on the following dates and may no longer produce electricity from those dates onward:

…

– Doel 2: 1 December 2025.’

42 Further, the Law of 28 June 2015 inserted a third paragraph into Article 4 of the Law of 31 January 2003, in the following terms:

‘By order deliberated in the Council of Ministers, the King shall bring forward the date referred to in § 1 in respect of the Doel 1 and Doel 2 nuclear power stations to 31 March 2016, if the agreement referred to in Article 4/2, § 3, has not been concluded by 30 November 2015, at the latest.’

43 Finally, the Law of 28 June 2015 inserted an Article 4/2, into the Law of 31 January 2003, worded as follows:

‘§ 1. The owner of the Doel 1 and Doel 2 nuclear power stations shall pay an annual fee to the Federal State, until 15 February 2025 for Doel 1 and 1 December 2025 for Doel 2, in return for the extension of the period authorised for the industrial production of electricity by the fission of nuclear fuels.

…

§ 3. The Federal State shall conclude an agreement with the owner of the Doel 1 and Doel 2 nuclear power stations, for the purpose of, in particular:

1° specifying the arrangements for calculating the fee referred to in paragraph l;

2° paying compensation to each party in respect of any breach of their contractual obligations.’

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

44 There are seven nuclear reactors in the Kingdom of Belgium: four in the territory of the Flemish Region at Doel (Doel 1, Doel 2, Doel 3 and Doel 4), and three in the territory of the Walloon Region at Tihange (Tihange 1, Tihange 2 and Tihange 3). For the purposes of the present judgment, each reactor will be treated as a separate nuclear power station.

45 The Doel 1 and Doel 2 power stations have been in service since 15 February 1975 and 1 December 1975, respectively. A single consent was issued in respect of both stations by Royal Order in 1974, for an indeterminate period.

46 The Law of 31 January 2003, in the initial version, first of all, prohibited the construction and commissioning of any new nuclear power stations in Belgium and, secondly, established a timetable for the phasing out of nuclear energy, whereby industrial electricity production by all active power stations would end on specified dates. For that purpose, the law provided that specific operating consents and consents for the industrial production of electricity would expire 40 years after the power station concerned was brought into service, but allowed the King to adjust the timetable if security of supply to the country were threatened.

47 However, the Law of 18 December 2013, amending the Law of 31 January 2003, postponed by 10 years the date on which industrial production of electricity by the Tihange 1 power station, brought into service on 1 October 1975, would end. That Law provided that only the consent for industrial production of electricity would expire on the deactivation date provided for in the timetable for the phasing out of nuclear energy and that the operating consent would remain valid until such time as it were ‘adjusted’. The law also removed the possibility of the King altering the timetable for phasing out nuclear energy laid down in the Law of 31 January 2003.

48 On 18 December 2014 the Belgian Government decided that the period of electricity production at the Doel 1 and Doel 2 power stations would also be extended by 10 years.

49 On 13 February 2015 Electrabel, the owner-operator of those two power stations, notified the AFCN that the Doel 1 power station would be deactivated and that industrial electricity production at that station would cease on 15 February 2015 at midnight, in accordance with the timetable established by

the Law of 31 January 2003. It was specified that the notification would be 'null and void', if and when legislation providing for a 10-year extension in respect of that power station were to enter into force and provided that the conditions relating thereto were accepted by Electrabel.

50 The Law of 28 June 2015 introduced further changes to the timetable laid down by the national legislature for phasing out nuclear energy, deferring the end of industrial electricity production at the Doel 1 and Doel 2 power stations by 10 years. That law also provided that the Doel 1 power station could resume electricity production.

51 Under that law, those two power stations must be deactivated and cease industrial electricity production on 15 February 2025, for the Doel 1 power station, and 1 December 2025, for the Doel 2 power station.

52 The order for reference indicates that members of parliament held a number of hearings in the course of the proceedings for the adoption of that law, and those heard from included the head of the national body on radioactive waste and enriched fissionable materials, who indicated that a 10-year extension of electricity production by those two power stations was likely to produce 350 m^3 of operational waste.

53 In September 2015 the AFCN confirmed the decision it had adopted in August 2015 not to carry out an environmental impact assessment in respect of the changes envisaged by the operator under the LTO plan.

54 An action was brought against that decision before the Conseil d'État (Council of State, Belgium).

55 A Royal Order of 27 September 2015 laid down the conditions for the operation of the Doel 1 and Doel 2 power stations, specifying that Electrabel should implement the LTO plan by the end of 2019 at the latest. An action against that decision was also brought before the Conseil d'État (Council of State).

56 On 30 November 2015 Electrabel and the Belgian State signed an agreement for a 'rejuvenation' investment plan of approximately EUR 700 million to extend the period of operation of the Doel 1 and Doel 2 power stations up until the date provided for in the Law of 28 June 2015 ('the Agreement of 30 November 2015').

57 The Belgian environmental protection associations Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen brought proceedings before the Cour constitutionnelle (Constitutional Court, Belgium) seeking annulment of the Law of 28 June 2015. They argue, in essence, that the adoption of that legislation was in breach of the requirements to carry out a prior assessment, under the Espoo Convention and the Aarhus Convention, as well as the EIA Directive, the Habitats Directive and the Birds Directive.

58 In those circumstances, the Cour constitutionnelle (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 1 to [the Epsoo Convention], be interpreted in accordance with the explanations provided in the background note on the application of the [Espoo Convention] to nuclear-energy related activities and the good practice recommendations on the application of the [Espoo Convention] to nuclear-energy related activities?

(2) May Article 1(ix) 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], 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], 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] and/or suspension of the application of those provisions?

(4) Must Article 2(2) of the [Aarhus Convention] be interpreted as excluding from the scope of that [Convention] legislative acts such as the [Law of 28 June 2015], 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.1 to that [Convention], be interpreted as applying prior to the adoption of a legislative act such as the [Law of 28 June 2015], 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 derogation from the application of Articles 2 and 6 of the [Aarhus Convention] and/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 investment 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], 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 in the public interest linked with the security of the country's electricity supply?

(7) Must the concept of "specific act of 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], 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 Doel 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], 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 Law [of 28 June 2015] 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?'

III. **Consideration of the questions referred**

A. **Questions 6 and 7, on the EIA Directive**

1. ***Question 6(a) to (c)***

59 By Question 6(a) to (c), which should be examined first, the referring court asks, in essence, whether the first indent of Article 1(2)(a) and Article 2(1) of the EIA Directive must be interpreted as meaning that restarting industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing production at that power station, and deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station, where those measures entail work to upgrade the power stations in question, constitute a project, within the meaning of that directive and if so, whether an environmental impact assessment must be carried out in respect of that work and those measures prior to the adoption of those measures by the national legislature. The referring court is also uncertain whether it is relevant that in order to implement the measures contested before that court, subsequent measures must be adopted in respect of one of the two power stations in question, such as the issue of a new specific consent for the production of electricity for industrial purposes.

60 Given that, as stated in recital 1 of the EIA Directive, that directive codifies Directive 85/337, the Court's interpretation of the provisions of the latter directive also applies to identical provisions of the EIA Directive.

(a) ***The definition of a 'project' for the purposes of the EIA Directive***

61 The term ‘project’ in Article 1(2)(a) of the EIA Directive refers, in the first indent, to the execution of construction works or of other installations or schemes and in the second indent, to other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

62 It follows from the case-law of the Court that the definition of the term ‘project’, specifically in the context of the wording of the first indent of Article 1(2)(a) of the EIA Directive, refers to work or interventions involving alterations to the physical aspect of the site (see, to that effect, judgment of 19 April 2012, *Pro-Braine and Others*, C-121/11, EU:C:2012:225, paragraph 31 and the case-law cited).

63 The referring court’s question is whether that description applies to the measures at issue in the main proceedings, given that their implementation requires and would therefore inevitably be accompanied by substantial investment and major upgrading work to the two power stations concerned.

64 The evidence available to the Court indicates that the measures at issue in the main proceedings entail major work on the Doel 1 and Doel 2 power stations to upgrade them and ensure that current safety standards are met, as demonstrated by the EUR 700 million investment budget earmarked for those power stations.

65 According to the order for reference, the Agreement of 30 November 2015 makes provision for a ‘rejuvenation’ investment plan, which describes that work as what is needed in order to extend the operational life of both power stations and includes, in particular, investment approved by the AFCN under the LTO plan for the replacement of facilities due to ageing and the upgrading of other facilities, along with changes to be introduced under the Fourth Periodical Safety Review and stress tests carried out in the wake of the accident in Fukushima (Japan).

66 In particular, the documents provided to the Court indicate that work will focus, in particular, on upgrading the containment structures of the Doel 1 and Doel 2 power stations, renewal of the spent fuel pools, building a new pumping station and adaptation of the base to offer better protection to the power stations against flooding. That work would not be limited to improvements to existing structures, but would also involve the construction of three buildings, two to host ventilation systems and a third as a fire protection structure. Work of that nature is such as to alter the physical aspect of the sites in question, within the meaning of the Court’s case-law.

67 Further, although no reference is made to that work in the Law of 28 June 2015, and it features instead in the Agreement of 30 November 2015, it is nonetheless closely linked to the measures adopted by the Belgian legislature.

68 Given the extent of the prolongation of industrial production of electricity provided for by those measures, those measures could not have been adopted unless the Belgian legislature had first been made aware of the nature and the technical and financial feasibility of the upgrading work required and the investment needed to implement it. Indeed, the explanatory memorandum and the *travaux préparatoires* of the Law of 28 June 2015 make specific reference to that upgrading work and that investment.

69 It must also be pointed out that the tangible link between the measures contested before the referring court and the investment referred to in the preceding paragraph is borne out by the fact that the Law of 28 June 2015 inserted a paragraph 3 into Article 4 of the Law of 31 January 2003, which provides that, in the absence of agreement between the owner of the Doel 1 and Doel 2 power stations and the Belgian State by 30 November 2015 at the latest, the King would bring forward the date of deactivation for those power stations to 31 March 2016.

70 The documents provided to the Court also show that the operator of both power stations took on a legal obligation to complete all work by the end of 2019.

71 In the light of those various factors, measures such as those at issue in the main proceedings cannot be artificially dissociated from the work to which they are inextricably linked when assessing, in the present instance, whether they constitute a project within the meaning of the first indent of Article 1(2)(a) of the EIA Directive. It must therefore be held that such measures and the upgrading work

inextricably linked thereto together constitute a single project within the meaning of that provision, subject to findings of fact that are for the referring court to make.

72 The fact that the implementation of those measures requires the adoption of subsequent acts in respect of one of the power stations concerned, such as issue of a new specific consent for the production of electricity for industrial purposes, does not change that analysis.

(b) ***The need for an environmental impact assessment***

73 It must, first, be recalled that, before consent is granted in respect of any project within the meaning of Article 1(2)(a) of the EIA Directive, an environmental impact assessment must be conducted on that project pursuant to Article 2(1) of that directive, if it is likely to have significant effects on the environment, by virtue of its nature, size or location.

74 Furthermore, the requirement imposed by Article 2(1) of the EIA Directive is not that all projects likely to have a significant effect on the environment be made subject to the assessment procedure provided for in that directive, but only those mentioned in Article 4 of that directive, which refers to the projects listed in Annexes I and II thereto (see, to that effect, judgment of 17 March 2011, *Brussels Hoofdstedelijk Gewest and Others*, C-275/09, EU:C:2011:154, paragraph 25).

75 Finally, Article 2(1) and Article 4(1) of the EIA Directive, read together, indicate that projects covered by Annex I to that directive, present an inherent risk of significant effects on the environment and therefore an environmental impact assessment is indispensable in those cases (see, to that effect, on the obligation to conduct an impact assessment, judgments of 24 November 2011, *Commission* v *Spain*, C-404/09, EU:C:2011:768, paragraph 74, and of 11 February 2015, *Marktgemeinde Straßwalchen and Others*, C-531/13, EU:C:2015:79, paragraph 20).

(1) *The application of Annexes I and II to the EIA Directive*

76 Point 2(b) of Annex I to the EIA Directive lists nuclear power stations and other nuclear reactors, including their dismantling and decommissioning, among the projects which under Article 4(1) of that directive are subject to an assessment in accordance with Articles 5 to 10 of that directive.

77 Consequently, it must be examined whether measures such as those at issue in the main proceedings, along with the work to which those measures are inextricably linked, may fall within the scope of point 24 of Annex I to the EIA Directive, which refers to ‘any 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’, or of point 13(a) of Annex II to that directive, which refers to ‘any 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)’.

78 As regards point 24 of Annex I to the EIA Directive, it is evident from the wording and general scheme of that provision that it applies to any change or extension to a project, which by virtue of, inter alia, its nature or scale, presents risks that are similar, in terms of their effects on the environment, to those posed by the project itself.

79 The measures at issue in the main proceedings, which have the effect of extending, by a significant period of 10 years, the duration of consents to produce electricity for industrial purposes with respect to both power stations in question, which had up until then been limited to 40 years by the Law of 31 January 2003, combined with major renovation works necessary due to the ageing of those power stations and the obligation to bring them into line with safety standards, must be found to be of a scale that is comparable, in terms of the risk of environmental effects, to that when those power stations were first put into service.

80 The Court therefore finds that those measures and that work fall within the scope of point 24 of Annex I to the EIA Directive. Such a project carries an inherent risk of significant effects on the environment, within the meaning of Article 2(1) of that directive, and must therefore be subject to an assessment of its environmental impact under Article 4(1) of that directive.

81 Furthermore, given that the Doel 1 and Doel 2 power stations are located close to the border of the Kingdom of Belgium and the Kingdom of the Netherlands, it is indisputable that the project could also have significant effects on the environment in the latter Member State, within the meaning of Article 7(1) of that directive.

(2) *The stage at which the environmental impact assessment must be conducted*

82 Article 2(1) of the EIA Directive states that the environmental impact assessment required by that directive must be conducted 'before consent is given' in respect of projects covered by that directive.

83 As the Court has previously pointed out, the requirement that such an assessment should precede consent is justified by the fact that it is necessary, in the decision-making process, for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than to counteract their effects subsequently (judgment of 31 May 2018, *Commission* v *Poland*, C-526/16, not published, EU:C:2018:356, paragraph 75 and the case-law cited).

84 It must also be stated that Article 1(2)(c) of the EIA Directive defines the term 'development consent' as the decision of the competent authority or authorities which entitles the developer to proceed with the project, a matter which should be determined, in principle, by the referring court, in the light of applicable national legislation.

85 Furthermore, 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 potential effects of the project on the environment (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).

86 Where one of those stages is a principal decision and another 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. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure (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).

87 In the present case, although it is for the referring court to determine, in the light of the applicable national legislation, whether the Law of 28 June 2015 constitutes development consent for the purposes of Article 1(2)(c) of the EIA Directive, it must be found that that legislation provides, in a precise and unconditional manner, first for the restarting of industrial production of electricity, for a period of almost 10 years, at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the date initially set by the national legislature for deactivating and ceasing industrial production of electricity at that power station and, second, for deferral, also by a period of 10 years, of the date initially set by the national legislature at which industrial production of electricity at an active power station would cease.

88 Consequently, although further measures are required to implement those acts, in the context of a complex and regulated process designed, inter alia, to ensure compliance with safety and security standards applicable to industrial production of nuclear electricity, and those measures are subject, in particular, to prior approval by the AFCN, as is apparent from the explanatory memorandum to the Law of 28 June 2015, the fact remains that those measures, once adopted by the national legislature, define essential characteristics of the project and, a priori, should no longer be a matter for debate or reconsideration.

89 As regards the need for the issuing of a new specific consent for the production of electricity for industrial purposes in respect of one of the two power stations concerned in order to proceed with the project, that fact cannot justify postponing the environmental impact assessment until after the adoption of that legislation. Furthermore, the order for reference indicates that the amount of additional

radioactive waste (350 m^3) likely to be generated as a result of the measures at issue in the main proceedings had been brought to the attention of the Belgian Parliament prior to its adoption.

90 Moreover, as stated in paragraphs 63 to 71 of the present judgment, the measures at issue in the main proceedings, together with the upgrading work inextricably linked thereto, constitute a project within the meaning of the first indent of Article 1(2)(a) of the EIA Directive.

91 Against that background, it would appear, prima facie, that the Law of 28 June 2015 constitutes development consent, within the meaning of Article 1(2)(c) of that directive, or at the very least, a first step in the process of obtaining consent for the project, as regards its essential characteristics.

92 As regards whether the environmental impact assessment should extend to work inextricably linked to the measures at issue in the main proceedings, that would be the case if both the work and its potential effects on the environment were sufficiently identifiable at that stage of the consent procedure, a finding that it is for the referring court to make. On that point, it is apparent from the order for reference, as previously noted in paragraph 68 of the present judgment, that both the nature and cost of the work entailed by the measures contained in the Law of 28 June 2015 were also known to the Belgian Parliament prior to the adoption of that law.

93 Furthermore, if the project at issue in the main proceedings is likely to have significant effects on the environment in another Member State, it must also be subject to a procedure for transboundary assessment under Article 7 of the EIA Directive.

94 In the light of all the foregoing, the answer to Question 6(a) to (c) is that the first indent of Article 1(2)(a), Article 2(1) and Article 4(1) of the EIA Directive must be interpreted as meaning that the restarting of industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the deadline initially set by the national legislature for deactivating and ceasing production at that power station, and deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station, measures which entail work to upgrade the power stations in question such as to alter the physical aspect of the sites, constitute a ‘project’, within the meaning of that directive, and subject to the findings that are for the referring court to make, an environmental impact assessment must, in principle, be carried out with respect to that project prior to the adoption of those measures. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be made subject to such an assessment before the adoption of those measures if its nature and potential impact on the environment are sufficiently identifiable at that stage, a finding which it is for the referring court to make.

2. *Question 6(d)*

95 By Question 6(d), the referring court asks, in essence, whether Article 2(4) of the EIA Directive must be interpreted as permitting an exemption, in respect of a project such as that at issue in the main proceedings, from the requirement to conduct an environmental impact assessment on grounds linked with the security of the electricity supply in the Member State in question.

96 In accordance with the first subparagraph of Article 2(4) of the EIA Directive, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions of that directive, without prejudice, however, to Article 7 of that directive on the obligations incumbent on Member States in whose territory a project that is likely to have significant effects on the environment in another Member State is intended to be carried out.

97 Although it is conceivable that the need to ensure the security of the electricity supply to a Member State could amount to an exceptional case, within the meaning of the first subparagraph of Article 2(4) of the EIA Directive, which would justify exempting a project from environmental impact assessment, it should be noted that points (a) to (c) of the second subparagraph of Article 2(4) of that directive impose specific obligations upon Member States wishing to rely on that exemption.

98 In such a case, the Member States concerned are required to consider whether another form of assessment would be appropriate, make available to the public concerned the information thereby obtained, and inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information, if any, made available to their own nationals.

99 As noted by the Advocate General in point 150 of her Opinion, these obligations are not mere formal requirements, but conditions designed to ensure that the objectives of the EIA Directive are met, as far as possible.

100 In the present case, although it is a matter for the referring court to determine whether the Kingdom of Belgium has met those obligations, it may be noted at this stage that the Commission has stated in its written observations that it has not been informed by that Member State that such an exemption had been granted.

101 Moreover, the exemption of a project under Article 2(4) of the EIA Directive from the requirement to conduct an environmental impact assessment is only permissible if the Member State concerned can show that the alleged risk to security of the electricity supply is reasonably probable and that that project is sufficiently urgent to justify not carrying out such an assessment. Furthermore, as stated in paragraph 96 of the present judgment, the exemption is applicable without prejudice to Article 7 of that directive, on the assessment of projects with transboundary effects.

102 In the light of the foregoing, the answer to Question 6(d) is that Article 2(4) of the EIA Directive must be interpreted as meaning that a Member State may exempt a project such as that at issue in the main proceedings from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity supply only where that Member State can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment, subject to compliance with the obligations in points (a) to (c) of the second subparagraph of Article 2(4) of that directive. However, that possibility of granting an exemption is without prejudice to the obligations incumbent on the Member State concerned under Article 7 of that directive.

3. ***Question 7***

103 By Question 7, the referring court seeks, in essence, to ascertain whether Article 1(4) of the EIA Directive must be interpreted as meaning that national legislation such as that at issue in the main proceedings constitutes a specific act of national legislation, within the meaning of that provision, which is excluded, by virtue of that provision, from the scope of that directive.

104 In that regard, Article 1(4) of the EIA Directive, which reproduced the content of Article 1(5) of Directive 85/337, requires two conditions to be met if a project is to be excluded from the scope of the EIA Directive.

105 The first condition is that the project must be adopted by a specific act of legislation that has the same characteristics as a development consent. In particular, that act must grant the developer the right to proceed with the project (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 32 and the case-law cited).

106 In addition, the project must be adopted in detail, that is to say, in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment. The legislative act must demonstrate that the objectives of the EIA Directive have been achieved as regards the project in question (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 33 and the case-law cited).

107 It follows that the details of a project cannot be considered to have been adopted by a legislative act, for the purposes of Article 1(4) of the EIA Directive, if that act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to be entitled to proceed with the project (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 34 and the case-law cited).

108 The second condition laid down in Article 1(4) of the EIA Directive is that the objectives of that directive, including that of making available information, are achieved through the legislative process. It follows from Article 2(1) of that directive that the essential objective of the 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 subject to an assessment with regard to their environmental effects before consent is given (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 35 and the case-law cited).

109 Consequently, the legislature must have sufficient information at its disposal at the time when the project concerned is adopted. In that regard, it follows from Article 5(3) of the EIA Directive that 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, the data required to identify and assess the main effects which the project is likely to have on the environment, an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects, and a non-technical summary of the above information (see, to that effect, 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 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 37).

110 In the present case, it is for the referring court to determine whether those conditions have been satisfied, 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 (see, to that effect, 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 47, and of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 41).

111 However, having regard to the information brought to the attention of the Court, that does not appear to be the case.

112 While the referring court mentions that studies and hearings were conducted prior to the adoption of the Law of 28 June 2015, the documents before the Court do not indicate that the national legislature had the information referred to in paragraph 109 of the present judgment on the measures at issue in the main proceedings or the work inextricably linked thereto, which have, together, been held to comprise a single project, in the answer to Question 6(a) to (c).

113 Furthermore, as is apparent from, in particular, paragraph 91 of the present judgment, a law such as that of 28 June 2015 could merely be the first step in the process of granting development consent in respect of the project at issue in the main proceedings, as regards the work that project entails, with the result that it also fails to satisfy one of the prerequisites of the project concerned being excluded from the scope of the EIA Directive under Article 1(4) thereof, namely that it was adopted in detail, by a specific legislative act.

114 In the light of the foregoing, the answer to Question 7 is that Article 1(4) of the EIA Directive must be interpreted as meaning that national legislation such as that at issue in the main proceedings is not a specific act of national legislation, within the meaning of that provision, that is excluded, by virtue of that provision, from the scope of that directive.

B. **Question 8, on the Habitats Directive**

1. ***Question 8(a) to (c)***

115 By Question 8(a) to (c), the referring court asks, in essence, whether Article 6(3) of the Habitats Directive, read together with Articles 3 and 4 of the Birds Directive and, where relevant, in the light of the EIA Directive, must be interpreted as meaning that the measures at issue in the main proceedings constitute, given the upgrading work and work to ensure compliance with safety standards, a plan or project subject to assessment, under Article 6(3), and, if so, whether that assessment should be conducted before they are adopted by the legislature. The referring court also asks whether a distinction should be drawn dependent on whether the measures relate to one or other of the two power stations at

issue in the main proceedings, having regard to the need to adopt subsequent administrative acts in respect of one power station, such as issue of a new specific consent for the production of electricity for industrial purposes.

(a) ***Preliminary observations***

116 Article 6 of the Habitats Directive imposes upon the Member States a set of specific obligations and procedures designed, as is clear from Article 2(2) of that directive, to maintain, or as the case may be, restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest, in order to attain the more general aim pursued by that directive, which is to ensure a high level of environmental protection for the sites protected pursuant to it (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 106 and the case-law cited).

117 Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (judgments of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited, and of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 38).

118 Article 6(3) distinguishes two stages in the prescribed assessment procedure.

119 The first, the subject of that provision's first sentence, requires Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on the site. The second, the subject of the second sentence, which arises following the appropriate assessment, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of the directive (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 32).

120 Furthermore, an appropriate assessment of the implications of a plan or project implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity only if they have made certain that it will not adversely affect the integrity of that site. That is so where there is no reasonable scientific doubt as to the absence of such effects (judgment of 7 November 2018, *Holohan and Others*, C-461/17, EU:C:2018:883, paragraph 33 and the case-law cited).

121 Furthermore, with regard to areas classified as special protection areas, the obligations arising from Article 6(3) of the Habitats Directive replace, in accordance with Article 7 of that directive, any obligations arising under the first sentence of Article 4(4) of the Birds Directive, as from the date of classification under the Birds Directive, where that date is later than the date of implementation of the Habitats Directive (judgments of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 109 and the case-law cited, and of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 27).

(b) ***The definition of a 'project', for the purposes of the Habitats Directive***

122 As the Habitats Directive does not define the term 'project', for the purposes of Article 6(3), account should be taken of the definition of 'project' in Article 1(2)(a) of the EIA Directive (see, to that effect, judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraphs 23, 24 and 26; of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 38; of 17 July 2014, *Commission* v *Greece* C-600/12, not published, EU:C:2014:2086, paragraph 75; and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 60).

123 The Court has previously held that if an activity is covered by the EIA Directive, it must, a fortiori, be covered by the Habitats Directive (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 65).

124 It follows that if an activity is regarded as a 'project' within the meaning of the EIA Directive, it may constitute a 'project' within the meaning of the Habitats Directive (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 66).

125 Given the answer to Question 6(a) to (c), it must be held that measures such as those at issue in the main proceedings, together with the work inextricably linked thereto, constitute a project, for the purposes of the Habitats Directive.

126 Further, it is not disputed that the project at issue in the main proceedings is neither linked to nor necessary for the management of a protected site.

127 Last, the fact that a recurrent activity has been authorised under national law before the entry into force of the Habitats Directive does not constitute, in itself, an obstacle to such an activity being regarded, at the time of each subsequent intervention, as a distinct project for the purposes of that directive, at the risk of permanently excluding that activity from any prior assessment of its implications for that site (see, to that effect, judgments of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 41, and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 77).

128 To that end, it must be determined whether, having regard in particular to the regularity or nature of some activities or the conditions under which they are carried out, they must be regarded as constituting a single operation, and can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive (see, to that effect, judgments of 14 January 2010, *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 47, and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 78).

129 That would not be the case where there is no continuity in the activity, inter alia when the location and conditions in which it is carried out are not the same (judgment of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others*, C-293/17 and C-294/17, EU:C:2018:882, paragraph 83).

130 In the present case, while industrial electricity production by the Doel 1 and Doel 2 power stations was authorised before the entry into force of the Habitats Directive for an unlimited period, the Law of 31 January 2003 limited that period of activity to 40 years, up until 15 February 2015 for the Doel 1 power station and 1 December 2015 for the Doel 2 power station. As noted by the referring court, that legislative choice was modified by the measures at issue in the main proceedings, with the result, in particular, that one of those two power stations had to be restarted.

131 It is also undisputed that upon implementation of those measures, industrial production at those two power stations will not be carried out under operational conditions identical to those initially authorised, if only due to scientific developments and new safety standards, the latter of which justify, as stated in paragraphs 64 to 66 of the present judgment, proceeding with major upgrading work. Furthermore, the order for reference indicates that a production consent was granted to the operator of those power stations after the Habitats Directive had entered into force, following an increase in their capacity.

132 It follows that the measures at issue in the main proceedings, together with the work inextricably linked thereto, constitute a distinct project, subject to the rules of assessment provided for in Article 6(3) of the Habitats Directive.

133 The fact that the national authority that is competent to approve the plan or project in question is the legislature has no bearing in this matter. In contrast to the provisions of the EIA Directive, no derogation is possible from the assessment under Article 6(3) of the Habitats Directive on the grounds that the competent authority to grant consent to the project in question is the legislature (see, to that effect, judgment of 16 February 2012, *Solvay and Others*, C-182/10, EU:C:2012:82, paragraph 69).

(c) ***The risk of a protected site being significantly affected***

134 It follows from the Court's case-law that the requirement of an appropriate assessment of the implications of a plan or project under Article 6(3) of the Habitats Directive is conditional on there being a likelihood or a risk that the plan or project will have a significant effect on the site concerned. Having regard to the precautionary principle, in particular, such a risk is deemed to be present where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives for the site. The assessment of that risk must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraphs 111 and 112 and the case-law cited).

135 In the present case, as apparent from extracts of parliamentary proceedings on the Law of 28 June 2015, reproduced in the order for reference, and as noted by the Advocate General in points 24 to 26 of her Opinion, the power stations that are the subject of the measures at issue in the main proceedings are located on the banks of the Scheldt, close to protected areas under the Habitats Directive and the Birds Directive, designated as such specifically for protected species of fish and cyclostomata in that river.

136 In that regard, the fact that a project is located outside a Natura 2000 area is not sufficient to exempt it from the requirements under Article 6(3) of the Habitats Directive (see, to that effect, judgments of 10 January 2006, *Commission* v *Germany*, C-98/03, EU:C:2006:3, paragraphs 44 and 51, and of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 29).

137 In the present case, it is abundantly clear, given the scale of the work involved and the length of the extension granted for industrial production of electricity at the two power stations, that the project at issue in the main proceedings is likely to undermine the conservation objectives for nearby protected sites, if only because of how those power stations operate, in particular, by collecting large volumes of water from the nearby river for use in the cooling system, which are then discharged into that river, but also the risk of a serious accident (see, by analogy, judgments of 10 January 2006, *Commission* v *Germany*, C-98/03, EU:C:2006:3, paragraph 44, and of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 30), there being no need to distinguish the two power stations.

138 Accordingly, a project such as that at issue in the main proceedings is likely to have a significant effect on protected sites within the meaning of Article 6(3) of the Habitats Directive.

139 It follows from the foregoing that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures such as those at issue in the main proceedings, together with the work inextricably linked thereto, constitute a project in respect of which an appropriate assessment of its effects on the site concerned must be conducted under that directive, there being no need to distinguish whether those measures relate to one or other of the two power stations in question.

(d) ***When the assessment should take place***

140 The second sentence of Article 6(3) of the Habitats Directive specifies that following an appropriate assessment, the competent national authorities are to 'agree' to the 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.

141 It follows that the assessment must be conducted before agreement is given.

142 Furthermore, while the Habitats Directive does not define the conditions governing how the authorities 'agree' to a given project under Article 6(3) of that directive, the definition of 'development consent' in Article 1(2)(c) of the EIA Directive is relevant in defining that term.

143 Accordingly, by analogy with the Court's findings on the EIA Directive, if national law provides for a number of steps in the consent procedure, the assessment under Article 6(3) of the Habitats Directive, should, in principle, be carried out as soon as the effects which the project in question is likely to have on a protected site are sufficiently identifiable.

144 Consequently, for reasons similar to those set out in paragraphs 87 to 91 of the present judgment, national legislation such as the Law of 28 June 2015 has the characteristics of an agreement given by the authorities in respect of the project concerned, for the purposes of Article 6(3) of the Habitats Directive, and the fact that subsequent acts must be adopted in order to proceed with that project, specifically a new specific consent for production of electricity for industrial purposes at one of the two power stations in question, does not justify the failure to conduct an appropriate assessment of those effects before the adoption of that legislation. Moreover, as regards the work that is inextricably linked to the measures at issue in the main proceedings, if its nature and potential effects on the protected sites are sufficiently identifiable, a finding which it is for the national court to make, an assessment must be conducted of that work at that stage of the consent procedure.

145 In the light of the foregoing, the answer to Question 8(a) to (c) is that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures such as those at issue in the main proceedings, together with the work of upgrading and of ensuring compliance with current safety standards, constitute a project in respect of which an appropriate assessment of its effects on the protected sites concerned should be conducted. Such an assessment should be conducted in respect of those measures before they are adopted by the legislature. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be subject to such an assessment before the adoption of those measures if its nature and potential impact on the protected sites are sufficiently identifiable at that stage, a finding which it is for the referring court to make.

2. ***Question 8(d)***

146 By Question 8(d), the referring court asks, in essence, whether Article 6(4) of the Habitats Directive must be interpreted as meaning that the objective of ensuring the security of a Member State's electricity supply constitutes an imperative reason of overriding public interest, within the meaning of that provision.

147 As a provision derogating from the criterion for authorisation laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) thereof 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) (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 189 and the case-law cited).

148 Under the first subparagraph of Article 6(4) of the Habitats Directive, if, in spite of the findings of an assessment carried out in accordance with the first sentence of Article 6(3) of that directive being negative, 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 is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see, to that effect, judgments of 20 September 2007, *Commission* v *Italy*, C-304/05, EU:C:2007:532, paragraph 81, and of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 190).

149 Moreover, where the site concerned hosts a priority natural habitat type or a priority species, the second subparagraph of Article 6(4) of the Habitats Directive provides that the only considerations which may be raised are those relating to human health or public safety, or beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

150 Knowledge of the effects of a plan or project, in the light of the conservation objectives relating to the site at issue, is thus a necessary prerequisite for the application of Article 6(4) of the Habitats Directive, since, in the absence thereof, no condition for 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 (judgments of 20 September 2007,

Commission v *Italy*, C-304/05, EU:C:2007:532, paragraph 83, and of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 191 and the case-law cited).

151 In the present case, it is apparent from the order for reference that Question 8(d) is based on the premiss that the studies and hearings conducted in the course of the procedure for the adoption of the measures at issue in the main proceedings made it possible to conduct an assessment that meets the requirements laid down in Article 6(3) of the Habitats Directive.

152 However, aside from the fact that it is not apparent from the documents before the Court that those studies and hearings made it possible to conduct an environmental impact assessment under the EIA Directive, the referring court would have to assess, in any event, whether such an assessment may be deemed to satisfy also the requirements of the Habitats Directive (see, by analogy, judgments of 22 September 2011, *Valčiukienė and Others*, C-295/10, EU:C:2011:608, paragraph 62, and of 10 September 2015, *Dimos Kropias Attikis*, C-473/14, EU:C:2015:582, paragraph 58).

153 Whatever the situation, it is necessary in particular, as noted in paragraph 120 of the present judgment, that all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of the protected sites concerned should be identified, in the light of the best scientific knowledge in the field (see, to that effect, judgments of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 113 and the case-law cited, and of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 40).

154 The referring court should also verify, if necessary, whether negative findings emerged from the studies and hearings conducted in the context of the procedure for the adoption of the measures at issue in the main proceedings, because, if not, Article 6(4) of the Habitats Directive would not be applicable.

155 As regards the question whether the objective of ensuring the security of a Member State's electricity supply constitutes an imperative reason of overriding public interest within the meaning of the first subparagraph of Article 6(4) of the Habitats Directive, it should be noted that an interest capable of justifying proceeding with a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed against that directive's objective of the conservation of natural habitats and wild fauna, including birds, and flora (judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 121).

156 In that regard, it may be noted that Article 194(1)(b) TFEU identifies security of energy supply in the European Union as one of the fundamental objectives of EU policy in the field of energy (judgment of 7 September 2016, *ANODE*, C-121/15, EU:C:2016:637, paragraph 48).

157 Furthermore, and in any event, the objective of ensuring the security of electricity supply in a Member State at all times fulfils the conditions specified in paragraph 155 of the present judgment.

158 However, if a protected site likely to be affected by a project hosts a priority natural habitat type or species, within the meaning of the Habitats Directive, in circumstances such as those in the main proceedings, the only ground capable of constituting a public security ground for the purposes of the second subparagraph of Article 6(4) of that directive that would justify proceeding with the project is the need to nullify a genuine and serious threat of rupture of that Member State's electricity supply.

159 It follows that the answer to Question 8(d) is that the first subparagraph of Article 6(4) of the Habitats Directive must be interpreted as meaning that the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of overriding public interest, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State's electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision.

C. **Questions 1 to 3, on the Espoo Convention**

160 By Questions 1 to 3, the referring court asks, in essence, whether the Espoo Convention must be interpreted as meaning that the environmental impact assessment provided for by that Convention must be conducted in respect of measures such as those at issue in the main proceedings.

161 However, as noted in paragraph 93 of the present judgment, measures such as those at issue in the main proceedings form part of a project that is likely to have significant effects on the environment in another Member State, and that project must undergo an assessment procedure of its transboundary effects in accordance with Article 7 of the EIA Directive, which takes account of the requirements of the Espoo Convention, as indicated by recital 15 of the EIA Directive.

162 As a result, there is no need to answer Questions 1 to 3, in relation to the Espoo Convention.

D. Questions 4 and 5, on the Aarhus Convention

163 By its Questions 4 and 5, the referring court asks, in essence, whether Article 6 of the Aarhus Convention must be interpreted as meaning that the public participation requirements under that Convention apply to measures such as those at issue in the main proceedings.

164 It is apparent from the order for reference that the Cour constitutionnelle (Constitutional Court) raises those questions on account of its doubts as to whether the EIA Directive applies to those measures, yet, as is apparent from recitals 18 to 20 of that directive, the EIA Directive is intended to take account of the provisions of the Aarhus Convention.

165 It follows, however, from the answers to Questions 6 and 7 that measures such as those at issue in the main proceedings, together with the work inextricably linked thereto, constitute a project in respect of which, prior to its adoption, an environmental impact assessment must be conducted under the EIA Directive.

166 Consequently, there is no need to answer Questions 4 and 5.

E. Question 9, on maintaining the effects of the law in question in the main proceedings

167 By Question 9, the referring court asks, in essence, whether EU law allows a national court to maintain the effects of measures such as those at issue in the main proceedings for the time necessary to remedy any infringement of the EIA Directive and the Habitats Directive.

168 In that regard, while Article 2(1) of the EIA Directive imposes an obligation to conduct a prior assessment of projects covered by that provision, the Habitats Directive also provides, in respect of projects subject to assessment under Article 6(3) of that directive, that Member States may agree to a project only after they have ascertained that it will not adversely affect the integrity of the site concerned.

169 However, neither the EIA Directive nor the Habitats Directive specify what action should be taken in the event of infringement of the obligations laid down by those directives.

170 Nonetheless, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of that infringement of EU law. The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35 and the case-law cited).

171 That obligation is also incumbent on national courts before which an action against a national measure including such a consent has been brought. The detailed procedural rules applicable to such actions are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (the principle of

effectiveness) (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 45 and the case-law cited).

172 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 project adopted in breach of the obligation to carry out an environmental assessment (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre Wallonne*, C-41/11, EU:C:2012:103, paragraph 46 and the case-law cited).

173 It is true that the Court has also held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law (judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 37 and the case-law cited).

174 However, such a possible regularisation would have to be subject to the condition that it does not offer the parties concerned the opportunity to circumvent the rules of EU law or to refrain from applying them, and should remain the exception (judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 38 and the case-law cited).

175 Consequently, in the event of failure to carry out an assessment of the environmental impact of a project required under the EIA Directive, although Member States are required to nullify the unlawful consequences of that failure, EU law does not preclude regularisation through the conducting of such an assessment while the project is under way or even after it has been completed, on the twofold condition, first, that national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to refrain from applying them, and second, that an assessment carried out for regularisation purposes is not conducted solely in respect of the project's future environmental impact, but must also take into account its environmental impact since the time of completion of that project (see, to that effect, judgments of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 43, and of 28 February 2018, *Comune di Castelbellino*, C-117/17, EU:C:2018:129, paragraph 30).

176 By analogy, it must be held that EU law does not preclude such regularisation, subject to the same conditions, in the event of failure to conduct a prior impact assessment of the effects of the project concerned on a protected site, as required by Article 6(3) of the Habitats Directive.

177 It must be added that only the Court of Justice may, in exceptional cases, for overriding considerations of legal certainty, allow temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. If national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily, the uniform application of EU law would be undermined (see, to that effect, judgments of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraphs 66 and 67, and of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 33).

178 However, the Court has also held, in paragraph 58 of its judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103), that a national court may, given the existence of an overriding consideration relating to the protection of the environment, as applied in the case giving rise to that judgment, and provided that the conditions specified in that judgment are met, exceptionally be authorised to make use of a provision of its national law empowering it to maintain certain effects of an annulled national measure. It is thus apparent from that judgment that the Court intended to afford, on a case-by-case basis and by way of exception, a national court the power to adjust the effects of annulment of a national provision held to be incompatible with EU law, with due regard to the conditions laid down by the Court's case-law (see, to that effect, judgment of 28 July 2016, *Association France Nature Environnement*, C-379/15, EU:C:2016:603, paragraph 34).

179 In this instance, in accordance with the case-law cited in paragraph 177 of the present judgment, it is for the Court of Justice alone to determine the circumstances in which it may be justifiable, by way of exception, to maintain the effects of measures such as those at issue in the main proceedings on account of overriding considerations relating to the security of the electricity supply of the Member State concerned. In that regard, such considerations could justify maintaining the effects of national measures

adopted in breach of the obligations under the EIA Directive and the Habitats Directive only if, in the event that the effects of those measure were annulled or suspended, there was a genuine and serious threat of disruption to the electricity supply of the Member State concerned, which could not be remedied by any other means or alternatives, particularly in the context of the internal market.

180 It is for the referring court to assess whether, given the other means and alternatives available to the Member State concerned for the purpose of ensuring electricity supply within its territory, the need to respond to such a threat justifies maintaining, exceptionally, the effects of the measures contested before that court.

181 In any event, the effects may only be maintained for as long as is strictly necessary to remedy the breach.

182 In the light of the foregoing, the answer to Question 9 is that EU law must be interpreted as meaning that if domestic law allows it, a national court may, by way of exception, maintain the effects of measures, such as those at issue in the main proceedings, adopted in breach of the obligations laid down by the EIA Directive and the Habitats Directive, where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned, which cannot be remedied by any other means or alternatives, particularly in the context of the internal market. The effects may only be maintained for as long as is strictly necessary to remedy the breach.

IV. Costs

183 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The first indent of Article 1(2)(a), Article 2(1) and Article 4(1) of Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment must be interpreted as meaning that the restarting of industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, with the effect of deferring by 10 years the deadline initially set by the national legislature for deactivating and ceasing production at that power station, and deferral, also by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station, measures which entail work to upgrade the power stations in question such as to alter the physical aspect of the sites, constitute a 'project', within the meaning of that directive, and subject to the findings that are for the referring court to make, an environmental impact assessment must, in principle, be carried out with respect to that project prior to the adoption of those measures. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be made subject to such an assessment before the adoption of those measures if its nature and potential impact on the environment are sufficiently identifiable at that stage, a finding which it is for the referring court to make.**

2. **Article 2(4) of Directive 2011/92 must be interpreted as meaning that a Member State may exempt a project such as that at issue in the main proceedings from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity supply only where that Member State can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment, subject to compliance with the obligations in points (a) to (c) of the second subparagraph of Article 2(4) of that directive. However, that**

possibility of granting an exemption is without prejudice to the obligations incumbent on the Member State concerned under Article 7 of that directive.

3. **Article 1(4) of Directive 2011/92 must be interpreted as meaning that national legislation such as that at issue in the main proceedings is not a specific act of national legislation, within the meaning of that provision, that is excluded, by virtue of that provision, from the scope of that directive.**

4. **Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that measures such as those at issue in the main proceedings, together with the work of upgrading and of ensuring compliance with current safety standards, constitute a project in respect of which an appropriate assessment of its effects on the protected sites concerned should be conducted. Such an assessment should be conducted in respect of those measures before they are adopted by the legislature. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be subject to such an assessment before the adoption of those measures if its nature and potential impact on the protected sites are sufficiently identifiable at that stage, a finding which it is for the referring court to make.**

5. **The first subparagraph of Article 6(4) of Directive 92/43 must be interpreted as meaning that the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of overriding public interest, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State's electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision.**

6. **EU law must be interpreted as meaning that if domestic law allows it, a national court may, by way of exception, maintain the effects of measures, such as those at issue in the main proceedings, adopted in breach of the obligations laid down by Directive 2011/92 and Directive 92/43, where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned, which cannot be remedied by any other means or alternatives, particularly in the context of the internal market. The effects may only be maintained for as long as is strictly necessary to remedy the breach.**

Lenaerts	Silva de Lapuerta	Bonichot
Prechal	Vilaras	Regan
von Danwitz	Toader	Lycourgos
Rosas	Ilešič	Malenovský
Safjan	Šváby	Fernlund

Delivered in open court in Luxembourg on 29 July 2019.

[Signatures]

---

* Language of the case: French.