Belgium

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Section I: Multidimensionality of energy solidarity and energy security in EU and national law

Question 1

(i) *General*

It seems useful to start by defining the terms "energy solidarity" and "energy security," or at least what we understand them to mean.

Energy solidarity could be broadly described as follows:

> Energy solidarity is the expression of mutual assistance between states when one of them faces a critical energy supply disruption; it extends to deeper energy cooperation when states decide to pool their energy resources, and integrate their energy systems.[1]

Energy security is an evolving concept, and its scope is expanding and has not reached a universal definition. However, energy security is emerging as a cornerstone of energy policies and frameworks around the world, and a widely accepted definition of energy security is based on the notion of an uninterrupted energy supply. The energy becomes secure when a country has energy reserve, balanced supply and demand, and balanced energy trade.[2]

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[1] C. Banet, 'Legal mechanisms to ensure energy solidarity in international and EU law', in: C. M. Bailliet, *Research Handbook on International Solidarity and the Law*, UK: Edward Elgar Publishing, 2024, pp. 399–420.

[2] T. R. Bajracharya, S. R. Shakya and A. Sharma, 'Dynamics of energy security and its implications', in: M. Asif (ed.), *Handbook of Energy and Environmental Security*, Academic Press, 2022, pp. 13–25.

In this paper we understand and apply this concept at the level of states, in particular Belgium. "Internal" energy solidarity measures (e.g. energy poverty) are currently not the subject of this paper.

We can say with certainty that the concepts of energy solidarity and energy security, as already approximately defined, are not part of the Belgian Constitution.

Throughout the Belgian Electricity Act of 29 April 1999,[3] the concept of security of supply appears at some places. For example, the government is required by this Act to carry out a prospective study to assess the security of electricity supply. In addition, the government must monitor the country's security of supply situation on an ongoing basis, in particular with a view of the following winter period. Also, the Federal Energy Regulator (CREG) should monitor investments in generation and storage capacity from a security of supply perspective.

The concept of energy solidarity is not reflected in the Belgian Electricity Act.

(ii) *Case law*

a. *A lifetime extension of nuclear power plants and security of supply*

The concept of "security of supply" seems to return from time to time in Belgian case law. We discuss hereunder the two most prominent set of cases that relate to the concepts of security of supply.

A first good example is the appeal for annulment brought before the Constitutional Court against the Act of 28 June 2015[4] concerning the extension of the operating lives of the nuclear power plants Doel 1 and 2. By preliminary ruling of 22 June 2017,[5] the Constitutional Court referred nine preliminary questions to the Court of Justice concerning the interpretation and application of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[3] Act of 29 April 1999 on the organisation of the electricity market, *Belgian State Gazette* 11 May 1999.

[4] Act of 28 June 2015 amending the Act of 31 January 2003 on the gradual exit from nuclear energy for industrial electricity production with a view to ensuring security of supply in the field of energy, *Belgian State Gazette* 6 July 2015.

[5] Constitutional Court 22 June 2017, no. 82/2017.

In particular, the Constitutional Court asks whether the provisions of the above-mentioned conventions and directives apply to the extension of the operating life of Doel 1 and Doel 2 (nuclear power plants) and, if so, whether security of supply constitutes an overriding reason in the general interest justifying their non-application. The Court also asked whether, if the treaties and directives were applicable and if security of supply could not constitute an overriding reason in the general interest justifying a derogation from the obligations, the effects of the Act of 28 June 2015 could be maintained in order to avoid legal uncertainty.

The ECJ ruled[6] that the project required a cross-border environmental impact assessment under Directive 2011/92/EU. This assessment should have been carried out prior to the adoption of the Law of 28 June 2015. An exemption can only be granted if it can be shown that there is a reasonable likelihood of a risk to security of supply and that the project is urgent.

According to the Court, the Habitats Directive must also be interpreted in the same way and an appropriate assessment is also required.

As regards the maintenance of legal effects, the Court states that EU law does not preclude assessments from being carried out by way of regularisation. In addition, EU law must be interpreted as meaning that a national court may, if national law so permits, exceptionally maintain the effects of a measure where that measure is justified by overriding reasons relating to the need to avoid serious and real risks to security of supply which cannot be dealt with by other means and alternatives. Such enforcement may not last longer than strictly necessary.

Following the preliminary ruling of the Court of Justice, the Constitutional Court, in its judgment of 5 March 2020 No 34/2020, annulled the Law of 28 June 2015 on the grounds that it violated the principle of equality and the right to protection of a healthy environment, in conjunction with the Habitats Directive (92/43/EEC)[7] and the EIA Directive (2011/92/EU).[8] The Constitutional Court ruled that the Law of 28 June 2015 and the works necessary to carry out the life extension (the "LTO works") "together constitute one and the same 'project' within the meaning of the first indent of Article 1(2)(a) of Directive 2011/02/EU."[9] An EIA with transboundary consultation is therefore required,

[6] ECJ 29 July 2019, nr. C-411/17.

[7] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *Pb.L* 22 July 1992, no. 206, 0007-0050.

[8] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, *Pb.L.* 28 January 2012, nr. 26, pp. 1–22.

[9] Constitutional Court 22 June 2017, no. 82/2017, B.18.2.

covering both the life extension and the inextricably linked LTO works. However, in view of the real and serious risk to security of supply, the effects of the above-mentioned Act have been maintained until 31 December 2022. Such maintenance of the effects should give the Belgian State the opportunity to remedy the unconstitutionality established and to prepare a preliminary environmental impact assessment with cross-border public consultation.

Other judgments of the Constitutional Court[10] have often referred to this case law.

b. *Gas transmission pipelines and security of supply*

In a series of cases before the Council of State, the licence granted to Fluxys (the Belgian gas transmission system operator) to build gas transmission pipelines on private land in the territory of several municipalities was challenged. The Council of State rejected the appeals, taking into account, *inter alia*, the following references to the concept of elements of the security of electricity supply:

> […] Considering that the statement of reasons for the contested Royal Decree sufficiently explains why the gas transmission pipeline which it declares to be in the public interest is in the public interest; in that it states that it is intended to supply a power station whose output will be fed back into the national grid for the benefit of the entire community and will therefore contribute to increasing *the country's electricity supply*; in that it relies in that regard on various documents in the file which show, in particular, that, following the grant of the only licence for the construction and operation of the Marchienne-au-Pont TGV unit, S.A. MARCINELLE ENERGIE, at the instigation of its majority shareholder, ENEL TRADE S.P.A., has redirected the activities of this TGV unit towards the exclusive supply of electricity to consumers in the region; that this reasoning is also based on studies carried out by neutral parties specialised in this field; a CREG study of 27 September 2007 entitled "On the undercapacity of electricity production in Belgium" shows that the project in question makes it possible to limit the risk of a shortage of electricity in Belgium between 2010 and 2012, without, however, reducing it to a level considered acceptable; furthermore, the final report of the GEMIX group of 30 September 2009 entitled "What is the ideal energy mix for Belgium in 2020 and 2030?" Also included in the file is the GEMIX group's final report of September 2009 entitled "What is the ideal energy mix for Belgium in 2020 and 2030?," which highlights a worsening of the shortage of electricity production capacity in Belgium by 2020, taking into account the commissioning of the S.A. MARCINELLE ENERGIE power plant. MARCINELLE ENERGIE; that these documents show that it is in the general interest to *ensure sufficient electricity production capacity at na-*

[10] Constitutional Court 25 February 2021, no. 30/2021; Constitutional Court 14 October 2021, no. 141/2021.

> *tional level*, which must be increased in relation to current production capacity and changes in demand in order to guarantee a constant supply at reasonable prices; that the public utility of the planned pipeline is therefore justified by the public utility nature of the electricity production unit which it is intended to supply; […][11] [emphasis added]

The concept of "energy solidarity" does not yet seem to be reflected in the case law of the Belgian courts.

Question 4

For relevant case law, see Question 1 (ii).
For the purpose of this question, we will furthermore look at two very concrete examples where the concept of "security of supply" have been central, namely (i) the extension of nuclear power plants and (ii) the capacity remuneration mechanism (hereafter 'CRM').

(i) *Nuclear power plants*

Belgium currently has seven nuclear units: four units at the Doel (Flanders) nuclear power plant and three units at the Tihange (Wallonia) nuclear power plant. In 2003, after a long parliamentary debate, the Nuclear Decommissioning Act[12] was adopted. The original Act was limited in scope and consisted of ten articles regulating three aspects. First, it stipulated that no new nuclear power plant for industrial electricity generation could be built and/or put into operation. Second, it stipulated that existing power plants should be decommissioned 40 years after industrial operation. Thirdly, it provided that in the event of a threat to the security of electricity supply, the King could, after consulting the CREG (federal regulatory authority), take the necessary measures by decree, after consultation with the Council of Ministers. The CREG's opinion must relate to the impact of the evolution of production prices on security of supply.

Much of the parliamentary and public debate concerned the impact of the closure of nuclear power plants on security of supply. The issue of security of supply continues to dominate the debate and, 20 years after the law was passed, has already led to the life extension of the three oldest nuclear units, which were the first to be closed. In 2022, the complete phase-out of nuclear power in 2025 came under fire again. On 31 October 2021, the federal govern-

[11] Council of State 27 March 2014, nr. 226.902; Council of State 27 March 2014, nr. 226.904; Council of State 26 June 2014, nr. 227.913; Council of State 26 June 2014, nr. 227.914.

[12] Act of 31 January 2003 phasing out nuclear energy for industrial production, *Belgian State Gazette* 28 February 2003.

ment was informed of the evaluation report of the Directorate-General for Energy, which included the results of the CRM auction (see (ii)).[13] According to this report, security of supply for 2025–2026 would be guaranteed if all the capacities selected in the CRM auction were available. The two new gas power plants (Awirs and Vilvoorde) were considered essential in the context of this evaluation.

At the end of December 2021, in view of the uncertain licensing path for the two new CRM gas plants, the Directorate-General for Energy of the Federal Public Service Economy and the Federal Agency for Nuclear Control (hereafter 'FANC') were asked to carry out an analysis of the extension of the life of Doel 4 and Tihange 3, including the so-called activation of Plan B.[14] According to the analysis of the Directorate-General for Energy and the Federal Public Service Economy, the long-term extension of the life of Doel 4 and Tihange 3, including the so-called activation of Plan B, was not feasible. According to both bodies, the long-term decommissioning of Doel 4 and Tihange 3 is possible under the following conditions, which must be fulfilled in chronological order: (i) the government decides in favour of the long-term exploitation of Doel 4 and Tihange 3, (ii) Engie Electrabel is willing to make the necessary investments, and (iii) the FANC considers that safe operation is technically and legally possible.

On 18 March 2022, the federal government announced that it would nevertheless take the necessary steps to extend the life of the Doel 4 and Tihange 3 reactors until 2035.[15] By extending the operation of the youngest nuclear reactors by 10 years,[16] the federal government aims to ensure *energy security* beyond 2025. To this end, a law[17] amending the law of 31 January 2003 on the phasing-out of nuclear energy for industrial electricity production was adopted on 11 October 2022. The purpose of this law is to authorise the operation of the Doel 4 and Tihange 3 nuclear reactors for the next 10 years, taking into account the results of the environmental impact assessment, the public consultation, the consultation of the competent authorities and the cross-border consultations.

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[13] See AD Energy Administration evaluation report: *First CRM auction: evaluation report on security of supply and impact on electricity prices*, 30 November 2021, accessible at https://economie.fgov.be/sites/default/files/Files/Energy/Report-in-supply-security-affordability-and-sustainability.pdf

[14] See FANC, 'Listing and analysis of necessary actions for activation Plan B. Long-term Operation Doel 4 & Tihange 3', 17 January 2022, pp. 1–13, consultable at https://fanc.fgov.be/nl/system/fi les/2022-01-17_fanc-report_action-points_lto_d4_t3_en.pdf

[15] It concerns an extension of 2 GW of nuclear capacity.

[16] Also called Long Term Operation or LTO. This abbreviation is usually used as a reference for a project to extend the life of a nuclear reactor.

[17] Act of 11 October 2022 amending the Act of 31 January 2003 on the phasing-out of nuclear energy for industrial electricity production, *Belgian State Gazette* 3 November 2022.

On 9 January 2023, the federal government and ENGIE Electrabel signed a head of terms agreement providing for the restart of the Doel 4 and Tihange 3 nuclear power plants by November 2026 in order to maintain a nuclear generation capacity of 2 gigawatts for another 10 years. Following interim steps on 29 June 2023 ("Updated Head of Terms") and 21 July 2023 ("Framework Agreement"), this led to a binding agreement on 13 December 2023[18] to extend the operating life of the nuclear reactors concerned. The main elements of this agreement are contained in the Act of 26 April 2024 amending the Act of 31 January 2003 on the gradual phasing-out of nuclear energy for industrial electricity production.[19]

(ii) *CRM*

Another example of legislation based on the concept of "security of supply" is the already mentioned CRM legislation. The main purpose of the CRM is to facilitate the phase-out of nuclear power. Indeed, the planned closure of nuclear power plants by the end of 2025 requires a significant amount of additional generation capacity, which is mainly expected to come from the construction of new (flexible) gas-fired power plants. The CRM should make investment in such gas-fired power plants (as well as in other forms of flexibility) attractive again.

The introduction of the CRM was already announced in the Interfederal Energy Pact of 11 December 2017 (p. 9): "During the nuclear phase-out period (2022-2025), a support mechanism will be introduced. Its objective is to facilitate the construction or extension of the operation of gas-fired power plants with a total capacity in the order of 5 GW (excluding cogeneration)." The principle of the CRM was finally adopted by the Act of 22 April 2019.[20] The Act of 15 March 2021 gave the CRM its final form in Article 7 *undecies* of the Electricity Act of 29 April 1999.

The CRM is based on a system of "reliability options." Specifically, two types of subsidy tenders are organised: one four years before the planned delivery year (T-4) "to give suppliers of new capacity sufficient time to participate and compete effectively with other capacity" and one year before (T-1) "to refine sufficient capacity."[21] The main criterion is the need for subsidy of the candidate capacity suppliers. The selected capacity suppliers conclude a capacity contract with the transmission system operator. Under this contract, the

[18] See: https://economie.fgov.be/nl/themas/energie/bronnen-en-dragers-van-energie/kernenergie/verlenging-van-de-levensduur

[19] *Belgian State Gazette* 5 June 2024.

[20] Act 22 April 2019 amending the Act of 29 April 1999 on the organisation of the electricity market to establish a capacity compensation mechanism, *Belgian State Gazette* 16 May 2019.

[21] *Parl.St.* Kamer 2018-19, nr. 54-3584/001, 25.

selected capacity supplier is entitled to a fixed fee per MW per year (determined by the outcome of the tender). In addition, the capacity supplier in question will also receive income from the sale of the electricity it produces on the regular market. The duration of the capacity contract (and thus the fixed annual fee) depends on whether or not certain investment thresholds are reached.

However, the essential feature of a system based on reliability options is the capacity provider's repayment obligation if the day-ahead market price for electricity ("reference price") rises above a predetermined strike price, in order to avoid windfall profits. This repayment obligation applies whether or not the electricity was actually produced and sold by the capacity provider. In particular, this creates a natural incentive for the capacity supplier to produce when the market price is high (implying high demand) and thus contribute to security of supply.

Section II: Energy solidarity, energy security and green transition

Question 4

The Just Transition Fund is the first pillar of the Just Transition Mechanism. The Commission provides support to Member States having identified the territories expected to be the most negatively impacted by the transition towards climate-neutrality. The Just Transition Fund supports the economic diversification and reconversion of the territories concerned. This means (i) up- and reskilling of workers, (ii) investments in Small and Medium-sized Enterprises, (iii) creation of new firms, (iv) research and innovation, (v) environmental rehabilitation, (vi) clean energy, (vii) job-search assistance, (viii) transformation of existing carbon-intensive installations.

This EU funding only supported Wallonia, one of the three Belgian regions, to transition away from fossil fuels and heavy industry. Flanders and Brussels did not receive any funding.[22] The European Commission has set a number of criteria to determine which regions are eligible for money from the Transition Fund. One of the criteria takes into account the carbon emissions of industry, but also the "gross value added" of that industry. Based upon these criteria, it was decided that Wallonia would receive the available funds.

[22] European Commission, 'EU Cohesion Policy: Almost €183 million for a just climate transition in Belgium', 21 December 2022, https://ec.europa.eu/regional_policy/whats-new/newsroom/21-12-2022-eu-cohesion-policy-almost-eur183-million-for-a-just-climate-transition-in-belgium_en#:~:text=The%20Commission%20has%20adopted%20the,a%20fair%20climate%20transition%20in

Tournai, Mons, and Charleroi will receive JTF support to move towards clean energy production, namely by the replacement of fossil fuels by renewable hydrogen and biomethane.[23] As much as €40 million will be dedicated to renewable energy, and about €68 million to energy efficiency. Decarbonisation of the regional industry will also be supported, with grants to co-finance investments for their economic reconversion and the purchase of related high-performing technological materials. It will also contribute to the decontamination of former industrial sites, which will then be suitable for new economic settlements while also avoiding further soil consumption. Furthermore, the Fund will allocate around €14 million for research and innovation activities.

Section III: The EU's crisis management in the field of energy and its limits

In response to the energy crisis, in 2022, the EU has significantly enhanced its legal toolbox of crisis management measures. In particular, Article 122(1) TFEU has become one of the most widely used legal bases ensuring the Union's reactivity and resilience. **Did the use of this legal basis raise any concerns or reaction in the legal order in your Member State?**

An annulment appeal was filed before the Belgian Constitutional Court against the law 16 December 2022 "establishing a temporary solidarity contribution by the oil sector."[24] This law introduces a temporary solidarity contribution for 1) registered petroleum companies operating in the refining sector and having refining capacity in Belgium, and 2) registered petroleum companies designated as primary participants for diesel, gas oil and petrol products in the year 2022. With this solidarity contribution, the legislator wants the energy companies that have benefited from excess profits due to the energy crisis and price increases since the beginning of 2022 to contribute, and this in support of households suffering from the consequences of the crisis and facing high prices. With the temporary solidarity contribution, the legislator aims to partially implement Regulation (EU) 2022/18541,[25] which was based on Article 122(1) TFEU.

Before ruling on the substance of the remaining pleas of the applicants, the Court considers it necessary to refer nine questions to the Court of Justice of the European Union (C-358/24) for a preliminary ruling.

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[23] See the full list of projects: https://europe.wallonie.be/sites/default/files/2024-01/Liste%20projets%20FTJ.pdf

[24] *Belgian State Gazette* 22 December 2022.

[25] Council Regulation (EU) 2022/1854 of 6 October 2022 "on emergency intervention in response to high energy prices."

The Constitutional Court first questions the Court of Justice of the European Union on the validity of the provisions of Regulation (EU) 2022/1854 relating to the temporary solidarity contribution, in so far as they were adopted on the basis of Article 122(1) of the Treaty on the Functioning of the European Union, which empowers the Council to adopt measures appropriate to the economic situation (first preliminary question).

If those provisions of Regulation (EU) 2022/1854 are valid, the Court then wishes to know whether the temporary solidarity contribution introduced by the Law of 16 December 2022 constitutes an "equivalent national measure" within the meaning of Regulation (EU) 2022/1854 (second question referred for a preliminary ruling). In the event of an affirmative answer to the first two questions referred for a preliminary ruling, the Court asks three questions concerning the conformity of provisions of Regulation (EU) 2022/1854 with primary European Union law. Specifically, the Court wishes to know whether the Regulation:

- infringes the principle of equality and non-discrimination (Articles 20 and 21 of the Charter of Fundamental Rights of the European Union) in so far as it permits the adoption of a national measure applicable both to registered petroleum companies operating in the crude oil and refining sectors and in the distribution sector and to the extent that it permits the adoption of a national measure applicable to the registered oil companies designated as primary participants in the year 2022 for diesel, gas oil and petrol products, while that measure does not apply to non-primary participants, to primary participants for other product categories, such as lamp oil and paraffin, nor to the companies operating in the coal and natural gas sectors (third preliminary question);
- the freedom to choose an occupation and the right to work, the freedom to conduct a business, the right to property (Articles 15, 16 and 17 of the Charter of Fundamental Rights of the European Union) as well as the freedom of establishment and the free movement of services (Articles 49 and 56 of the Treaty on the Functioning of the European Union), in so far as it authorises a national measure which fixes the amount of the temporary solidarity contribution on the basis of a flat-rate amount per cubic metre of products released for consumption between 1 January 2022 and 31 December 2023 (seventh preliminary question);
- infringes the general principle of legal certainty and the non-retroactivity of laws by allowing the amount of the contribution to be calculated on the products released for consumption between 1 January 2022 and 31 December 2023, whereas the regulation and the law did not enter into force until 8 October 2022 and 22 December 2022 respectively (eighth preliminary question).

In addition, the Court asks whether the temporary solidarity contribution from the law of 16 December 2022:

– constitutes a prohibited tax of equivalent effect to a customs duty (fourth preliminary question);
– constitutes a discriminatory domestic tax (fifth preliminary question);
– constitutes new state aid that had to be notified to the European Commission (sixth preliminary question).

Finally, the Court asks whether it could definitively uphold the effects of the law if, on the basis of the answers provided by the Court of Justice of the European Union, it were to conclude that the contested law violates European law in order to avoid budgetary difficulties and enable the objectives of Regulation (EU) 2022/1854 to be achieved (ninth preliminary question).