THE LONG TERM OPERATION OF NUCLEAR POWER PLANTS MEASURED BY THE YARDSTICK OF ENVIRONMENTAL IMPACT ASSESSMENT AND PUBLIC PARTICIPATION

PERSPECTIVE ON THE EUROPEAN DIRECTIVES, ON THE AARHUS CONVENTION AND THE ESPOO CONVENTION

APPLICATION TO THE SPECIFIC CASE OF BELGIUM

MARC BEYENS
# TABLE OF CONTENTS

I. GENERAL FRAMEWORK  
A. The phase out of nuclear power in Belgium – a legislative three-step waltz  
B. LTO projects of the operator  
C. Decisions of the FANC on the environmental screening note submitted by the operator in support of its LTO projects  
D. Royal decrees by which reactor licensing requirements are completed as part of the long-term operation

II. APPEALS AGAINST BOTH THE NUCLEAR EXTENSION LAWS AND ADMINISTRATIVE DECISIONS RELATED TO LTO PROJECTS

III. CONCEPTS OF ENVIRONMENTAL IMPACT ASSESSMENT AND PUBLIC PARTICIPATION, APPLIED TO THE ADOPTION OF AN EXTENSION LAW FOR THE OPERATION OF EXISTING NUCLEAR POWER PLANTS  
A. Highlights from the position of the applicant associations  
B. Highlights from the positions of the Belgian State and the operator  
1. Extension laws are equivalent to policies, which are free of any obligation of environmental impact assessment and public participation  
2. The extensions laws do not involve in themselves any environmental impact and are, therefore, also exempt of any obligation of environmental impact assessment and public participation  
3. Extension laws and the Espoo Convention  
4. The extension laws, the Aarhus Convention and Directive 2011/92/EU  
5. Conclusions
I. GENERAL FRAMEWORK

A. The phase out of nuclear power in Belgium – a legislative three-step waltz

The Kingdom of Belgium currently has seven nuclear plants respectively commissioned between 1975 and 1985, which cover 55% of the electric energy needs of the country. Such plants were at the time authorized on the basis of administrative authorisations issued in the form of Royal Decrees for an unlimited period.

First step. As of the early 2000s the idea of a nuclear phase out became the subject of debate. Subsequent to these debates, on 31 January 2003, the Belgian Federal Parliament votes a law on phasing out of nuclear energy for purposes of industrial production of electricity.

This national policy known as ‘nuclear phase out’ is based on the twin principles i) of the inactivation of existing nuclear power plants forty years after their industrial commissioning, with as a result a full exit from nuclear power by 2025 and ii) of the prohibition to create and operate any new nuclear power plant.

The aim of the federal legislator is to ensure the development of renewable energy sources, while allowing time to develop such alternative energy, without compromising the country’s security of supply of electrical energy.

Second step. After discovering that renewable energy sources did not develop at the pace that was hoped for, and for fear that, for various reasons, the supply of the country's electricity could be at risk, the Belgian federal legislator decides, according to the law of December 18, 2013, to postpone with 10 years the inactivation of one nuclear power plant only (Tihange 1), while respecting the final deadline of the nuclear phase out by 2025.

This first modification of the schedule for inactivation of nuclear power plants did not provoke, at the time of its adoption, any judicial action.

The principle of extending the Tihange 1 plant as decided by virtue of the law of December 18, 2013 was, however, a matter of theoretical capacity, since the effective implementation of this extension was subject to two conditions: firstly it was subject to the prior agreement of the Belgian nuclear administrative authorities, referring to a particular extension project of the said plant that had to be submitted to them by the operator (Long Term Operation – hereinafter referred to as LTO); secondly, it was subject to the agreement of the operator itself.

Third step. After becoming aware, for a second time, of a potentially problematic situation for the country regarding security of supply in the short-term and in order to avoid all risks of power shortage, the Belgian federal legislator decided, by virtue of
a law of June 28, 2015, to again adapt the schedule of the nuclear phase out, without prejudice to the national policy of nuclear phase out by 2025.

The Belgian federal legislator therefore decided that two other nuclear plants (Doel 1 and Doel 2) could also potentially generate electricity for an additional period of ten years, on the following two conditions: firstly, the explicit green light by the Belgian administrative nuclear authorities, based on an LTO project to be submitted by the operator and, secondly, the agreement of the operator.

It is important to note from the outset that neither one of the three aforementioned laws, be it i) the one on nuclear phase out or ii) the ones on partial nuclear extension, have been subjected to an environmental impact assessment and to a consultation of the public.

B. LTO projects of the operator

**Framework.** The Belgian Federal Agency for Nuclear Control (hereafter “FANC”) has established, prior to the analysis of the operator’s LTO projects, the security requirements for a possible extension of the industrial generation of electricity beyond the threshold of 40 years, as initially imposed by the above-mentioned law of 31 January 2003, called “the nuclear phase out law”.

FANC thus requires the operator to analyze more in particular, and in the framework of its LTO projects, the following aspects:

- The aging management program,
- The reassessment of the design and identification of the necessary improvements for the implementation of an “agreed design upgrade”,
- The rules to be applied,
- The reliability of the equipment,
- Human and organizational factors, including management skills, training and transfer of knowledge and experience.

**Principles and objectives.** The LTO, in conjunction with the fourth periodic safety review of the concerned nuclear plants, should thus permit to pursue the process of continuous improvement of nuclear power plants, by upgrading the oldest of them to a safety level that approaches as much as possible that of the most recent nuclear power plants.

In this context, the technical, economic, social, financial and safety aspects are studied in depth. Also are taken into account the results of the stress tests (Belgian Stress Test – BEST) which were carried out at the initiative of the European Commission after the Fukushima accident in March 2011 and the actions (post-BEST projects) that ensued.
Environmental screening note. As part of its LTO projects, the operator filed not only a summary report outlining the technical aspects of its projects, as required by the FANC, but has in addition filed an environmental screening note to inform the FANC on the potential environmental impact of the 4th periodic safety review (including the LTO program).

The potential environmental effects in a broad sense as well as the potential effects induced by ionizing radiations are both discussed in this document.

The content of this environmental screening note is based on the criteria of Annex IIA (Information to be provided by the developer) and III (Selection criteria) of the European Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU.

The operator’s file includes:

- A description of the project;
- The location of the project;
- A description of the elements of the environment likely to be significantly affected by the project;
- The description of all the significant effects that the project is likely to have on the environment;
- The description of the measures foreseen to avoid and mitigate significant adverse effects and, if possible to correct them.

C. Decisions of the FANC on the environmental screening note submitted by the operator in support of its LTO projects.

In 2015, the FANC decides, based on the environmental screening notes transmitted by the operator and based on the criteria of Annex III of Directive 2011/92/EU, that the LTO programs presented to it for the three nuclear power plants for which the capacity to generate electricity is legally and potentially extended by 10 years, should not be subject to an environmental impact assessment since the amendments to the said plants will have no negative radiological environmental impact and will have no significant effect on existing radiological impact.

The FANC states that the lack of effect on cross-border radiological environmental impacts supports its conclusion that an assessment of the project impacts on the environment is not necessary.

The reasoning of the FANC can be shortly summarized as follows:
LTO projects take part in the concept of "project" within the meaning of Article 1.2.a. of Directive 2011/92 / EU to the extent that these projects include modifications to nuclear power plants, which result in works to make physical changes to the said power plants.

LTO projects are not automatically subject to environmental impact assessments. The FANC notes in this regard that the LTO projects certainly involve changes to existing nuclear plants, but do not meet the criterion 2b of Annex I of Directive 2011/92 / EU, which refers only to the creation of a new plant or the dismantling of an existing plant.

The FANC also notes that the LTO projects do not meet the following criteria: 3.a (installations for the reprocessing of irradiated nuclear fuel), 3.b.i. (facilities designed for the production or enrichment of nuclear fuel), 3.b.ii. (facilities designed for the processing of irradiated nuclear fuel or high-level radioactive waste), 3.b.iii. (Installations designed for the final disposal of irradiated nuclear fuel); 3.b.iv. (Installations designed solely for the final disposal of radioactive waste), 3.b.v. (facilities designed solely for the storage (planned for more than ten years) of irradiated nuclear fuels or radioactive waste in a different site than the production site).

The FANC finally finds that with respect to criterion 24 of Annex I of Directive 2011/92/EU, the LTO projects do not result in exceeding any threshold set by the directive, so that this criterion is not applicable either.

LTO projects entail modifications to already licensed nuclear power plants, so that these projects are at most only potentially subject to an environmental impact assessment. Such projects should therefore be analyzed with respect to the criteria of annex III of Directive 2011/92/EU.

The FANC firstly notes in this respect, that in this case, criterion 3.g. (installations for the storage of radioactive waste (unless included in Annex I of the Directive)) is not applicable, nor criterion 13.b. of Annex I of Directive 2011/92 / EU (projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years).

The FANC notes on the contrary, that in this case criterion 13.a. of Annex I of Directive 2011/92/ EU (any change or extension of projects listed in Annex I of the Directive, already authorized, executed or in the process of being executed, which may have significant adverse effects on the environment) applies.

After recalling that the evaluation to be made by its services, on the requirement or not to make an environmental impact assessment, i) is based on the criteria of Directive 2011/92/EU, ii) takes into account potential transboundary effects (Espoo Convention and Directive 2011/92/EU) and the criteria contained in the Aarhus Convention and iii) covers only the single question of protection against ionizing
radiation, the **FANC concludes**, after completion of its analysis i) of the characteristics of LTO projects, ii) of their location, and iii) of the type and characteristics of their potential impact, in the following terms:

« Based on the total environmental screening note and on the criteria of Annex III of Directive 2011/92/EU, the FANC has concluded that the LTO program (...) should not be subject to an environmental impact assessment since the modifications will not have negative radiological environmental effects and will not significantly impact existing radiological environmental effects. The lack of impact on transboundary radiological environmental effects supports the conclusion of the FANC that an environmental impact assessment of the project is not necessary. »

D. Royal decrees by which reactor licensing requirements are completed as part of the long-term operation

Royal Decrees were adopted to enable the LTO projects.

These decrees impose special additional operating requirements complementing initial licenses.
II. APPEALS AGAINST BOTH THE NUCLEAR EXTENSION LAWS AND ADMINISTRATIVE DECISIONS RELATED TO LTO PROJECTS

Environmental protection associations have introduced three types of judicial proceedings against the above-mentioned process of temporary extension of the operation of three nuclear power plants:

- A request for an environmental injunction, brought before the civil courts, aimed at an order to end the operation of the three plants concerned beyond the term of 40 years set by the law of 31 January 2003. This claim was dismissed at first instance level for reasons that are not directly related to the legal issues addressed in this contribution. An appeal was lodged, however, which is under investigation.
- An annulment procedure coupled with a request for suspension brought before the Belgian Council of State, against administrative decisions authorizing the extension of the operation of three nuclear power plants based on the LTO projects submitted by the operator. The request for suspension was rejected for lack of urgency. The annulment procedure is still pending.
- An annulment procedure, lodged with the Constitutional Court of Belgium, against the law of 28 June 2015 authorizing the 10-year extension of the operation of nuclear plants Doel 1 and Doel 2. This annulment procedure is still pending.

The main justifications invoked by the applicant associations are quite similar and are essentially based on i) the omission, when adopting the extension laws of 2013 and 2015 of the realization of a preliminary environmental impact assessment and ii) the lack of public consultation relating thereto.
III. CONCEPTS OF ENVIRONMENTAL IMPACT ASSESSMENT AND PUBLIC PARTICIPATION, APPLIED TO THE ADOPTION OF AN EXTENSION LAW FOR THE OPERATION OF EXISTING NUCLEAR POWER PLANTS.

A. Highlights from the position of the applicant associations

Invoked International, European and constitutional provisions. The applicant associations base their claims on an alleged infringement of:

- Directive 2011/92/EU of the European Parliament and Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (articles 2 to 8 and 11, Annexes I, II and III),
- the Convention on Environmental Impact Assessment in a Transboundary Context, signed in Espoo February 25, 1991 (article 2 §§ 1, 2, 3, 6 and 7, article 3, § 8, article 5, article 6, § 1 and point 2 of appendix II),

All in combination with Belgian constitutional law and, in particular, Articles 10 and 11 (principle of equality and non-discrimination of the Belgians before the law) and 23 (standstill principle: prohibition to the legislator of reducing notably the protection level of the right to protection of a healthy environment, at least without compelling reasons).

Summary of the thesis of environmental protection associations. Environmental protection associations criticize the laws extending the operation of the three concerned nuclear reactors primarily for having been adopted without i) the prior organization of an environmental assessment procedure relating to the impact of the adoption of such laws, without ii) allowing public participation in the legislative process or, a fortiori, without iii) having duly taken into account the results of the impact assessment on environment, as well as the comments of the public received with respect to it.

Whereas, in the esteem of the applicant associations, the 2013 and 2015 extension laws i) constitute as many “projects” within the meaning of the aforementioned directives and international agreements, by allowing the continued operation of three specific nuclear power plants and, therefore, ii) should be subject to environmental impact assessment as well as public consultation, transboundary included, prior to their adoption.
B. Highlights from the positions of the Belgian State and of the operator

1. Extension laws are equivalent to policies, which are free of any obligation of environmental impact assessment and public participation.

**Prescriptions of the directives and international conventions.** It is important in this respect to recall that neither the European directives nor the international conventions invoked in support of the recourse impose to submit “policies” to an impact assessment and public consultation. At the most, the States Parties to these directives and international conventions are invited to submit their policies to such requirements.

**Espoo Convention.** The said convention provides the following in article 2, 7th:

“To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programs.”

**Aarhus Convention.** The said convention provides in article 7, and solely with respect to environmental policies, more in particular the following:

“Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment,”

**Directive 2011/92/EU.** The directive covers only the projects defined in article 1 referring to i) the execution of construction works or other installations or schemes and to ii) other interventions in the natural surroundings and landscape, including those involving the extraction of mineral resources.

**Directive 92/43/EEC.** The directive provides in article 10, and solely with respect to land use policies (which do not concern the above-mentioned extension laws), more in particular the following:

“Member States shall endeavor, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.”

**Directive 2009/147/EC.** While the preamble to that directive states that it fits in the framework of a conservation policy, Directive 2009/147 in no way intends to apply to other types of policies, such as the nuclear phase out policy and the policy of secure electricity supply.
**Political principle.** The Belgian State and the operator argue in essence that the criticized extension laws establish at most a political principle of a potential postponement, with 10 years, of the deactivation of the concerned nuclear plants.

**Economic policy.** The national policy of nuclear phase-out in 2025 – which included the criticized extension laws – is indeed based on the twin principles of i) the deactivation of existing plants by 2025 and ii) the prohibition to create and operate any new nuclear power plant.

These are two of the founding principles of a policy that is strictly economic, which aims to promote a massive emergence of renewable energy sources.

The preparatory works of the extension laws, which are right in line with the law of 31 January 2003, could, in this regard not be more clear:

« The law of 31 January 2003 has the purpose to prohibit the generation of electricity and to end the permissions to operate and industrially produce electricity. This prohibition must be understood in a purely economic sense.»

“Marie-Christine Marghem, Minister : (…) I have always said, the government has always said, and repeats, and it is also written extensively in the 2013 law, and besides it was Mr. Deleuze who had already spoken in the works of the law of 2003, that the prohibition of electricity generation, the inability to produce electricity further, must be understood in a purely economic sense, i.e., as I have already had the occasion to explain here in plenary session, the possibility of injecting electricity into the network and to gain income from the injection of electricity into the network” (Doc. Ch. Session 2014-2015 54 Doc 0967/005, p. 73).

**Policy of security of energy supply.** The national policy of nuclear phase-out in 2025 was accompanied, upon adoption of the law of 31 January 2003, by a policy related to the necessary security of energy supply.

Extension laws have no other purpose than to adapt the schedule of the nuclear phase-out, decided in 2003, while respecting the final term of 2025 and that, strictly for reasons of security of supply of the country.

The parliamentary works of the law of 28 June 2015 specify it in the following terms :

“The draft law establishes an economic and energy policy in order to lift the inability to produce electricity that the legislator had imposed in other circumstances. There is no question here to authorize on a concrete and technical level the restart of the Doel 1 plant, as this power legally belongs to the FANC (as explained below). This is about establishing, given the short-term electricity supply risk and the well-known emergency context, through the entry into force of the law, a legal possibility to produce for the Doel 1 nuclear plant.
The debated law therefore postpones the date of deactivation of the Doel 1 nuclear power plant until 15 February 2025 and lifts a legal incapacity of producing electricity beyond 15 February 2015. Accordingly, the law gives the possibility for this plant, provided that the FANC agrees, to still produce electricity and inject it into the network.

→ the restart of the Doel 1 power plant is conditional upon the green light that the Federal Agency for Nuclear Control may give, once the law is adopted.

*Solely the FANC is able to decide on the technical and security level ».*

**Political principle with uncertain effective implementation.** Finally, the extension laws imply a political choice which can in no way be equated with a ‘project’ as the concrete future application that will result from them remains uncertain.

As was noted here-above, the effective implementation of such a political choice depends not only on:

- the will of the operator who may not accept the extension of the activation of its nuclear plants.
- but also the position to be taken by the administrative ‘nuclear’ authorities (FANC and the King (= legal term denoting the Belgian Federal government)) with respect to the LTO projects submitted to them by the operator.

The parliamentary works of the above-mentioned law of 28 June 2015 state it in the following terms:

“The agreement of the Federal Agency for Nuclear Control, which will set the conditions relating to safety and security, will be an essential prerequisite before the extension of these units is effective”.

*Or*:

“Given the risks to the country's security of supply, the lifetime of the nuclear power plants Doel 1 and Doel 2 should be extended for 10 years, meaning until 2025, provided it satisfies the requirements of ten-year safety reassessment covering in particular the specific aspects of "LTO" (Long Term Operation), the adaptation of the action plan on stress tests and the necessary approvals of the Federal Agency for Nuclear Control”.

So that the day they were adopted, parliamentarians could obviously not be certain of what the future would have in store for the two extension laws.
**Political principle with undetermined effective implementation.** The extension laws also imply a political choice which can in no way be equated with a ‘project’ because it is undetermined as to its practical application and future.

As specified above, the effective implementation of such a political choice depends indeed on the LTO project to be submitted by the operator to the ‘nuclear’ administrative authorities.

But, on the day of the adoption of the extension laws, parliamentarians were not in possession of the LTO projects of the operator and did not know the ins or outs and this for the following double reason:

- firstly, because the LTO projects were not finalized;
- secondly, the Parliament is obviously not the place to present a strictly technical project of extension of industrial production of electricity from the concerned nuclear power plants.

The file related to the LTO project is, for these technical reasons, only transmitted to the FANC and not to the parliamentarians.

**Conclusions.** It seems that it is correct that the Belgian State as well as the operator demonstrate that the extension laws are not constitutive of a ‘project’ to be submitted to environmental impact assessment and public consultation, but are constitutive of a ‘policy’ exempt of such procedural requirements.

Besides the fact that no concrete project to postpone deactivation and, as a consequence, of extended industrial production of electricity form the power plants of Tihange 1, Doel 1&2, for an additional period of 10 years, was put to the vote of the parliamentarians, the criticized extension laws of 2013 and 2015 do not, in themselves, carry the authorization to extend, for another 10 years, the exploitation of the concerned nuclear power plants.

Only the FANC and the King (= legal term denoting the Belgian Federal government) have indeed authority, after evaluation of the environmental impact assessment of individual LTO projects to be submitted by the operator, to authorize or not the requested extension for an additional 10 years. This is the ‘green light’ to which the preparatory works for the extension laws make repeatedly reference to.

For this reason in particular the extension laws do not impose in themselves any change of any kind whatsoever, to the authorizations to create and operate the concerned plants, which will only be modified at the King’s (= legal term denoting the Belgian Federal government) initiative, according to the FANC’s
advice and taking into account the particular LTO projects submitted by the operator.

2. The extension laws do not involve in themselves any environmental impact and are, therefore, also exempt of any obligation of environmental impact assessment and public participation.

**Prescriptions of the directives and international conventions.** The European directives as well as the international conventions invoked by the applicant associations further limit the obligations imposed to the States Parties in terms of environmental assessment and public consultation, solely to the area of plans, programs or projects or to the projects alone, with a potential impact on the environment.

The prescribed conventions and directives referred to in the briefs, and as listed below, demonstrate this sufficiently.

**Espoo Convention.** The preamble of the said convention expresses this in the following terms:

“Mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context,

Conscious of the need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context.”

Article 1 of the convention defines the notions of impact and transboundary impact in the following terms:

“(vii) ‘Impact’ means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

(viii) ‘Transboundary impact’ means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.”
Article 2 of the convention meanwhile states what follows:

“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 (...).

4. The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.”

Article 3 of the convention in turn states what follows:

“1. For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity (...).

7. When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question”.

Aarhus Convention. This convention provides in article 6 relating to public participation to decisions on specific activities:

«1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
(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”.

**Directive 2011/92/EU.** The directive provides the following in point 6 of the preamble:

“General principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.”

**Directive 92/43/EEC.** The directive provides as follows in article 6.3.:

“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.”

**Directive 2009/147/EC:** The directive provides as follows in its article 2:

“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.”

And the directive pursues in particular in article 3:

“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.”

Thus requiring Member States to take all necessary measures to preserve, maintain or restore certain animal species and certain habitats, the European Union limits the requirements imposed on Members States only to plans, programs and/or projects likely to affect such species and/or habitats.

**Conclusions.** It seems that it is also correct that the Belgian State and the operator argue in this regard, in essence, that the criticized extension laws of 2013 and 2015, i) whereas they fall under the notion of economic policy and
policy of security of supply, ii) whereas they do not authorize any particular project, iii) whereas they do not in themselves modify nuclear power plants, or impose changes to the said plants and finally iv) whereas an LTO project must be submitted by the operator and subjected to the express approval of the administrative nuclear authorities, do not entail, in themselves, an environmental impact so that they do not fall within the scope of international conventions and guidelines invoked in support of the appeals.


**Scope of the Espoo convention – new nuclear power plants and major changes to licensed nuclear facilities.** The Espoo Convention covers solely the activities that require an authorization. Therefore, the preamble of the Convention refers in particular to "the need to give explicit consideration to environmental factors at an early stage in the decision-making process."

Appendix I of the Convention refers only to “nuclear power stations and other nuclear reactors”. The concept of “proposed activity”, as contained in article 1, v) also enters into the field of application of the convention “any major change to a nuclear facility”.

A combined reading of the aforementioned principles leads to the conclusion that only the establishment and operating permit for new nuclear plants as well as authorizations for major modifications to licensed nuclear facilities are subject to the Convention.

**Extension laws are not comparable to authorization of the establishment and operation or to authorization of modification of a nuclear plant.** As was stated above, extension laws only aim, according to the economic policy and the policy of security of supply, to postpone the deactivation date and therefore to establish a legal possibility of extension of industrial production of electricity from some nuclear plants, for an additional period of 10 years, subject to the agreement of the operator and the prior approval of the ‘nuclear’ administrative authorities (FANC and King (= legal term denoting the Belgian Federal government)), based on the concrete project proposed by the operator.

The nuclear plants concerned are indeed covered by a Royal Decree authorizing their creation and exploitation for an indefinite duration, which remains strictly applicable – subject to amendments made by the King (= legal term denoting the Belgian Federal government) himself – until it is substituted by a dismantling authorization.
So, this is, we believe, why the Belgian State and the operator argue correctly that there can be no question of assimilating the 2013 and 2015 extension laws to an authorization, within the meaning of the Espoo Convention, subject to environmental impact assessment and transboundary public consultation.

This is even less the case since the specific LTO projects submitted by the operator, have themselves been subject to:

- A decision of the FANC describing the changes made to the facility as not important – in opposition to the notion of ‘major change’ laid down by the Espoo convention,
- A decision of the FANC, deciding after environmental screening, not to submit the LTO project to a preliminary environmental impact assessment, in the absence of any significant environmental impact, both inside the kingdom and outside the borders – in opposition to the concept of ‘significant adverse transboundary impact’ established by the Convention.
- And finally, a Royal Decree endorsing the above-mentioned decisions of the FANC and amending the Royal Decree laying down the original authorization by supplementing it with new special operating conditions relating to the LTO project.

These authorizations demonstrate in themselves that the implementation itself of the extension laws do not fall under the notions of “major change » of a nuclear facility, nor of « significant adverse transboundary impact”.

**Background note on the application of the Convention to nuclear energy-related activities.** The appellant associations also invoke, to support their thesis, the “Background note on the application of the Convention to nuclear energy-related activities” of the Economic Commission for Europe of the Economic and Social Council of the United Nations.

They are of the opinion that this document would consider the extension of the lifetime of a nuclear power plant as a “major change” in the sense of the Espoo Convention.

This document does not however have any force of law.

Indeed, the Economic and Social Council of the United Nations has no competence to impose any legally binding rule at all.

In its preamble, the above-mentioned document also clearly states the following:
“This note attempts to reflect the diverse and sometimes conflicting views expressed on the application of the 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 Convention. This note does not necessarily reflect the views of the United Nations Economic Commission for Europe or of the secretariat”.

This document therefore limits itself to present “information on how the Convention has been and is applied to such activities and suggests good practice, primarily with respect to nuclear power plants”.

Moreover, the Court of Justice of the European Union has pronounced itself explicitly in this way in a judgment of 16 February 2012 with regard to an Aarhus Convention implementation guide. The judgment Solvay e.a. finds the following in this respect:

“25. By its first question the referring court asks whether Articles 2(2) and 9(4) of the Aarhus Convention must be interpreted in accordance with the guidance in the Aarhus Convention Implementation Guide.

26. It is apparent from the wording of that Guide, in particular the observations in the section headed “How to use this Guide”, that the aim of the document, drawn up by international experts, is solely to provide an analysis of the Aarhus Convention which “introduces the reader to the Convention and to what it can mean in practice”.

27. While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.

28. The answer to Question 1 is therefore that, for the interpretation of Articles 2(2) and 9(4) of the Aarhus Convention, it is permissible to take the Aarhus Convention Implementation Guide into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention”.

The conclusion of the Court of Justice in this respect can obviously be perfectly transposed to the “Background Note” invoked by the appellant associations.

**Good Practice Recommendations on the application of the Convention to nuclear energy-related activities, dated 16 march 2015.**

---

In its Good Practice Recommendations on the application of the Convention to nuclear energy-related activities, dated 16 March 2015, the Economic and Social Council of the United Nations moreover specifies as follows:

“Screening will have to determine whether nuclear activities, as well as major changes to them, fall under the scope of the Convention. That is, is the proposed activity listed under appendix I, as amended, and likely to cause a significant transboundary impact. (…) Screening includes considerations about the extension, renewal or update of a licence (e.g. lifetime extension)”.  

Such a recommendation has effectively been respected in the case at hand. The screening in question has indeed been effected by the FANC in the stadium of the appreciation of the concrete LTO projects, which are the only ones subject to a “license”, as presented by the operator and having entailed modifications by the King (= legal term denoting the Belgian Federal government) to the basic operating permits.

Therefore it is in our opinion justified that the Belgian State as well as the operator invoke that the Espoo Convention is not applicable to the extension laws.

4. The extensions laws, the Aarhus Convention and directive 2011/92/EU

**Scope of the Aarhus Convention and directive 2011/92/EU – new nuclear power plants and major changes to licensed nuclear facilities.** Both the Aarhus Convention as well as directive 2011/92/EU apply solely to activities that require a license.

Thus article 6.2. a) of the Convention refers to “the proposed activity and the application on which a decision will be taken”. It is also in this way that article 6.5. of the Convention provides that “Each Party should, where appropriate, encourage prospective applicants to identify the public concerned (…)”.  

As far as the directive is concerned, it provides more especially in its sixth consideration: “General principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment”. The said notion of development consent is further defined in the following words: “development consent” means the decision of the competent authority or authorities which entitles the developer to proceed with the project”.

Annex I to the Convention solely refers in its point 1 to the “Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors”.  


Moreover article 6, 10 of the Aarhus Convention provides as follows: “Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraph 2 to 9 of this article are applied mutatis mutandis, and where appropriate”.

As far as Annex I to directive 2011/92/EU is concerned, it refers in its point 2 b) to the “Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors” and in its point 24, “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”.

As of Annex II of directive 2011/92/EU, it refers in its point 13 a) 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)”.

The constant jurisprudence of the Court of Justice of the European Union specifies in this respect that the term “project” referred to in article 1 of the Directive covers only the acts, works or interventions that alter the physical reality of the establishment or the site of implantation concerned (C.J.E.U., Abraham, C-2/07; C.J.E.U., Brussels Hoofdstedelijk Gewest, C-275/09;…).

A combined reading of the above-mentioned provisions and principles leads to the conclusion that the Convention and the Directive only refer to the licenses for the establishment and the operation of new nuclear power plants as well as the consents to modifications of licensed nuclear facilities, that are susceptible to have major negative effects on the environment.

The extension laws cannot be assimilated to a license to establish and operate, nor to a license to change a nuclear power plant. Thus, the extension laws of 2013 and 2015 are limited, as an economic policy and a policy of security of supply, to postponing a date of deactivation and, consequently, to establish a legal capacity to extend the industrial production of electricity from the concerned nuclear power plants, for a supplementary duration of 10 years, provided the operator agrees and the “nuclear” administrative authorities (FANC and the King (= legal term denoting the Belgian Federal government)) give their consent, on the basis of a concrete project proposed by the operator.

Therefore we think it is justified that the Belgian State and the operator advance that the extension laws must in no way be confused with a license to establish or to operate, nor with a license to change a nuclear power plant. These laws do not give the operator the right to act or to do works. They allow the operator to generate electricity to be injected on the grid, on condition that he requests and disposes of the necessary authorizations.
Indeed, the concerned nuclear power plants are covered by a Royal Decree authorizing their establishment and their operation, for an undetermined duration, that remains strictly applicable – except for the modifications made by the King (= legal term denoting the Belgian Federal government) himself – until it is substituted by a dismantling license.

The Court of Justice of the European Union has, by the way, explicitly affirmed such a position with respect to the renewal of an existing license to operate a landfill of waste in the following terms:

“(…) any change to or extension of a landfill site, such as the one at issue in the main proceedings, may constitute a “project” within the meaning of Directive 85/337 where it may have significant adverse effects on the environment.

As has been established by the Court, the term “project” refers to works or interventions involving alterations to the physical aspect of the site (Case C-275/09 Brussels Hoofdstedelijk Gewest and Others [2011] ECR I-1753, paragraphs 20, 24 and 38).

Thus, the mere renewal of an existing permit to operate a landfill site cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a “project” within the meaning of Article 1(2) of Directive 85/337.(…)

Accordingly, the answer to the question referred is that the definitive decision relating to the carrying on of operations at an existing landfill site (…), does not constitute a “consent” within the meaning of Article 1(2) of Directive 85/337 unless that decision authorizes a change to or extension of that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337 and thus constitute a “project” within the meaning of Article 1(2) of that Directive.” (Case C-121/11).

The above-mentioned jurisprudence can in our view be transposed to the criticized extension laws, that in no way modify the operation conditions of the nuclear power plants that they cover. These operating conditions are solely contained in the “consents” required for the operation of the nuclear power plants in the meaning of Directive 2011/92/EU.

It should moreover be recalled that the LTO projects have been submitted to

i) A decision of the FANC qualifying the changes made to the classified establishment as not significant – as opposed to the notion of “major change” referred to in the Convention
ii) A decision of the FANC deciding, after environmental screening, not to subject the LTO project to a prior environmental impact assessment, in the absence of significant environmental effect, inside as well as outside the border of the kingdom – as opposed to the notions of “significant effect” on the environment, referred to by the convention and by the directive,

And finally

iii) A Royal Decree confirming the above-mentioned decisions of the FANC and modifying the original royal decrees by complementing them with new specific operating conditions relating to the LTO project.

These consents demonstrate in themselves, as far as necessary, that the application of the extension laws does not fall under the notion of “physical alteration” entailing a “significant effect” on the environment.

The above-mentioned considerations are mutatis mutandis applicable to the other European directives invoked by the applicant associations.

5. Conclusions

It seems justified to us that the Belgian State and the operator argue that the 10 year extension laws of the three concerned nuclear power plants did not have to be subject to a prior environmental impact assessment nor to a (possibly transboundary) public consultation.

This being said, it is essentially up to the Belgian Constitutional Court to decide on this issue, possibly after having asked a prejudicial question to the European Court of Justice, as has in fact been suggested by the operator.

The Constitutional Court should pronounce its judgment by the end of 2016 or the beginning of 2017.