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Compliance of radioactive waste repository with the French Constitution: The Constitutional Council takes a stand

The French Constitutional Council received an application from the *Conseil d'État* (French Administrative Supreme Court) for a preliminary ruling on the issue of constitutionality relating to the conformity of Article L. 542-10-1 of the French Environmental Code, in its version resulting from Law No. 2016-1015 of July 25, 2006, specifying the terms and conditions for the creation of a reversible deep geological repository for long-lived high- and intermediate-level radioactive waste (the Cigéo project) with the rights and freedoms guaranteed by the French Constitution.

In a decision handed down on October 27, 2023, the French Constitutional Council, while recognizing that the legislator must ensure that choices intended to meet current needs do not compromise the ability of future generations and other peoples to meet their own needs, by preserving their freedom of choice in

this respect, concluded that the Cigéo project does not infringe the rights of future generations^[1].

The application

The question of the constitutionality of Article L. 542-10-1 of the French Environmental Code, which regulates this repository, was raised by the *Meuse Nature Environnement* association, along with numerous other organizations, in an appeal lodged against Decree of July 7, 2022 declaring Cigéo to be of public interest.

Article L. 542-10-1 of the French Environmental Code sets out the rules applicable to the creation and operation of a deep geological repository for radioactive waste.

The challenged provisions of this Article stipulate that the storage of radioactive waste in such a facility is subject to a requirement of reversibility, to be implemented according to precise terms and conditions and for a minimum period of time.

The applicants criticized these provisions for not guaranteeing the reversibility of deep geological storage of radioactive waste beyond a period of one hundred years, thereby preventing future generations from being able to reconsider this choice while the resulting irremediable damage to the environment, and in particular to water resources, could compromise their ability to meet their needs.

In their view, these provisions infringed the right of future generations to live in a balanced environment that respects their health, a principle of solidarity between generations, and a principle of fraternity between generations.

The principle: Not to compromise the ability of future generations to meet their own needs

In its October 23, 2023 decision, the Constitutional Council recalled that, pursuant to Article 1 of the French Environmental Charter, *“Everyone has the right to live in a balanced environment which shows due respect for health”*.

According to recital 7 of the French Environmental Charter, *“in order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs”*.

The Constitutional Council ruled that it follows from Article 1 of the French Environmental Charter, clarified by its recital 7, that *“when adopting measures likely to have a serious and lasting effect on a balanced environment that shows due respect for health, the legislator must ensure that the choices made to meet current needs do not compromise the ability of future generations and other peoples to meet their own needs, while preserving their freedom of choice in this respect”*.

It further added that *“Limitations imposed by the legislator on the exercise of the right to live in a balanced environment that shows due respect for health must be linked to constitutional requirements or justified on grounds of public interest and proportionate to the pursued objective.”*

This was in line with two previous decisions handed down on January 31, 2020 and August 12, 2022.

In the first decision that concerned the production of plant protection products containing active substances banned in the European Union, the Constitutional Council had held that that protection of the environment, the common heritage of all mankind, constituted an objective of constitutional value. It inferred therefrom that the legislator had to consider the effects that the activities carried out in France could have on the environment outside of France.

In the second decision, the Constitutional Council had extended the scope of the human right to the environment, and held that preservation of the environment should *“be pursued in the same way as the other fundamental interests of the Nation”* and that the choices made in responding to current needs *“must not compromise the ability of future generations and other peoples to meet their own needs”*.

The application of this principle: The challenged legislative provisions comply with the French Constitution

In its October 23, 2023 decision, the Constitutional Council pointed out that, by allowing radioactive waste to be stored in an underground facility, the challenged provisions were likely to cause serious and lasting harm to the environment, given the hazardous nature and lifespan of the waste.

However, firstly, it noted that the legislator wanted, on the one hand, to ensure that radioactive waste could be stored in conditions that would protect the environment and health from the long-term risks of disseminating radioactive substances and, on the other hand, that the burden of managing this waste would not be shifted onto future generations alone. In so doing, it sought to pursue the constitutional objectives of protecting the environment and protecting health.

The Constitutional Council concluded that it was not for it to determine whether the objectives set by the legislator could have been achieved by other means, since the terms and conditions imposed by the law were not, in the light of current scientific and technical knowledge, manifestly inappropriate to these objectives.

Secondly, it follows from the very provisions set forth in Article L. 542-1 of the French Environmental Code that the management of radioactive waste must respect the protection of human health, safety, and the environment, and that the implementation of the means necessary for the final disposal of radioactive waste must prevent or limit the burdens that will be borne by future generations.

In this respect, the Constitutional Council noted that Article L. 542-10-1 of the same Code regulates the creation and operation of a deep geological repository for radioactive waste with several safeguards designed to ensure compliance with these requirements.

These safeguards include the fact that reversibility is achieved through progressive construction, adaptability of the design, and flexibility in the operation of the repository, with the possibility of retrieving waste packages that have already been stored in a manner and for a period of time that is consistent with the strategy for operating and closing the repository.

In addition, the creation of a deep geological repository for radioactive waste is subject to a special authorization procedure.

In particular, the application for authorization must relate to a geological layer that has been studied in an underground laboratory. The submission of this application must be preceded by a public debate based on a dossier produced by the *Agence nationale pour la gestion des déchets radioactifs* (French national agency for the management of radioactive waste). The application must also be discussed in a report from the national commission referred to in Article L. 542-3 of the French Environmental Code, in an opinion from the *Autorité de sûreté nucléaire* (French nuclear safety authority) and submitted to the relevant regional and local authorities for consideration. It is then forwarded to the parliamentary office for the evaluation of scientific and technological options, which assesses it and reports to the relevant committees of the National Assembly and the Senate.

When the application for authorization is being reviewed, the safety of the repository is assessed with regard to the various stages of its management, including its permanent closure. As a precautionary measure, the delivered authorization sets the minimum period during which the reversibility of the facility must be ensured, which may not be less than one hundred years.

Furthermore, the authorization for the commissioning of the facility is limited to a pilot phase, which should enable the reversibility and safety of the facility to be demonstrated, in particular through a whole set of on-site tests. All waste packages must remain easily retrievable during this phase, which includes retrieval tests. The results of the pilot phase are presented in a report drawn up by the *Agence nationale pour la gestion des déchets radioactifs* that is submitted to the same authorities and public bodies as those involved in the authorization procedure.

Following the presentation of a bill adapting the conditions for exercising the reversibility of the repository, the *Autorité de sûreté nucléaire* issues an authorization for the full commissioning of the facility, provided that the reversibility of the repository is guaranteed in accordance with the conditions laid down by law.

For all these reasons, the Constitutional Council concluded that, given these safeguards, the challenged provisions do not infringe the requirements of Article 1 of the Charter of the Environment, as interpreted in light of its recital 7. It, therefore, held that such provisions conform to the French Constitution.

[1] Available here: <https://www.conseil-constitutionnel.fr/decision/2023/20231066QPC.htm> (in French only)

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