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Case Comment

Environmental Protection Meets Security of Electricity Supply: Case C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL *v.* Conseil des ministres, *Court of Justice of the European Union*

Ilina Cenevska*

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Abstract
This case comment explores the relationship between two intertwined objectives – ensuring security of electricity supply and environmental protection – in the context of the judgment of the Court of Justice of the European Union in *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* v. *Conseil des ministres*. The analysis focuses on the application of the Environmental Impact Assessment Directive and the Habitats Directive to the facts of the case, which concerns the extension by a ten-year period of the operation of two Belgian nuclear power stations (Doel 1 and Doel 2) as part of a national energy policy strategy to ensure the security of Belgium's electricity supply. The case comment also considers the legal and practical implications that arise as a result of employing the 'security of electricity supply' exemption to enable derogation from the requirements of the aforementioned Directives in circumstances where a Member State considers the security of its electricity supply to be under threat.

Keywords: Security of electricity supply, Environmental protection, Nuclear energy, Environmental impact assessment, Habitats protection, Natura 2000

1. INTRODUCTION

While nuclear energy in the European Union (EU) is slowly but surely on its way out, the improved climate targets provided in the European Green Deal[1] and related policy documents which aim for a full decarbonization of the EU's electricity sector

* Ph.D., Faculty of Law, Ghent University (Belgium); LL.M., College of Europe, Bruges (Belgium). Email: icenevska@yahoo.com.

1 European Commission, 'The European Green Deal', COM (2019) 640 final, 11 Dec. 2019, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN.

by 2050[2] may lead some Member States to rethink their nuclear energy phase-out plans. Belgium, the Member State with the nuclear energy policy at the centre of *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* v. *Conseil des ministres* (*Inter-Environnement Wallonie ASBL*),[3] decided to reconsider its original nuclear energy phase-out plan as early as 2015. Initially, under the Law on the Progressive Phasing Out of Nuclear Energy for the Purposes of Industrial Production of Electricity adopted in 2003 (the 2003 Law), Belgium had established a timetable for phasing out industrial production of electricity by fission of nuclear fuels in nuclear power stations on its territory. In 2015, in a veritable U-turn on its domestic nuclear energy policy, Belgium passed the Law amending the Law of 31 January 2003 on the Progressive Phasing Out of Nuclear Energy for the Purposes of Industrial Production of Electricity in order to Ensure the Security of the Energy Supply (the 2015 Law).[4] Guided by the objective of ensuring the security of Belgium's electricity supply, the 2015 Law extended the operation of the country's Doel 1 and Doel 2 nuclear power stations and allowed these to continue electricity production until 2025.

This case comment provides a critical commentary on the judgment in *Inter-Environnement Wallonie ASBL*. The case concerned a request made by the Belgian Constitutional Court (BCC) for a preliminary ruling in proceedings raised by two Belgian environmental protection associations challenging the legality of the 2015 Law. Essentially, the application before the BCC pertained to the environmental consequences arising from the 2015 Law and related measures, as well as the possibility that national authorities could avoid their EU law-mandated environmental impact assessment (EIA) obligations through reliance on the 'security of electricity supply' exemption in Article 194(1)(b) of the Treaty on the Functioning of the European Union (TFEU).[5] The issues raised in the case lie at the intersection of, on the one hand, the objective of ensuring security of energy supply as a goal realized within the framework of EU energy policy and, on the other hand, the objectives of EU

[2] The 'European Green Deal' Communication makes no mention of nuclear energy while the subsequent draft proposal for a 'Regulation establishing the Just Transition Fund (JTF)', mandated by the European Green Deal, excludes the decommissioning or construction of nuclear power stations from the scope of the support envisaged under the JTF; see Council of the European Union, 'Regulation establishing the Just Transition Fund: Partial Mandate for Negotiations with the European Parliament', 2020/0006 (COD), 25 June 2020, draft Art. 5, available at: https://data.consilium.europa.eu/doc/document/ST-8502-2020-REV-1/en/pdf. In contrast, a recent Commission preparatory document based on reports from the Technical Expert Group on Sustainable Finance, concerning the introduction of an EU Taxonomy & EU Green Bond Standard, did not completely dismiss nuclear power from the EU's pool of viable energy sources; see 'Frequently Asked Questions about the Work of the European Commission and the Technical Expert Group on Sustainable Finance on EU Taxonomy & EU Green Bond Standard', June 2020, p. 13, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200610-sustainable-finance-teg-taxonomy-green-bond-standard-faq_en.pdf.

[3] Case C-411/17, ECLI:EU:C:2019:622.

[4] See n. 14 below.

[5] Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009, [2010] OJ C 83/47, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF.

environmental policy set out in Article 191(1) TFEU,[6] including the associated duty to ensure a high level of protection of the environment under Article 191(2) TFEU. The factual and legal context of the *Inter-Environnement Wallonie ASBL* case provides a fitting arena in which to explore the relationship of concurrence, or indeed competition, between the objective of ensuring security of electricity supply and that of environmental protection, and to examine how fulfilling one objective can sometimes (possibly inadvertently) come at the expense of the other.

This case note will survey the prior assessment requirements arising from Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment (EIA Directive)[7] and Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive).[8] These Directives apply to national legislative measures, such as the 2015 Law and measures adopted pursuant thereto, the annulment of which was sought in the proceedings before the BCC. Further, the case comment will explore the potential of the 'security of electricity supply' justification advanced by Member States as a basis for derogating from the obligations in the EIA and the Habitats Directives. In this vein, it is important to stress that what makes this case unique is that it is thus far the only case in which the Court of Justice of the EU (CJEU) has given detailed consideration to the application of the 'security of electricity supply' exemption within the framework of EU environmental legislation. In particular, this is a judgment in which the CJEU balances recognition of the interests of Member States in guaranteeing the security of their electricity supply (and the associated margin of appreciation in determining when said interest is under threat) with compliance with the relevant environmental protection requirements prescribed by EU law.

The terms 'security of electricity supply' and 'energy security' are not synonymous, despite their interchangeable use in scholarly works and relevant policy and legal documents.[9] For practical reasons this case comment will use the two terms interchangeably. Energy security has been defined by the United Nations Development Programme (UNDP) as 'the continuous availability of energy in varied forms, in sufficient quantities and at affordable prices'.[10] The International Energy Agency (IEA) describes energy security as 'the uninterrupted availability of energy sources at an affordable price'.[11] There is arguably

6 Art. 191(1) TFEU.

7 [2012] OJ L 26/1.

8 [1992] OJ L 206/7 (as amended by Directive 2013/17/EU [2013] OJ L 158/193).

9 In *Inter-Environnement Wallonie ASBL*, the CJEU consistently used the term 'security of electricity supply', whereas Advocate General (AG) Kokott, in her Opinion, predominantly employed the term 'energy security' when speaking about 'security of electricity supply'. Such practice is not uncommon, as both scholars and relevant international bodies have adopted this lexical approach; see J. Speight, *Natural Gas: A Basic Handbook* (Gulf Professional/Elsevier, 2019); C. Strambo, M. Nilsson & A. Månsson, 'Coherent or Inconsistent? Assessing Energy Security and Climate Policy Interaction within the European Union' (2015) 8 *Energy Research & Social Science*, pp. 1–12; B.G. Miller, *Clean Coal Engineering Technology* (Elsevier, 2011); IEA, 'Energy Security: Reliable, Affordable Access to All Fuels and Energy Sources', available at: https://www.iea.org/topics/energy-security.

10 UNDP, *World Energy Assessment: Energy and the Challenge of Sustainability* (UNDP, 2000), available at: https://www.undp.org/content/undp/en/home/librarypage/environment-energy/sustainable_energy/world_energy_assessmentenergyandthechallengeofsustainability.html.

11 IEA, n. 9 above.

an intrinsic link between the concepts of security of energy supply and environmental protection, demonstrated by the fact that some sources define 'security of energy supply' with reference to various aspects of environmental protection.[12] Likewise, Article 194(1) TFEU explicitly recognizes this link by stipulating that the aims of the EU policy on energy will be realized 'with regard for the need to preserve and improve the environment'.[13]

The ensuing analysis does not intend to cover all the issues raised in the preliminary reference proceedings before the CJEU. Rather, the case comment aims to examine critically the parts of the judgment that are relevant to the security of electricity supply/environmental protection nexus. Its analysis of the judgment is structured accordingly, as follows. After setting out the factual background to the case, the concept of 'security of electricity supply' is examined in general terms. The case comment then explores the capacity of the concept to act as an exemption that can justify derogation from the provisions of the EIA and the Habitats Directives. More specifically, the case comment considers the prior assessment requirements in these two Directives in the light of the possibility for national authorities to rely on the 'security of electricity supply' exemption and thereby escape the reach of impact assessment requirements. Finally, the concluding section reviews the follow-up judgment of the BCC delivered in March 2020 and critically reflects on the viability of 'security of electricity supply' as a derogation from EU environmental protection requirements, weighing up the legal and practical consequences sustained by the environment as a result of an unrestrained and injudicious use of such derogation. In this respect the case comment argues that the discretion granted to Member States in assessing whether the security of their electricity supply is under threat should be exercised with extreme caution and in highly exceptional circumstances only, thus precluding any possibility for abuse of discretion.

2. FACTUAL BACKGROUND AND QUESTIONS REFERRED FOR PRELIMINARY RULING

The request for a preliminary ruling in *Inter-Environnement Wallonie ASBL* was made in proceedings brought by the Belgian environmental protection associations Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL before the BCC. The applicants sought the annulment of the 2015 Law adopted by Belgium's Council of Ministers.[14] The 2015 Law had two key effects. Firstly, it enabled the industrial production of electricity to continue for a period of almost 10 years at the Doel 1 nuclear power station (which previously had been shut down). Secondly, the 2015 Law provided

[12] E.g., Sovacool considers technical feasibility, affordability, environmental protection, reliability and security of supply as constituent elements of energy security: B.K. Sovacool, 'Coal and Nuclear Technologies: Creating a False Dichotomy for American Energy Policy' (2007) 40(2) *Policy Sciences*, pp. 101–22.

[13] Art. 194(1) TFEU.

[14] 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 Progressive 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.

for a deferral by 10 years of the date initially set for deactivation and cessation of industrial production of electricity at the (still active) Doel 2 nuclear power station.[15]

In challenging the validity of the 2015 Law, the environmental protection associations essentially argued that adopting the 2015 Law and associated national measures intended to give it effect had breached the requirements for a prior impact assessment under relevant international conventions to which the EU is a party, as well as relevant EU legislation.[16] These legal instruments are the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention),[17] the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),[18] Directive 2009/147/EC on the Conservation of Wild Birds (Birds Directive),[19] the Habitats Directive, and the EIA Directive.

The original 2003 Law, precursor to the contested 2015 Law, was adopted to implement Belgium's long-term plan for a progressive phasing out of the industrial production of electricity by fission of nuclear fuels. According to this plan, all Belgian nuclear power plants would be deactivated 40 years after the date on which they were brought into service for industrial purposes and could no longer produce electricity thereafter.[20] Under the 2003 Law, the Doel 1 and Doel 2 power stations, both built in 1975, were scheduled to cease operation in February and December 2015, respectively.[21] The provisions were made on the condition that the security of the country's electricity supply would not be threatened; if such a threat existed, the King of Belgium would be entitled to take the necessary measures to counteract the threat by Royal Order, deliberated upon by the Council of Ministers.[22]

Subsequently, in a bid to address the risk of an imminent threat to the security of the country's electricity supply, the Belgian legislature passed the 2015 Law, which extended the operation period of the Doel 1 and Doel 2 nuclear power stations. The 2015 Law provides that the Doel 1 nuclear power station (no longer in operation at that time) could resume electricity production from the date of entry into force of the Law and that it will be deactivated and cease to produce electricity from 15 February 2025. The 2015 Law also provides for the Doel 2 nuclear power station (then still in operation) to be deactivated from 1 December 2025.[23] The extension of the operating periods of both power stations was part of a 'rejuvenation' investment plan worth

[15] *Inter-Environnement Wallonie ASBL*, para. 2. There are currently seven nuclear reactors in the Kingdom of Belgium: four in the Flemish Region at Doel (Doel 1, Doel 2, Doel 3, and Doel 4), and three in the Walloon Region at Tihange (Tihange 1, Tihange 2, and Tihange 3) (ibid., para. 44).

[16] Para. 1.

[17] Espoo (Finland), 25 Feb, 1991, in force 10 Sept. 1997, available at: https://unece.org/fileadmin/DAM/env/eia/eia.htm.

[18] Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/treatytext.html.

[19] [2010] OJ L 20/7 (as amended by Directive 2013/17/EU [2013] OJ L 158/193).

[20] Para. 37.

[21] Paras 36, 37.

[22] Para. 38.

[23] Paras 39 et seq.

approximately EUR 700 million, agreed between Electrabel, the owner-operator of the two nuclear power stations, and the Belgian state on 30 November 2015 (Agreement of 30 November 2015).[24]

In this respect it is important to note that the Doel 1 and Doel 2 nuclear power stations are located on the banks of the river Scheldt and are in the vicinity of several Belgian sites protected under the Habitats Directive and the Birds Directive because of the presence of protected species of fish and cyclostomata[25] in the river.[26] Equally, it is necessary to stress the transboundary dimension of this case, in that these nuclear power stations are located only a few kilometres from the Belgian border with the Netherlands,[27] and are also close to a Dutch site that is protected under the Habitats Directive.[28]

The questions that the BCC addressed to the CJEU are diverse in nature and scope. Given the considerable length of the CJEU judgment, this case comment does not examine all questions referred in the request for a preliminary ruling; rather, the analysis concentrates on select questions that are directly relevant to the relationship between security of electricity supply and environmental protection objectives. Specifically, the following sections will focus on the CJEU's responses to the questions regarding the applicability of the energy security exemption to the respective fields of application of the EIA and the Habitats Directives. The case comment will focus, firstly, on the question of whether Article 2(4) of the EIA Directive permits an exemption from the EIA requirements in Articles 2 to 8 and 11 of the Directive, so as to enable the deactivation of a nuclear power station to be postponed for overriding reasons of public interest associated with the security of a country's electricity supply.[29] The discussion will then consider the question submitted to the CJEU regarding the interpretation of the prior assessment provisions in Article 6(4) of the Habitats Directive and, in particular, whether, following these provisions and having regard to the assessments and hearings carried out in the context of the adoption of the 2015 Law, a country's electricity supply can qualify as an imperative reason of overriding public interest.[30]

3. NATURE AND SCOPE OF THE 'SECURITY OF ELECTRICITY SUPPLY' EXEMPTION

As a complex and multi-dimensional concept, energy security has implications across a wide range of spheres – political, economic, environmental, social, and technical.[31] The

[24] Para. 56.

[25] Species of jawless fish characterized by a long eel-like body without scales.

[26] Para. 135; Opinion of AG Kokott in Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL* v. *Conseil des ministers*, ECLI:EU:C:2018:972 (delivered on 29 Nov. 2018), paras 24-6.

[27] Para. 81; AG Kokott Opinion, para 27.

[28] AG Kokott Opinion, paras 24, 25.

[29] Question 6 (para. 58).

[30] Question 8 (para. 58).

[31] T. Jakstas, 'What Does Energy Security Mean?', in M. Tvaronavičienė & B. Ślusarczyk (eds), *Energy Transformation towards Sustainability* (Elsevier, 2019), pp. 99–112.

dynamic and context-dependent nature of energy security is one of the main reasons why this concept has proved so difficult to define.[32] Under a narrow definition, which matches the 'security of supply' dimension of the concept, energy security[33] denotes the continuous and uninterrupted availability of energy to a specific country or region.[34] As noted above, the UNDP describes energy security as 'the continuous availability of energy in varied forms, in sufficient quantities and at affordable prices',[35] while the IEA defines it as 'the uninterrupted availability of energy sources at an affordable price'.[36]

Authors have singled out three coexisting perspectives on energy security, based on the different policy problems and threats that each of these engage – resilience, robustness, and sovereignty.[37] All three perspectives guide the policymaking process,[38] all the while being rooted in various scientific disciplines and informed by distinct methodologies and conceptual frameworks. The measures employed to address threats and risks to energy security typically engage one or two of these perspectives. However, certain measures can have a bearing on all three perspectives.[39]

Generally speaking, security of electricity supply is informed by two principal factors: (i) resource availability, which concerns the actual physical amount of a given resource available around the world (long-term security); and (ii) system reliability, which relates to the continuous supply of energy, particularly electricity, sufficient to meet consumer demand at any given time (short-term security).[40] While long-term energy security deals mainly with timely investment to supply energy in accordance with economic development and environmental needs, short-term energy security focuses on the energy system's ability to react promptly to sudden changes in the supply/demand balance.[41]

Particularly relevant for the present case comment is the intrinsic connection between energy security and environmental protection, which has been recognized explicitly in a number of authoritative definitions on energy security.[42] Scholars of

[32] L. Chester, 'Conceptualising Energy Security and Making Explicit its Polysemic Nature' (2010) 38(2) *Energy Policy*, pp. 887–95.

[33] For practical reasons elaborated in the introduction, this article uses the terms 'energy security' and 'security of energy supply' interchangeably.

[34] Speight, n. 9 above, p. 365.

[35] UNDP, n. 10 above.

[36] IEA, n. 9 above.

[37] A. Cherp & J. Jewell, 'The Three Perspectives on Energy Security: Intellectual History, Disciplinary Roots and the Potential for Integration' (2011) 3(4) *Current Opinion in Environmental Sustainability*, pp. 202–12.

[38] Strambo, Nilsson & Månsson, n. 9 above, p. 2.

[39] Cherp & Jewell, n. 37 above.

[40] Miller, n. 9 above, p. 607.

[41] IEA, n. 9 above.

[42] Sovacool has identified 45 different definitions of energy security expressed in legislation, documents from public organizations and by academics. Some of these definitions contain a reference to environmental protection or sustainability. E.g., the International Atomic Energy Agency has described energy security as comprising 'the secure supply of energy fuels as well as imports and technologies that promote self-sufficiency as well as protection against disruptions … and improve *environmental sustainability*' (emphasis added); the World Economic Forum considers energy security to encompass, inter alia, the

energy security have discerned technical feasibility, affordability, environmental protection, reliability, and security of supply as the constituent elements of the overarching concept of energy security.[43] Sustainability has also been included among the key tenets of the concept of energy security,[44] proving elemental to the claim that energy security and environmental protection are two inextricably linked goals. In the context of energy security, the importance of sustainability-related considerations is reflected in the demand for low greenhouse gas (GHG) emissions and, more generally, a minimal contribution to environmental pollution at the local, regional, and global levels.[45] In this sense it is imperative that in striving towards energy security, the underlying values of social and environmental sustainability are also considered, which in turn helps to ensure the protection of the natural environment, communities, and future generations.[46]

Efforts have been made to pinpoint the scope of the concept of energy security within the unique policy setting of the EU, and particularly within the context of the EU energy policy, given the wide variety of disciplines it engages. However, the boundaries of the concept still remain fluid.[47] Article 194(1) TFEU includes security of electricity supply as one of the aims pursued by the EU energy policy, along with the following aims: ensuring the functioning of the energy market; promoting energy efficiency and energy saving; development of new and renewable forms of energy; and promoting the interconnection of energy networks. The article integrates the 'need to preserve and improve the environment' into the EU energy policy, thereby validating the intrinsic link between the aims pursued within the framework of EU energy and environmental policies, respectively.[48] Furthermore, Article 194(2) TFEU expressly recognizes the right of Member States to determine the conditions for exploiting their energy resources, the choice between different energy sources, and the general structure of their energy supply. Thus, it grants broad discretion to Member States, which, if not adequately framed and properly exercised, may yield unforeseeable consequences for the environment.

4. THE 'SECURITY OF ELECTRICITY SUPPLY' EXEMPTION IN THE CONTEXT OF THE EIA DIRECTIVE

This section explores how the 'security of electricity supply' exemption applies with regard to the EIA requirements that flow from the EIA Directive and the Habitats Directive. As previously noted, one aspect that distinguishes the *Inter-Environnement*

notion of 'sustainability, or sufficient supply or energy to support a *high quality of life without damaging the environment*' (emphasis added): B.K. Sovacool, 'Introduction: Defining, Measuring, and Exploring Energy Security', in B.K. Sovacool (ed.), *The Routledge Handbook of Energy Security* (Routledge, 2011), pp. 3–6.

43 Sovacool, n. 12 above.

44 Sovacool, n. 42 above, p. 10.

45 Ibid.

46 Ibid., p. 11.

47 Strambo, Nilsson & Månsson, n. 9 above, p. 2.

48 Arts 194(1) and 191(1) TFEU.

Wallonie ASBL judgment is the structured and elaborate assessment by the CJEU of the scope of application of the 'security of electricity supply' exemption and the breadth of discretion accorded to Member States to invoke this exemption for the purpose of derogating from their EIA obligations.

Preliminarily, it should be noted that the CJEU concluded that national measures concerning the restarting of industrial production of electricity at a nuclear power station that had previously been shut down (Doel 1) and deferral of the date initially set for ceasing industrial production of electricity at an active power station (Doel 2), including the upgrading work inextricably linked thereto, constitute a single 'project' within the meaning of Article 1(2)(a) of the EIA Directive.[49] Having ascertained that the Belgian measures in question fall within the ambit of the EIA Directive, the CJEU went on to investigate whether the national authorities could invoke the energy security exemption to evade the requirements of the EIA Directive regarding the duty to carry out an EIA for projects that are *likely to have a significant effect on the environment*. Specifically, the CJEU was asked to interpret Article 2(4) of the EIA Directive, which provides for exemptions from the Directive's EIA regime. The question turned on whether Article 2(4) permits an exemption from the requirement to conduct an EIA for a project such as that at issue, on grounds linked with the security of a Member State's electricity supply.[50]

The first subparagraph of Article 2(4) of the EIA Directive specifies that Member States may *in exceptional cases* exempt a specific project from the provisions of the Directive, where the application of those provisions would adversely affect the purpose of the project, provided that the Directive's objectives are met.[51] This exemption applies without prejudice to Article 7 of the EIA Directive, which deals with the obligations of Member States in the territory of which a project is intended to be carried out, which would be likely to have significant effects on the environment of another Member State.[52] The second subparagraph of Article 2(4) of the EIA Directive outlines the cumulative conditions that Member States need to fulfil in order to be able to trigger the Article 2(4) exemption: firstly, they must consider whether another form of assessment would be appropriate; secondly, they have to make publicly available the information obtained under such other form(s) of assessment, as well as the information relating to the decision granting exemption and the reasons for granting it; and, thirdly, prior to granting the consent, they must inform the European Commission of the reasons justifying the exemption. Thereafter, the Commission, in accordance with the third subparagraph of Article 2(4), is required to forward the documents received to the other Member States and report to the European Parliament and to the Council annually on the application of the relevant requirements.

The CJEU accepted that 'it is conceivable' that a Member State's need to ensure the security of the electricity supply could 'amount to an exceptional case' for the purposes

[49] Para. 71.
[50] Para. 95.
[51] Emphasis added.
[52] Paras 96, 101.

of the first subparagraph of Article 2(4) of the EIA Directive, and justify exempting a project from an EIA.[53] However, the Court stated that the ability to invoke the exemption would be conditional on observing the specific obligations arising from the second subparagraph of Article 2(4), as outlined above.[54] Leaving it to the referring court to determine whether Belgium had met those obligations, the Court nevertheless acknowledged that Belgium had failed as yet to inform the Commission of granting any such exemption, pursuant to the third subparagraph of Article 2(4).[55]

Further, the CJEU asserted that the Member State concerned will be permitted to rely on the Article 2(4) exemption only if it can demonstrate that the alleged risk to the security of its electricity supply is '*reasonably probable* and that that project is *sufficiently urgent* to justify not carrying out … an assessment'.[56] In this way the Court imposed a dual condition for justifying the absence of an EIA: firstly, the alleged risk to the security of the Member State's electricity supply should be *reasonably probable* and, secondly, proceeding with the particular project must be *sufficiently urgent*. In addition, the Court indicated that the possibility of triggering the exemption does not prejudice the Member State's transboundary assessment obligations under Article 7 of the EIA Directive.[57]

The Opinion of Advocate General (AG) Kokott in the *Inter-Environnement Wallonie ASBL* case provides a more extensive illustration of the scope of the margin of appreciation that Member States enjoy when invoking the energy security exemption. AG Kokott argued that Article 2(4) of the EIA Directive permits an exemption from the obligation to undertake an EIA concerning a project for the extension of the period of operation of a nuclear power station, where this is necessary to avert a *grave and imminent peril to an essential interest* of the Member State concerned, and where the public concerned and the Commission are informed in accordance with the provisions of Article 2(4).[58] AG Kokott considered that ensuring the security of the electricity supply is an essential interest of Member States, one that can serve as grounds for exemption from the obligations of the EIA Directive only in the presence of a *grave and imminent peril* threatening this essential interest.[59] While the CJEU and AG Kokott defined the thresholds for activating the energy security exemption somewhat differently, neither provides clear parameters for delineating in more concrete terms the scope of Member States' discretion in assessing whether the presence of a risk is *reasonably probable* and whether a proposed project to counteract that risk is *sufficiently urgent*; or indeed, in determining whether the presence of a *grave and imminent peril* threatens the security of their electricity supply as an essential national interest. As a result, Member States are accorded considerable latitude in

[53] Para. 97.
[54] Para. 98.
[55] Para. 100.
[56] Para. 101 (emphasis added).
[57] Para. 102.
[58] Opinion of AG Kokott, para. 163 (emphasis added).
[59] Ibid.

determining, on a case-by-case basis, both the reasonable probability of the risk to the security of their electricity supply and the urgency of triggering the exemption.

5. THE 'SECURITY OF ELECTRICITY SUPPLY' EXEMPTION IN THE CONTEXT OF THE HABITATS DIRECTIVE

In *Inter-Environnement Wallonie ASBL*, the applicability of the relevant provisions of the Habitats Directive to the national measures at issue was examined in the light of the fact that the Doel 1 and Doel 2 nuclear power stations are situated on the river Scheldt and in the vicinity of several Natura 2000 sites protected under the Habitats and the Birds Directives.[60] This part of the river Scheldt hosts protected species of fish and cyclostomata.[61] The CJEU stressed that the power stations being located *outside* a Natura 2000 area was not a sufficient reason to exempt the 'project' from the requirements of the Habitats Directive.[62] In fact, as indicated by the BCC in the order for reference and highlighted in AG Kokott's Opinion,[63] some of the Natura 2000 protected sites concerned host priority habitat types and it did not appear to be ruled out *a priori* that these might be damaged by the nuclear power stations.[64]

Because the Habitats Directive does not define the term 'project', the CJEU applied to that Directive the definition of 'project' provided in Article 1(2)(a) of the EIA Directive.[65] The Court found that the measures at issue, together with the work inextricably linked thereto, constitute a distinct project that is subject to the rules of assessment set out in Article 6(3) of the Habitats Directive, which require that a project *likely to have a significant effect on the site*, individually or in combination with other projects, undergo an appropriate assessment of its implications for the site, having regard to the site's conservation objectives.[66] The fact that the national authority responsible

[60] AG Kokott indicated in her Opinion (para. 24) that the location of the nuclear power stations is adjacent landside to the Natura 2000 site 'Schorren en Polders van de Beneden-Schelde'. In that location, she further specified, the Scheldt is part of the Belgian Natura 2000 site 'Schelde- en Durmeëstuarium van de Nederlandse grens tot Gent' and the Dutch Natura 2000 site 'Westerschelde & Saeftinghe'. She noted that the Belgian Natura 2000 site 'Bos- en heidegebieden ten oosten van Antwerpen' is also in the vicinity.

[61] *Inter-Environnement Wallonie ASBL*, para. 135. As observed by AG Kokott, in the two protected areas that cover the river Scheldt there are several fish species found which are listed in Annex II to the Habitats Directive (AG Kokott Opinion, para. 26).

[62] Para. 136. The CJEU made statements to this effect in C-98/03, *Commission* v. *Germany*, ECLI:EU:C:2006:3, paras 44, 51; C-142/16, *Commission* v. *Germany*, ECLI:EU:C:2017:301, para. 29.

[63] AG Kokott noted that in the Belgian site 'Schelde- en Durmeëstuarium van de Nederlandse grens tot Gent' there are 350 hectares of the priority habitat type 'Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior*' and a smaller presence of the priority habitat type 'Species-rich Nardus grasslands'. She remarked that the same priority habitat types also occur in the Belgian site 'Bos- en heidegebieden ten oosten van Antwerpen' (AG Kokott Opinion, para. 25).

[64] AG Kokott Opinion, para. 191.

[65] Para. 122. The CJEU had already applied this approach in C-127/02, *Waddenvereniging and Vogelbeschermingsvereniging*, ECLI:EU:C:2004:482, paras 23, 24, 26; C-600/12, *Commission* v. *Greece*, ECLI:EU:C:2014:2086, para. 75; C-293/17 and C-294/17, *Coöperatie Mobilisation for the Environment*, ECLI:EU:C:2018:882, para. 60.

[66] Para. 132 (emphasis added).

for approving the project is the legislature was considered to have no bearing on the matter.[67]

After bringing the measures at issue within the ambit of Article 6 of the Habitats Directive, the CJEU considered whether the 'security of electricity supply' exemption fell within the scope of Article 6(4) of the Habitats Directive. This provision contains a derogation from the Article 6(3) assessment requirements and applies where, *in spite of a negative assessment of the implications* for the site and *in the absence of alternative solutions*, a project must nevertheless be carried out for *imperative reasons of overriding public interest*.[68] Thus, according to the first subparagraph of Article 6(4), Member States are responsible for taking all the compensatory measures necessary to ensure that the overall coherence of the Natura 2000 network is protected and must thereafter inform the Commission of the compensatory measures adopted. However, by virtue of the second subparagraph of Article 6(4), where the site concerned hosts a *priority natural habitat type or a priority species*, the only considerations related to the overriding public interest which may be raised are those linked to human health or *public safety*; beneficial consequences of primary importance for the environment; or, following an opinion from the Commission, other imperative reasons of overriding public interest.

5.1. *'Security of Electricity Supply' as an 'Imperative Reason of Overriding Public Interest'*

The CJEU was required to consider whether, under Article 6(4) of the Habitats Directive, the objective of ensuring the security of a Member State's electricity supply constitutes an *imperative reason of overriding public interest* for the purposes of that provision.[69] Although the CJEU had dealt with the interpretation and application of Article 6(4) of the Habitats Directive in numerous earlier cases,[70] *Inter-Environnement Wallonie ASBL* is so far the only case in which the CJEU was required to examine the 'security of electricity supply' exemption as a ground for derogation from the strict conditions of Article 6(3). The CJEU responded by relying on the interpretive criteria commonly applied to all derogations explicitly provided in EU law. The Court emphasized that the derogation provisions in Article 6(4) must be interpreted strictly and may be applied only after the implications of the project have been analyzed in accordance with Article 6(3).[71] The Court held that, given the conservation objectives for the site in question, knowledge of the effects of the project was a necessary prerequisite for the application of Article 6(4). In the absence of such knowledge, no

[67] Para. 133. The CJEU had previously confirmed this in C-182/10, *Solvay and Others*, ECLI:EU:C:2012:82, para. 69.

[68] Emphasis added.

[69] Para. 146.

[70] Some of these cases include C-441/17, *Commission* v. *Poland (Białowieża Forest)*, ECLI:EU:C:2018:255; C-387/15 and C-388/15, *Orleans and Others*, ECLI:EU:C:2016:583; C-399/14, *Grüne Liga Sachsen*, ECLI:EU:C:2016:10; C-164/17, *Grace and Sweetman*, ECLI:EU:C:2018:593; C-521/12 *T.C. Briels*, ECLI:EU:C:2014:330; C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias*, ECLI:EU:C:2012:560.

[71] Para. 147. The CJEU had previously declared this in *Commission* v. *Poland (Białowieża Forest)*, ibid., para. 189; *Orleans and Others*, ibid., para. 60.

condition for applying the derogating provision could be assessed.[72] This is because the assessment of both the imperative reasons of overriding public interest and the existence of less harmful alternatives require a weighing up against the damage caused to the site by the project in question.[73]

Because Member States can invoke the imperative reasons of overriding public interest only on the condition that compensatory measures be put in place, the Court stated that in order for the nature of the compensatory measures to be determined, the anticipated damage to the site must be precisely identified.[74] Importantly, it was apparent to the CJEU from the order for reference that the studies and hearings conducted in the course of the legislative procedure leading to the adoption of the contested measures made it possible for the national authorities to undertake an assessment that meets the requirements of Article 6(3).[75] In this sense the Court reiterated that all aspects of a project which can affect the conservation objectives of the protected sites should be identified in the light of the best scientific knowledge in the field.[76] It therefore tasked the referring court to verify, if necessary, whether the studies and hearings conducted in the context of the national legislative procedure yielded negative findings – Article 6(4) otherwise would not be considered applicable.[77]

Regarding the issue of 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), the CJEU held that such an interest is one that is both 'public' and 'overriding' and capable of justifying proceeding with a project; furthermore, the interest must be of such importance that it can be 'weighed against the Directive's objective of the conservation of natural habitats' and wild fauna and flora.[78] Before determining whether the interest of ensuring the security of electricity supply meets the foregoing conditions, the Court referred to Article 194(1)(b) TFEU as a provision which identifies security of energy supply as a fundamental objective of the EU energy policy.[79] It then concluded that the objective of ensuring the security of electricity supply in a Member State *at all times* fulfils the aforementioned conditions.[80] Thus, according to the CJEU, the objective of ensuring the security of electricity supply should *at all times* be considered an imperative reason of overriding public interest for the purposes of Article 6(4).[81]

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72 Para. 150.

73 Ibid.

74 Ibid. The Court stated this in *Commission* v. *Poland (Białowieża Forest)*, n. 70 above, para. 191; C-404/09, *Commission* v. *Spain*, ECLI:EU:C:2011:768, para. 109; *Grüne Liga Sachsen*, n. 70 above, para. 57.

75 Para. 151.

76 Para. 153. To that effect see *Commission* v. *Poland (Białowieża Forest)*, n. 70 above, para. 113; *Grace and Sweetman*, n. 70 above, para. 40.

77 Para. 154.

78 Para. 155. For the same pronouncement see *Nomarchiaki Aftodioikisi Aitoloakarnanias*, n. 70 above, para. 121.

79 Para. 156.

80 Para. 157 (emphasis added).

81 Para. 159 (emphasis added).

By giving such unwavering deference to Member State discretion in evaluating the overriding nature of the public interest at stake in cases pertaining to security of electricity supply, the CJEU effectively made the objective of ensuring the security of electricity supply an imperative reason of overriding public interest 'by default' – namely, a reason that should be considered as *a priori* capable of outweighing the interest of preserving the habitats and species protected under the Habitats Directive.

With regard to the CJEU's interpretation of the applicability of the second subparagraph of Article 6(4) (which relates to the priority species or priority habitat types potentially affected by the measures at issue), the Court held that only the need *to nullify a genuine and serious* threat of rupture of a Member State's electricity supply constitutes a *public security*[82] ground within the meaning of that provision, such as to justify proceeding with the project.[83] Interestingly, although the BCC had noted and AG Kokott had confirmed that some of the protected areas likely to be affected by the project host priority habitat types or priority species,[84] the CJEU did not address this further and left it for the national court to establish whether the protected site likely to be affected by the project hosts a priority natural habitat type or priority species.[85] If so, this finding would activate the provisions of the second subparagraph of Article 6(4) and thus significantly shorten the list of 'imperative reasons of overriding public interest' that can justify proceeding with the project in question.

Regrettably, the CJEU did not provide further guidance to the national court, or other relevant national authorities, on how to proceed when determining the presence of a *genuine and serious threat* to the security of their Member State's electricity supply. The absence of any parameters to guide the national authorities could lead to arbitrary determinations and decisions concerning the existence of a genuine and serious threat to the security of a Member State's electricity supply.

Finally, in her Opinion in *Inter-Environnement Wallonie ASBL*, AG Kokott offered a unique take on the 'security of electricity supply' exemption as a public security ground within the meaning of Article 6(4). In AG Kokott's view, public security may be invoked as an imperative reason for overriding public interest only for the purposes of *ensuring a minimum supply* as opposed to the general need to ensure sufficient

[82] Emphasis added. Although Art. 6(4) uses the term 'public safety', here the CJEU uses 'public security' as synonymous with 'public safety', as does AG Kokott in her Opinion (paras 186, 188, 189, 190).

[83] Para. 158. As concerns the 'security of electricity supply' qualifying as public security grounds for the purposes of Art. 6(4), the Court was faced with a similar issue in *Commission* v. *Spain*, n. 74 above. The case involved the operation of open-cast coal mines authorized by the Spanish authorities, located in or in the immediate vicinity of protected habitats where, inter alia, species of brown bear and subspecies of capercaillie are present (ibid., paras 25–7). As the brown bear is a priority species, the issue was brought within the ambit of the second subparagraph of Art.6(4) (ibid., para. 194). Spain justified proceeding with the mining operations by invoking '*security of supply*, the maintenance of employment and the definitive character of the authorizations, and proposals for measures to improve the habitat of the brown bear' as imperative reasons of major public interest (ibid., para. 193, emphasis added). In contrast to *Inter-Environnement Wallonie ASBL*, the Court did not view any of the considerations raised by Spain, including that relating to security of supply, as falling within the 'public safety' derogation provided in Art. 6(4) (ibid., paras 193–5).

[84] AG Kokott Opinion, paras 24–6, 191.

[85] Para. 159.

supply to satisfy the Member State's electricity demand.[86] AG Kokott emphasized that the distinction between the general interest in ensuring the security of electricity supply and the particular interest in securing a minimum supply is an especially important distinction.[87] In this vein she held that the BCC (the referring court) must consider whether the extension of operation of the Doel 1 and Doel 2 power stations only serves the general interest in ensuring the security of supply or whether it is in fact necessary to guarantee a minimum supply.[88] If the former, AG Kokott stated that reliance on Article 6(4) of the Habitats Directive would be possible only following a favourable opinion from the Commission.[89] She deemed the foregoing distinction to be essential in determining the 'absence of alternative solutions' – namely, the existence of less harmful alternatives to the project – as a derogation requirement under the first subparagraph of Article 6(4).[90] In this respect AG Kokott argued that the assessment of the absence of alternative solutions may differ depending on whether 'the *more substantial interest* in *ensuring a minimum supply* or the *less substantial general interest* in security of supply' is at stake.[91]

Although formulated differently, the respective lines of reasoning offered by the CJEU and AG Kokott regarding the applicability of the energy security exemption within the context of Article 6(4) of the Habitats Directive effectively achieve the same end result: while the CJEU held that reliance on the energy security exemption is contingent on *the need to nullify a genuine and serious threat of rupture* of a Member State's electricity supply, AG Kokott considered the triggering of the exemption as a public security ground to be conditional on a Member State's inability to otherwise ensure a *minimum electricity supply* within its territory.

6. CONCLUSION

The CJEU exceptionally allowed the national court to suspend the effects of the ruling and maintain the effects of the Belgian measures, which, as the Court stated, had been adopted 'in breach of the obligations laid down by the EIA Directive and the Habitats Directive'.[92] Maintaining the effects of those measures was considered justified in the light of the overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State, one that cannot be remedied by any other means or alternative.[93] Furthermore, the CJEU held that the

[86] AG Kokott Opinion, paras 186 and 188 (emphasis added).
[87] Ibid., para. 189.
[88] Ibid., para. 191.
[89] Ibid., para. 191. Interestingly, the CJEU did not follow this up in the judgment.
[90] Ibid., para. 192.
[91] Ibid., para. 192 (emphasis added). While acknowledging the prerogative of Member States to take steps to ensure the minimum supply in their territory, AG Kokott suggested that it would not be unreasonable to refer the Member States, in pursuing 'the *general interest* in security of supply, to the possibility of importing electrical energy' (ibid., para. 193 (emphasis added)).
[92] Para. 182.
[93] Ibid.

effects of the measures should be maintained for as long as strictly necessary to remedy the breach.[94]

On 5 March 2020, the BCC delivered its judgment in the proceedings between the two Belgian environmental protection associations (Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL) and the Council of Ministers.[95] The BCC annulled the 2015 Law, which provided for the extension of operation of the Doel 1 and Doel 2 nuclear power stations. In order to prevent the occurrence of a real and serious threat of disruption to Belgium's electricity supply and allow the national legislature to complete a new legislative procedure that would comply with the requirements for a prior EIA, public participation and cross-border consultation, the Court ruled that the effects of the annulled 2015 Law would be maintained for a time period strictly necessary to remedy the breach (until 31 December 2022 at the latest).[96]

The BCC held that ensuring the security of the electricity supply as an imperative reason of general interest was the main objective of the 2015 Law.[97] Surveying the current state of Belgium's capacities for electricity production (those of nuclear origin and others), the BCC found that any threat of disruption to its electricity supply could not be offset by any means other than those already employed.[98] The BCC accepted the reality of the risk of a threat to the security of the country's electricity supply, acknowledging that such a threat would increase in the event of an immediate shutdown of electricity production from the Doel 1 and Doel 2 nuclear power stations.[99] In order to further substantiate the seriousness of the threat, the BCC considered the option of importing electricity to secure Belgium's electricity supply,[100] but found this option to be 'limited' given the scope and potential of the existing energy links between Belgium and neighbouring countries.[101] The fact that there had not yet been any recorded disruption to the electricity supply did not affect the findings of the BCC concerning the reality and gravity of the threat.[102]

The BCC judgment closely follows the preliminary ruling of the CJEU, which fully endorsed Member States' discretion to determine whether a threat to the security of their electricity supply is both genuine and serious, and thereafter decide on the

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94 Ibid.

95 Constitutional Court of Belgium (Cour constitutionnelle), Arrêt n° 34/2020 du 5 mars 2020 en cause: Le recours en annulation de la 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 », introduit par l'ASBL « Inter-Environnement Wallonie » et l'ASBL « Bond Beter Leefmilieu Vlaanderen », available at: https://www.const-court.be/public/f/2020/2020-034f.pdf (in French).

96 Constitutional Court of Belgium judgment, Sections B.32(2) and B.33(1).

97 Section B.30(1).

98 Section B.31(1) (referring to para. 182 of the *Inter-Environnement Wallonie ASBL* judgment).

99 Section B.31(1).

100 While this possibility was not explored by the CJEU, it was indeed suggested by AG Kokott (para. 193, and see n. 91 above).

101 Section B.31(4). The Belgian Constitutional Court pointed out that several neighbouring countries had already decided or planned to close their nuclear and/or coal-fired power plants, thereby limiting their capacity to export electricity.

102 Section B.32(1).

necessary steps to counteract it. At the same time the CJEU provided little to substantiate the broad nature of this endorsement, failing to address the tension between energy security and environmental protection in the context of the present case. Moreover, while the CJEU judgment provides a well-sustained analysis of the procedural aspects of the case as far as the application of the Habitats Directive is concerned, the Court failed to take into account adequately some of its more compelling substantive aspects – namely, that damage to the protected habitats and species concerned *is likely to occur* as a result of the extended operation of the nuclear power stations. The CJEU did not expand on the issue of the damage that would occur, but instead simply reverted to an oft-repeated pronouncement from its previous case law which requires that the damage to the site concerned be precisely identified *prior* to the adoption of the compensatory measures.[103]

Notwithstanding the unquestionable merit of the arguments advanced in support of the energy security exemption, it is striking how, upon inspecting whether the conditions of the second subparagraph of Article 6(4) of the Habitats Directive had been met, the CJEU did not feel compelled to elaborate further on the second cumulative condition of the first subparagraph of Article 6(4). The foregoing relates to the duty of Member States to *take all the compensatory measures necessary* to ensure that the overall coherence of the Natura 2000 network is protected and thereafter inform the Commission of the measures adopted. With the issue of compensatory measures central to the application of Article 6(4),[104] the CJEU regrettably neglected to provide any guidance as to the nature and scope of the compensatory measures which can be adopted in order to offset the likely negative effects on biodiversity. Equally the BCC did not devote attention to the possible nature and scope of the compensatory measures.[105] This is highly problematic given that finding adequate compensatory measures will be a critical task for the Belgian authorities during the period preceding the adoption of the new law on the extension of operation of the Doel 1 and Doel 2 nuclear power stations. In the absence of any such guidance, the question remains

[103] *Inter-Environnement Wallonie ASBL*, paras 148, 150. Prior to this effect, see *Commission* v. *Poland (Białowieża Forest)*, n. 70 above, para. 191; *Commission* v. *Spain*, n. 74 above, para. 109; *Grüne Liga Sachsen*, n. 70 above, para. 57.

[104] The European Commission Notice 'Managing Natura 2000 Sites: The Provisions of Article 6 of the Habitats Directive' (2019/C 33/01) is a guidance document which details the steps necessary for a correct application of Art. 6 Habitats Directive, including the requirements on the general content of compensatory measures and the criteria to be followed for their design and adoption (pp. 38–53). Equally, for a more extensive scholarly discussion of the nature of the Art. 6(4) compensatory measures as instruments for offsetting biodiversity loss see D. McGillivray, 'Compensating Biodiversity Loss: The EU Commission's Approach to Compensation under Article 6 of the Habitats Directive' (2012) 24(3) *Journal of Environmental Law*, pp. 431–9; C. Bonneuil, 'Tell Me Where You Come From, I Will Tell You Who You Are: A Genealogy of Biodiversity Offsetting Mechanism in Historical Context' (2015) 192 *Biological Conservation*, pp. 485–91; R. Clutten & I. Tafur, 'Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception', in G. Jones (ed.), *The Habitats Directive: A Developer's Obstacle Course* (Hart, 2012); R. Lapeyre, G. Froger & M. Hrabanski, 'Biodiversity Offsets as Market-Based Instruments for Ecosystem Services? From Discourse to Practices' (2015) 15 *Ecosystem Services*, pp. 125–33.

[105] Constitutional Court of Belgium judgment, n. 95 above, Section B.23(1).

unclear about the types of compensatory measure the Belgian authorities will ultimately decide to implement and whether these will be fit for purpose.[106]

The above analysis demonstrates that once a project related to ensuring the security of a Member State's electricity supply passes the 'genuine and serious threat of rupture' test, the Member State is effectively given a *carte blanche* to rely on the 'security of electricity supply' exemption. Doubtless, the CJEU judgment in *Inter-Environnement Wallonie ASBL* cements the 'imperative' and 'overriding' nature of the objective of ensuring the security of electricity supply, including the right of Member States to determine the conditions for exploiting their energy resources and choose the general structure of their energy supply, as these flow from Article 194 TFEU.[107] Construed in this way, the former considerations arguably take precedence over the objectives of EU environmental policy and the duty to achieve a high level of environmental protection, enshrined in Article 191 TFEU. With the risk of experiencing a grave and serious threat to the security of their electricity supply being a real predicament for Member States, the intention of the CJEU in this judgment was to give adequate weight to the 'security of electricity supply' exemption – provided that the exemption is framed in accordance with the relevant environmental protection requirements. Such an approach allows for a win-win scenario for both the objective of ensuring security of electricity supply and the environmental protection objective. Still, given the shortcomings in the CJEU's reasoning identified above, and pending the future steps to be taken at the national level, in this particular case it may be that security of electricity supply wins 'a little bit more'.

[106] On the effectiveness of compensatory measures and whether loss of habitat can ever be fully offset, see R. Morris et al., 'The Creation of Compensatory Habitat: Can It Secure Sustainable Development?' (2006) 14(2) *Journal of Nature Conservation*, pp. 106–16; J. Salzman & J.B. Ruhl, 'Currencies and the Commodification of Environmental Law' (2000) 53(3) *Stanford Law Review*, pp. 607–94.

[107] AG Kokott elevates it to a 'fundamental right under Article 194(2) TFEU [for Member States] to determine themselves the choice between different energy sources and the general structure of their energy supply' (AG Kokott Opinion, para. 184).