Recent Developments in Environmental Jurisprudence in Belgium (May 2017-April 2018)

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Last year there have not been major developments in environmental legislation. Some interesting developments in the jurisprudence deserve to be reported.

1.

Request for a preliminary ruling from the Constitutional Court — *Inter-Environnement Wallonie asbl, Bond Beter Leefmilieu Vlaanderen vzw v Conseil des ministers* (Case C-411/17)[1]

In a case (demand for annulment) concerning the Federal Act of 28 June 2015 amending the Act of 31 January 2003 concerning the nuclear phase-out, the Constitutional Court (Judgment N° 82/2017 of 22 June 2017) referred some questions to the CJEU[2]:

I. Must Article 2(1) to (3), (6) and (7), Article 3(8), Article 5 and Article 6(1) of the Espoo Convention 'on Environmental Impact Assessment in a Transboundary Context', and point 2 of Appendix I to that convention, be interpreted in accordance with the explanations provided in the information document on the Application of the Convention to nuclear-energy related activities and the Good practice recommendations on the application of the Convention to nuclear-energy related activities?

2. May Article 1(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 'amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply', having regard in particular to the various assessments and hearings carried out in connection with the adoption of that law?

3. (a) Must Articles 2 to 6 of the Espoo Convention be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 amending the Law of 31 January 2003 on the phasing out

[1] http://curia.europa.eu/juris/document/document.jsf?text=&docid=194252&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=822365

[2] http://www.const-court.be/public/n/2017/2017-082n.pdf; http://www.const-court.be/public/n/2017/2017-082n-info.pdf; http://www.const-court.be/public/f/2017/2017-082f.pdf; http://www.const-court.be/public/f/2017/2017-082f-info.pdf; http://www.const-court.be/public/d/2017/2017-082d.pdf

of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply', Article 2 of which postpones the date of deactivation and of the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

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

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

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

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

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

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

6. (a) Must Article 1(2) of Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, in conjunction with point 13(a) of Annex II to that directive, read, where appropriate, in the light of the Espoo and Aarhus Conventions, be interpreted as applying to the postponement of the date of deactivation and of the end of the industrial production of electricity of a nuclear power station, entailing, as in this instance, significant investments and security upgrades for the Doel 1 and 2 nuclear power stations?

(b) If the answer to the question in point (a) is in the affirmative, must Articles 2 to 8 and 11 of Directive 2011/92/EU and Annexes I, II and III to that directive be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 'amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security

of the energy supply', Article 2 of which postpones the date of deactivation and the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

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

(d) If the answer to the question set out in point (a) is in the affirmative, must Article 2(4) of Directive 2011/92/EU 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 Directive 2011/92/EU for overriding reasons of public interest linked with the security of the country's electricity supply?

7. Must the concept of 'specific act of national legislation' within the meaning of Article 1(4) of Directive 2011/92/EU be interpreted as excluding from the scope of that directive a legislative act such as the Law of 28 June 2015 'amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply', having regard to the various assessments and hearings carried out in connection with the adoption of that law, which might attain the objectives of that directive?

8. (a) Must Article 6 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Articles 3 and 4 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, read, where appropriate, in the light of Directive 2011/92/EU and the Espoo and Aarhus Conventions, be interpreted as applying to the postponement of the date of deactivation and of the end of the industrial production of electricity of a nuclear power station, entailing, as in this instance, significant investments and security upgrades for the Doel 1 and 2 nuclear power stations?

(b) If the answer to the question in point (a) is in the affirmative, must Article 6(3) of the Directive 92/43/EEC be interpreted as applying prior to the adoption of a legislative act such as the Law of 28 June 2015 'amending the Law of 31 January 2003 on the phasing out of nuclear energy for the purposes of the industrial production of electricity in order to ensure the security of the energy supply', Article 2 of which postpones the date of deactivation and of the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power stations?

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

(d) If the answer to the question in point (a) is in the affirmative, must Article 6(4) of Directive 92/43/EEC be interpreted as allowing grounds linked with the security of the country's electricity supply to be considered an imperative reason of overriding public interest, having regard in particular to the various assessments and hearings carried out in the context of the adoption of the abovementioned Law of 28 June 2015, which might be capable of attaining the objectives of that directive?

9. If, on the basis of the answers to the preceding questions, the national court should conclude that the contested law fails to fulfil one of the obligations arising under the abovementioned conventions or directives, and the security of the country's electricity supply cannot constitute an imperative reason of overriding public interest permitting a derogation from those obligations, might the national court

maintain the effects of the Law of 28 June 2015 in order to avoid legal uncertainty and to allow the environmental impact assessment and public participation obligations arising under those conventions or directives to be fulfilled?

2.

Request for a preliminary ruling from the Rechtbank van eerste aanleg Brussel - Lies Craeynest, Cristina Lopez Devaux, Frédéric Mertens, Stefan Vandermeulen, Karin De Schepper, ClientEarth v Brussels Hoofdstedelijk Gewest, Brussels Instituut voor Milieubeheer and Belgische Staat (Case C-723/17)[3]

In a case concerning air quality in Brussels, the following questions have been referred to the CJEU by the Dutch Speaking Court of First Instance of Brussels:

1. Should Article 4(3) and the second subparagraph of Article 19(1) of the Treaty on European Union, read in conjunction with the third paragraph of Article 288 of the Treaty on the Functioning of the European Union and Articles 6 and 7 of Directive 2008/50/EC (1) of 21 May 2008 on ambient air quality and cleaner air for Europe, be interpreted as meaning that, when it is alleged that a Member State has not sited the sampling points in a zone in accordance with the criteria set out in point B.1.(a) of Annex III to Directive 2008/50, it is for the national courts, on application by individuals who are directly affected by the exceedance of the limit values referred to in Article 13(1) of that directive, to examine whether the sampling points were sited in accordance with those criteria and, if they were not, to take all necessary measures against the national authority, such as an order, with a view to ensuring that the sampling points are sited in accordance with those criteria?

2. Is a limit value within the meaning of Article 13(1) and Article 23(1) of [Directive 2008/50/EC] exceeded in the case where an exceedance of a limit value with an averaging period of one calendar year, as laid down in Annex XI to that directive, has been established on the basis of the measurement results from one single sampling point within the meaning of Article 7 of that directive, or does such an exceedance occur only when this becomes apparent from the average of the measurement results from all sampling points in a particular zone within the meaning of Directive 2008/50?

Recently some initiatives have been taken to have air quality measured through “crowd monitoring”.

See for the Brussels Capital Region: http://deredactie.be/cm/vrtnieuws.english/News/1.3204998

See for the Flemish Region: https://curieuzeneuzen.be/in-english/

[3] *OJ* C N° 104 of 19.03.2018, p.16

3.

The Belgian Climate Case – "De klimaatzaak"[4]

Inspired by the Dutch *Urgenda* Case some media figures have started the so called "Belgian Climate Case. The claim is similar but at the same time different, because the defense do not consist of one party like in the *Urgenda* Case (the State of the Netherlands), but 4 Governments, one federal and 3 regional (the Flemish, Walloon, and Brussels Capital Governments) because climate change is a mixed competence in Belgium. The claimants, the non-profit foundation " Klimaatzaak" and their +35.000 co-claimants, are claiming a joint reduction of those governments of GHG with 40 % towards 2020 (and at least 25 %), compared with the 15% reduction for non-ETS sectors under the EU Burden Sharing Decision. The claim is based on Art. 23(3), 2 and 4, of the Constitution (Rights to the Protection of Health and of a Healthy Environment), Art. 2, 8 and 13 ECHR (Right to Life, Right to the Protection of Private and Family Life; Right of an Effective Remedy) and Art. 1382 (Fault based Liability) and 714 of the Civil Code (Subjective right to the Use of non-privative Parts of the Environment). The case has been introduced by summons of 27 April 2015 before the French speaking District Court of Brussels, because 3 of 4 parties have French as their official language (as the federal and Brussels Capital governments are concerned together with Dutch). The official language of the Flemish Government is however Dutch and that government asked to send their (part of the) case to the Dutch Speaking District Court, which was refused by the presiding judge and, on appeal by the Presidents of the Courts concerned. Against that decision Flemish Government filed a cassation appeal with the Supreme Court. The Supreme Court decided on 20 April 2018 that the case can go on in French. Now the discussion on the merits can start before the District Court… As the summons contains also a second claim (reduction in 2030 with 55% and at least 40% compared with 1990), maybe there will be a judgment that can be relevant for that claim….

[4] https://www.klimaatzaak.eu/nl