CASE LAW

Belgium

Ruling by the Court of First Instance in Brussels, 3 September 2020, regarding Tihange 2

In 2016, a claim was introduced before the Court of First Instance in Brussels (Nederlandstalige rechtbank van eerste aanleg te Brussel) by several private persons and local governments from Germany, Luxembourg and the Netherlands against the Federal Agency for Nuclear Control (FANC), the Belgian State and the operator (Electrabel, the Belgian unit of the French utility Engie). The claim was based on FANC's 17 November 2015 decision allowing Tihange 2 to restart after hydrogen flakes were discovered in the reactor vessel in 2012 while the unit was shut down for periodic maintenance.

After the discovery, Tihange 2 was not allowed to restart. FANC determined that the operator had to provide the necessary evidence that the safety of the reactor vessel could be guaranteed. The operator provided a substantive safety case, which was then thoroughly examined by the FANC and additional teams composed of national and international experts. Based on all available information and analyses, the examination provided sufficient certainty that the presence of the hydrogen flakes did not pose an unacceptable impact on the safety of Tihange 2. The FANC then decided, after three years, that Tihange 2 could be restarted on 17 November 2015.

The plaintiffs sued the FANC on the basis of its civil liability. In their reasoning, the FANC's decision to restart was made based on an insufficient examination and was without due consideration for the possible consequences of the unsafe operation of Tihange 2 caused by the presence of the hydrogen flakes. The plaintiffs also contended that the FANC had not acted in a transparent way and had intentionally withheld information from the public with regard to the examinations of the safety case. They claimed to be suffering damage caused by the operation of Tihange 2, which among others was the claim of a psychological burden due to the constant fear of an imminent severe accident because of the presence of the hydrogen flakes.

On the 3 September 2020, the court ruled in favour of the FANC. In the first place, the court found that the plaintiffs had a sufficient legal interest. The court found there to be a personal interest in the proceedings for the private persons. The public persons also provided for a demonstrable interest in the linkage with a possible impact on their assets and reputations. For the involved non-governmental organisation (NGO), the court referred to the existing case law of the Court of Justice of the European Union[1] stating that NGOs, with a goal aimed at environmental protection, should have the opportunity to challenge before a court a decision taken following administrative proceedings liable to be contrary to environmental law.

Secondly, after the finding of sufficient legal interest of the plaintiffs, the court analysed whether the FANC acted as a diligent regulator when examining and evaluating the hydrogen flakes situation and ultimately when deciding that Tihange 2 could be restarted

1. Judgment of the Court (Grand Chamber) of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, C-240/09. EU:C:2011:125.

with no impact on nuclear safety. In its ruling, the court stated that based on all the presented evidence, the FANC had acted as a diligent regulator. The court's decision stated clearly that the FANC had acted immediately after the discovery in 2012 and consequently had taken every possible measure to ensure that a thorough examination, by itself and by other national and international experts, of the impact of the presence of the hydrogen flakes on the safety of the reactor vessel was done. Moreover, the court confirmed that no legal framework exists (national or international) with regard to the phenomena of hydrogen flakes and nothing excludes the safe operation of a reactor vessel in this case. The plaintiffs did not provide any argument to convince the court of the contrary.

Furthermore, the court found that the FANC had communicated to the public in an open and transparent way about the case by providing a specific page on its website (where all the necessary reports and opinions were available) and giving regular updates as well as press releases about the situation.

In concluding, the court said that no there could be no accountability of FANC as it was clear that the FANC had acted as a diligent regulator and that the decision of 17 November 2015 did not put economic or other interests above the safety of the public.

Japan

Request for injunction against prior consent to restart nuclear power plant

After the Fukushima Daiichi nuclear power plant accident, many legal cases were brought by residents living near nuclear power plants demanding an injunction against plant operations.[2] Their main concern was the safety of the nuclear reactors in the event of an earthquake or volcanic activity. Until recently, residents often pursued deficiencies in reactor safety against nuclear operators in the case of injunctions based on personal rights. But, in a recent case, a local government's prior consent to restarting a nuclear power plant became an issue. In this case, the residents tried to prevent the reactor's restart by blocking the local government's prior consent. Thus, it can be inferred that there are more ways to request injunctions against reactor operations than in the past.

1. The Japanese system in this case

- 1.1 Two prior consent procedures related to reactor restart

In operating a nuclear power plant, it is essential that the operator obtains the understanding of the local residents and in particular the local government that represents them. Two types of prior consent procedures are followed (collectively referred to as "this consent").

The first procedure is consent based on nuclear safety agreements. In this, the local government in the area where a nuclear power plant is sited enters into a "Nuclear Power Safety Agreement" with the nuclear power plant operator to ensure the safety of the plant and verify its implementation of safety measures on behalf of the local residents of the area. Since this agreement is formulated in a negotiation with the operator, it is flexible and allows for the incorporation of region-specific content. It may also include provisions that require the operator to consult with the local government and obtain consent in advance when a new reactor is to be constructed or modified.

This agreement is voluntarily entered into between the operator and the local government, and there is no requirement in the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors (Reactor Regulation Act) stipulating the

2. Recent decisions have been discussed in NEA (2020), "Update on the situation regarding preliminary injunctions against nuclear power plant operations since the Fukushima Daiichi nuclear power plant accident", *Nuclear Law Bulletin*, No. 104, OECD Publishing, Paris, pp. 10-12.

nuclear power plant's safety measures. But, there have been no cases in which operations were resumed without the prior consent of the local government, as operators have been effectively restrained from doing so.

The second consent procedure is based on an expression of understanding and consent to the restart to the Minister of Economy, Trade and Industry (METI). With Japan's Basic Energy Plan,[3] nuclear power plant safety is left to the Nuclear Regulation Authority's (NRA) determination. The Plan stipulates that the government will follow the NRA's judgment and proceed with the restart of the nuclear power plants when the NRA confirms that the nuclear power plants have abided by all the new regulatory requirements. In addition, the central government will make best efforts to obtain the understanding and co-operation of the host municipalities and other relevant parties. Specifically, to restart a nuclear power plant, METI requires the local governments to find the idea suitable and give its consent. If the local government consents to the nuclear power plant's restart, it must do so expressly.

- 1.2 Injunction requests for infringement of personal rights

Affected individual may seek an injunction against the infringing act based on their personal rights.

2. *Case summary*

In this particular case, based on their personal rights, residents living near the Onagawa nuclear power plant, which is owned by Tohoku Electric Power Co., Inc. (Tohoku EPCO), sought a preliminary injunction against the restarting of nuclear power plant operations by its prefectural governors. The residents claimed that:

- consent is an indispensable condition of restart;
- if any serious accident should occur on restart, residents will be at the risk of serious injury or hazard;
- procedures other than this consent are mere formalities and this consent, which is the most crucial condition for restart, poses a threat to the lives and health of residents as well as the operation of the nuclear reactor itself.

However, on 6 July 2020, the Sendai District Court rejected the petition, saying that there were no specific hazards of infringement on personal rights as claimed by the residents.[4]

3. *The court's decision*

In this case, the main issue was whether there was a tangible danger to the residents due to the consent to restart. As mentioned, consent is not a legal procedure necessary for reactor restart. Even if Tohoku EPCO determines in fact the restart supposing this consent, the restart decision ultimately rests with the entity that established the nuclear power plant.

In addition, besides consent, there are procedural regulations that the NRA must carry out in the form of safety examinations, as stipulated by the Reactor Regulation Act. Residents, however, have not presented *prima facie* evidence that these regulations are a mere formality. Furthermore, as Tohoku EPCO has not completed the legal procedures required for restarting, it is clear that the restart will take another two years or more. Accordingly, it cannot be said that the Onagawa nuclear power plant will immediately restart operations based on this consent, and thus the consent *per se* is not an instrument causing the specific hazard of releasing radioactive materials.

3. The Basic Energy Plan is a "basic plan for energy supply and demand" based on Article 12(1) of the Basic Energy Policy Act established by the government "to encourage long-term, comprehensive and systematic promotion of energy supply and demand measures".
4. In response to this, residents immediately filed an appeal with the Sendai High Court on 10 July 2020.

Based on the above, it cannot be said that if this consent is not suspended there is risk of significant danger to the residents, and thus an injunction against the consent is not warranted. As such, with regards to the allegations, *prima facie* evidence of infringement on personal rights or the need to suspend this consent was not presented, and thus the court saw no reason to suspend the consent. Therefore, all claims in this case were rejected.

European Union

Court judgment in Austria v. Commission, in Case C-594/18 P (Hinkley Point C)

On 22 October 2013, the United Kingdom of Great Britain and Northern Ireland notified measures in support of the Hinkley Point C nuclear power station (Hinkley Point C). After a formal investigation procedure launched on 18 December 2013, the European Commission adopted on 8 October 2014 a decision declaring the state aid compatible ("the Commission's Decision"). Austria challenged the Commission's decision before the General Court of the European Union. It considered that supporting nuclear energy was not an objective of common interest as it went against certain environmental objectives or principles. It also challenged the assessment made by the Commission of the necessity and proportionality of the measure.

With its judgment of 12 July 2018 in case T 356/15, the General Court dismissed all the arguments put forward by Austria and maintained the Commission's decision. It notably concluded that the Commission was right in considering that the measures to support Hinkley Point C were necessary to fulfil the objective of public interest of promotion of nuclear energy set out in the Euratom Treaty.

Austria appealed the General Court judgment to the Court of Justice of the European Union (CJEU). All intervening member states at first instance also participated in the procedure before the CJEU: Luxembourg in support of Austria, the Czech Republic, France, Hungary, Poland, Romania, the Slovak Republic and the United Kingdom in support of the Commission.

In May 2020, Advocate General Gerard Hogan issued his opinion proposing to the Court to dismiss Austria's action and to uphold the General Court judgment and the Commission's decision to approve the aid measures in question. In his decision, Advocate General Hogan noted that the Euratom Treaty has the same standing as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as far as the primary law of the EU is concerned and that these two treaties apply in all areas of EU law that have not been dealt with by the Euratom Treaty. He found that there is nothing in the Euratom Treaty dealing with the issue of state aid and added that he deems it appropriate that rules contained in the TFEU concerning competition and state aid should apply to the nuclear energy sector when the Euratom Treaty does not contain specific rules. The Advocate General then noted that the Euratom Treaty provisions necessarily envisage the development of nuclear power plants. He concludes that the argument advanced by Austria to the effect that those provisions of the Euratom Treaty do not cover either the building of further nuclear power plants or the replacement and modernisation of ageing plants by more modern, already developed technologies cannot be accepted.

He found further that the development of nuclear power is, as reflected in the Euratom Treaty, a clearly defined objective of EU law, and that objective cannot be subordinated to other objectives of EU law, such as the protection of the environment. Additionally, he noted that the clear words of the Treaty plainly acknowledge the right of each member state to choose between different energy sources and "the general structure of its energy supply" and that right necessarily extends to the right of each member state to develop nuclear power as part of its energy supply sources.

In the Advocate General's view, the requirement adopted by the General Court in a series of recent cases whereby any state aid approved pursuant to the TFEU must serve a common interest is not specified in the text of the relevant treaty article. It follows, therefore, that there is no requirement that the aid has to fulfil any purposes beyond those

specifically set out in the said article. According to its wording and the position of the provision in the TFEU, aid, in order to be compatible with the Treaty, neither has to pursue an "objective of common interest" nor an "objective of public interest". It only has to "facilitate the development of certain economic activities" and it must not "adversely affect trading conditions to an extent contrary to the common interest".

Advocate General Hogan noted that, in any event, by accepting the objectives of the Euratom Treaty, all member states have clearly signified their unqualified acceptance in principle of the right of other member states to develop nuclear power plants on their own territories should they wish to do so. A clearly stated Treaty objective of this kind must be capable of constituting an objective of common interest for the purposes of the application of the state aid rules.

Insofar as the analysis by the General Court is concerned, Advocate General Hogan deemed that it was fully entitled to find that there was abundant evidence before the Commission that the market was either unwilling or even incapable of coming up with finance for Hinkley Point C absent the guarantees and other forms of aid provided by the UK. He found that the General Court did not err when it concluded that the production of nuclear energy was the relevant economic activity for the purposes of state aid rules.

In September 2020, the Court rejected the appeal and confirmed the General Court judgment and the Commission decision. The Court notably stated that the Commission rightly identified the development of nuclear energy production as an economic activity, which can be supported by a state aid measure. The Court also confirmed the Commission's assessment that the aid measures adopted by the United Kingdom in support of Hinkley Point C were proportionate and did not distort trading conditions beyond the common interest.

In line with the reasoning proposed by the Advocate General, the Court also established that the compatibility of state aid under Article 107(3)(c) of the TFEU does not depend on whether the aid measure pursues an objective of common interest. In accordance with that article, state aid compatibility assessment should focus on the analysis as to whether a given aid facilitates the development of certain economic activities without adversely affect trading conditions to an extent contrary to the common interest.

The Court also stated that state aid for an economic activity falling within the nuclear energy sector cannot be declared compatible with the internal market when it is shown upon examination that it contravenes rules of EU law on the environment. Finally, the Court acknowledged that, under Article 194 TFEU, a member state is free to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, including as regards the choice of nuclear energy.