NUCLEAR LAW AT THE EUROPEAN COURT IN THE 21ST CENTURY

*Miguel Sousa Ferro**

Abstract: *This paper presents a global outlook on the evolution of the case-law of the European Court of Justice and of the European General Court related to Nuclear Law, focusing specifically on the cases handled since 2000. On the one hand, general trends are identified and discussed. On the other hand, each case is individually summarized and assessed, inclusively by reference to doctrine concerning them.*

1. INTRODUCTION

The European Union is the only regional integration project in the world that has reached a significant level of harmonization of Nuclear Law. Aside from some fields where national sovereignty continues to reserve to itself most of the regulation of nuclear activities, the EU and the Euratom Community are the source of the larger part of nuclear law in the Member States. Even issues that have traditionally been strictly kept within the national sphere of regulation have, in recent years, seen a beginning of transfer of powers to

* Counsel at Sérvulo & Associados (Lisbon). Guest lecturer and doctoral candidate at the University of Lisbon Law School. Email: msf@servulo.com. This paper was awarded the International Nuclear Law Association Award at the Inter Jura Congress 2012, in Manchester, United Kingdom. It was last revised in July 2011.

the EU level, such as nuclear safety and, soon, the management of irradiated nuclear fuel and decommissioning of nuclear facilities.

Nuclear law rules adopted by the European institutions are currently applicable to 500 million citizens in 27 States, making this the most extensive and widely applicable body of binding Nuclear Law in the western world.

One cannot, however, entirely grasp the breadth of EU Nuclear Law, nor can one fully understand its meaning, without the clarifications that have been provided throughout the years by the European Court of Justice (ECJ) and the European General Court (EGC). Indeed, the Luxembourg Court has played and continues to play a decisive role in shaping EU Nuclear Law.

Understanding the case-law, its motivations and consequences, also allows one to understand where EU Nuclear Law seems to be heading. Discussing the future of the Euratom Treaty, Mr. Grunwald noted that *"the ultimate truth about Euratom is rather simple, applying to the past and also to the future: the Treaty is what you make of it"*[1]. I would respectfully add that, insofar as the Member States have been unable to agree on a substantial revision of the Euratom Treaty, the Treaty is and will become what the Court makes of it.

It was, therefore, surprising to realize that there was no single source where the case-law of the Court in this field could be consulted. Aside from a brief description of a few selected cases in a Nuclear Law compilation[2] and from an exhaustive analysis of case-law until 1997 that has, in the meantime, been lost[3], doctrine has dealt with this case-law only in a piecemeal approach, that is far from being all encompassing, and that cannot provide a general overview and understanding of the Court's positions in this area. The present research is a first contribution to correcting this omission.

Subsequently, it will hopefully be possible to publish an extension of this research, to encompass all of the cases in the field of Nuclear Law in the 40 years that have elapsed since the European Court of Justice gave its first ruling in this field.

The analysis is divided in two parts. First, a general overview of the case-law will be presented, where some general trends and horizontal characteristics will be discussed. Second, each case will be summarized and briefly analyzed.

1 Grunwald, 2008: 1084.

2 Nocera, 2005.

3 Wainwright & Cusak, 1997.

2. OVERVIEW

2.1. Number of cases

Until the year 2000, there had been 23 judgments of the ECJ and EGC relating to Nuclear Law, the first dating back to 1971. From 2000 until the present day, the ECJ and EGC have adopted 21 judgments in this field, following the same general tendency evidenced at the European Court of an increase in litigation.

2.2. Advocates-General

Generally, after the first cases, the ECJ has seemed inclined to allow one of its Advocates-General to specialize in Nuclear Law issues. Thus, in the 21st century, AG Geelhoed was the preferential AG for such issues (2002/2005), followed by AG Poiares Maduro (2006/2009). It is not yet clear which AG will inherit this role, if any. It would be extremely useful for this concentration of Nuclear Law cases in a single AG to continue, as the Opinions by these specialized AGs have shown extraordinary insight and usefulness.

2.3. Single EU legal order

A consistent feature in almost every case of Nuclear Law handled by the European Court is the affirmation – explicit or implicit – of the existence of a single EU legal order, which includes, *inter alia*, the TFEU and the Euratom Treaty.

Thus, the Court refers indistinctively to its case-law under the TFEU when discussing parallel provisions under the Euratom Treaty, and it applies to the areas covered by the latter general principles of EU law, even if they are not explicitly mentioned in it (e.g. prohibition of discrimination on the grounds of nationality).

The consequence of the principle of the single EU legal order should be that any divergence from a common interpretation should be justified. In this sense, it should be noted that the recent judgments that excluded military activities from the scope of the Euratom Treaty (as discussed below) constituted an important deviation from this principle.

2.4. New issues

The new century has confronted the Court with new issues relating to nuclear activities *lato sensu*. The main example of such new issues is the question

of whether the Euratom Treaty applies to military activities, which will be mentioned below. It was only after 2000 that the Court was confronted with a clear cut question in this regard.

Another example is the enforcement of Competition Law to nuclear activities. In the 20th century, the issue was only once raised before the Court, in 1982[4], and only incidentally in a challenge by Member States to a Directive on the transparency of financial relations between Member States and public undertakings. Quite differently, in the 21st century, private parties have already led the Court to discuss the enforcement of Competition Law in this field five times.

None of these cases, however, brought about an in-depth analysis of competition practices in the nuclear sector. Moreover, following a general tendency in the case-law, and unlike the EGC, the ECJ showed itself unwilling to entertain appeals from private parties on decisions of the Commission concerning state aid measures, being extremely restrictive in its interpretation of the law and of the facts of the cases when applying the test of admissibility. This is particularly relevant given the Commission's perceived permissive attitude to public financial assistance to the nuclear sector.

Finally, and most recently, the Court has assumed a role of confirming and validating the efforts of the European institutions to combat the proliferation of nuclear weapons.

2.5. A shift in paradigm

In an outstanding look at the history of the Euratom Treaty, Mr. Grunwald stated that *"the Court has shown a deep insight into the legal logic of Euratom, and defended the Treaty against attacks from all quarters, with only some rare exceptions"*[5]. In my opinion, while this may have been true until 2002, the following years have confronted us with a drastically different reality.

In 2002, in the *Nuclear Safety Convention* case[6], the ECJ still appeared as an out-spoken fan of a broad interpretation of the Euratom Treaty, and a near-revolutionary supporter of the expansion of the transfer of sovereign powers from the Member States to the Community.

4 Judgment of the ECJ of 6 July 1982, *France et al v. Commission* (188 to 190/80), ECR (1982) 2545.

5 Grunwald, 2008: 1077.

6 Judgment of the ECJ of 10 December 2002, *Commission v Council* (C-29/99), ECR (2002) I-11221

But then something changed. In 2002, the Court stated that the purpose of the Treaty's rules on radiological protection *"was to ensure consistent and effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source"*[7], suggesting that the source of the ionising radiation was irrelevant for the applicability of those provisions.

By mid 2005, however, the Court produced its surprising conclusion, twice confirmed since, that no provision of the Euratom Treaty applies to military activities. This conclusion was reached with the vehement opposition of AG Geelhoed, and its justification is far from convincing, in both a literal and a teleological approach, not to mention awe-striking for connoisseurs of the Court's general case-law under the TFEU. There is no example in any of the case-law prior to 2005 of such a restrictive interpretation of the scope of the Euratom Treaty or of the powers of the Euratom Community.

In a Competition Law case (2006/2007[8]), the ECJ surfaced as protecting Member States' freedom of choice concerning the financing of the nuclear sector within their borders. By contrast, in a 1982 case, the ECJ had refused to give any special protection to public undertakings in the nuclear sector[9].

In *France v Commission* (2007), the Court annulled a Euratom Regulation adopted by the Commission for lack of powers, all the while recognizing it was possible in theory for powers to be implicitly granted and their exercise necessary to give practical effect to the implemented provisions[10]. In practice, this ruling prevented the Commission from modifying the mandatory legal consequences of a notification under Art. 41 Euratom.

And in *INB* (2006), the Court drastically reduced the powers of the Euratom Supply Agency by excluding uranium enrichment contracts from the concept of "supply contracts", meaning that the Agency would not have, e.g., a right of option, a right of ownership or an exclusive right to conclude

7 Judgment of the ECJ of 10 December 2002, *Commission v Council* (C-29/99), ECR (2002) I-11221, §80.

8 Judgment of the EGC of 26 January 2006, *Stadtwerke Schwäbisch Hall GmbH et al v Commission* (T-92/02), ECR (2006) II-11; Judgment of the ECJ of 29 November 2007, *Stadtwerke Schwäbisch Hall GmbH et al v Commission et al* (C-176/06 P), ECR (2007) I-170.

9 Judgment of the ECJ of 6 July 1982, *France et al v Commission* (188 to 190/80), ECR (1982) 2545, §§28 and 32.

10 Judgment of the EGC of 17 September 2007, *France v Commission* (T-240/04), ECR (2007) II-4035.

such contracts[11]. Free enterprise prevailed over supervision of the market by the Euratom Supply Agency.

All this is a far cry from the attitude of the Court that had, for example, single-handedly prevented the disappearance of the Euratom Supply Agency and of the common supply policy, when Member States could not agree on a future for this policy, as required by the Treaty[12]; that had placed the protection of the population from the dangers of ionizing radiation above the interests of the common market[13]; that walked a fine line between a possible future need for protectionist measures of Community uranium producers and the absence of such a need in the specific case, and ensured a broad discretionary margin for the Commission and the Supply Agency in the management of the common supply policy[14]; or that had extended the competencies of the Euratom Community to physical protection and to nuclear safety, focusing on the *effet utile* of the Treaty's provisions, even though no explicit reference to these issues is found in them and going against the wishes of the Member States[15].

Had something changed after 2002? The main event of relevance in European integration, in the period that followed, was the Convention on the Future of Europe, which presented its draft Constitution in July 2003. In mid 2004, this proposed Constitution was adopted by the heads of State and government of the EU, and was set aside following the two negative referendums in 2005. The Constitution was eventually reshaped into the Lisbon Treaty, which finally came into force in 2009. The grueling process of negotiations made one thing notoriously clear: there was no agreement on the future of the Euratom Treaty, and the only possible solution was not to

11 Judgment of the ECJ of 12 September 2006, *Indústrias Nucleares do Brasil* (C-123/04 and C-124/04), ECR (2006) I-7861

12 Judgment of the ECJ of 14 December 1971, *Commission v. France* (7/71), ECR (1971) 1003.

13 Judgment of the ECJ of 25 November 1992, *Commission v Belgium* (C-376/90), ECR (1992) I-6153.

14 Judgment of the EGC of 15 September 1995, *Empresa Nacional de Urânio SA v Commission* (T-458/93 and T-523/93), ECR (1995) II-2459; Judgment of the ECJ of 11 March 1997, *Empresa Nacional de Urânio SA v Commission* (C-357/95 P), ECR (1997) I-1329; Judgment of the EGC of 25 February 1997, *Kernkraftwerke Lippe-Ems GmbH v Commission* (T-149/94 and T-181/94), ECR (1997) II-161; Judgment of the ECJ of 22 April 1999, *Kernkraftwerke Lippe-Ems GmbH* (C-161/97 P), ECR (1999) I-2057.

15 Ruling of the ECJ 1/78, of 14 November 1978, ECR (1978) 2151; Judgment of the ECJ of 10 December 2002, *Commission v Council* (C-29/99), ECR (2002) I-11221.

change it in any significant way. Unlike its sibling-Treaty, the Euratom Treaty has indeed remained, in substance, unchanged since its inception.

Specifically at the level of Nuclear Law, the 2002-2005 period was also marked by the spectacular failure of the Commission's proposed Nuclear Package, which would have introduced a first set of relatively modest rules concerning nuclear safety and management of spent fuel and radioactive waste. Significantly, the proposal of the Nuclear Package was made viable by the broad interpretation of Euratom competences put forward by the Court in the *Nuclear Safety Convention* case.

The shift in the case-law of the Court, and in particular the reversal of the Court's classical paradigm of being a champion of European integration and refusing interpretations that restrict the transfer of powers from the Member States, suggest that the ECJ has possibly grown tired of a Treaty that Member States seem to have given up on. This is confirmed by the Court's suggestion, in the military activity cases, that the TFEU be used to adopt rules currently under the Euratom Treaty, so as to allow them to encompass military activities. In other words, the Court has actively promoted a shift in legal basis of radiological protection rules. It is almost as if the Court were suggesting it is time to leave the Euratom Treaty behind.

Unfortunately, the Court has not shared a thorough analysis of the implications of its approach. On the one hand, as long as the Euratom Treaty – *lex specialis* – exists, it is doubtful that the adoption of rules aimed at protection from ionizing radiation (or other typically Euratom subjects) under the TFEU would be acceptable under EU case-law on choice of a legal basis. It should also be kept in mind that, given the often different rules for adoption of legislation in the two Treaties, this same case-law may not allow for dual legal basis.

On the other hand, there seem to be several areas of regulation currently covered by the Euratom Treaty which would not easily find a legal basis under the TFEU. At best, some of these regulations would require unanimity under the TFEU, making their adoption far more difficult, especially in areas where some Member States have shown themselves most eager to hold on to sovereign powers, and unwilling to compromise on EU-level solutions.

2.6. Confirmation of Commission's positions

The European Court is often perceived as tending to favour the positions put forward by the European Commission. The analysis of the Court's case-law

on nuclear issues in the 21st century certainly might seem to allow for such a conclusion. Indeed, the Commission's position has been followed by the Court in 15 of the 22 cases in which it was a party or intervened, and in 2 others it was mostly followed.

However, in line with the Court's shift in paradigm discussed above, the Commission, which tends to appear before the Court promoting broad interpretations of the Treaties and greater powers to the Community, has had only one major victory in this period (*Nuclear Safety Convention* case), but several major defeats (*INB*; *Commission v UK (II)* and *Commission v UK (III)*; *France v Commission*). Another case where the Court expressed significant disagreements with the position put forward by the Commission was *Commission v France (III)*.

2.7. The future of nuclear litigation at the European Court

The recent trends in the cases brought before the European Court relating to nuclear issues allow for some speculation as regards the future of nuclear litigation before the EGC and ECJ.

First of all, one may expect to continue to see referrals from national courts concerning directly applicable EU rules, or provisions of Directives with direct effect. These have already played a significant role and there is reason to believe they will continue to do so.

There are also reasons to expect the European Parliament to challenge measures adopted under the Euratom Treaty, given the limited powers it is granted under that Treaty, whenever a possible alternative legal basis can be found in the TFEU.

One area of litigation that has not been particularly explored is that of the EU's non-contractual liability for damages caused by legislation or decisions. Given the requisites of such liability, these cases are far more likely to surface in areas where the EU's intervention has been made through Regulations (immediately and directly applicable).

The enforcement of Competition Law in the nuclear sector, and in particular of state aid rules, is likely to continue to draw attention, especially following the judgment in the *INB* case, the completion of the liberalization of the energy sector, and the recent option of Germany to phase-out nuclear power plants.

Finally, one should expect to continue to see a number of infringement procedures against Member States for failure to transpose Directives in

the nuclear sector. An interesting perspective has been opened up in this respect, particularly following the judgment in the *Sellafield MOX Plant* case. The Community has become a party to treaties such as the Nuclear Safety Convention or the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management, which have no compulsory dispute settlement mechanisms. Furthermore, the provisions of these treaties have been, or are in the process of being, reproduced in EU Law. The Court may thus be called on to interpret and enforce what are, first and foremost, provisions of international law which were so far not subject to the control of any court. As an example of a possible infringement to be tackled, it should be noted that there are some Member States which do not yet have the independent regulatory authorities required by these Treaties and, more recently, by the Nuclear Safety Directive.

3. CASES

3.1. Outstanding individual cases

3.1.1. Nuclear Safety Convention[16]

The *Nuclear Safety Convention* case was a recurrence of the kind of dispute seen in the *Physical Protection Convention* case[17] (even if procedurally different): in the context of the ratification by the Euratom Community of an international treaty, the Court was called on to clarify the extent of the Community's competences.

The essence of this case was the clarification of the scope of Euratom competences relating to nuclear safety, in an abstract approach that the ECJ is very rarely given the opportunity to take. In practice, the Court's judgment opened up an entirely new area of Euratom attributions, against the expressed wishes of the Council.

The Nuclear Safety Convention (NSC) was adopted on 17 June 1994. By the time of this judgment, it had been ratified by all the Member States and

16 Judgment of the ECJ of 10 December 2002, *Commission v Council* (C-29/99), ECR (2002) I-11221; Opinion of AG Jacobs delivered on 13 December 2001, in *Commission v Council* (C-29/99), ECR (2002) I-11221. For more on this case, see: NOCERA, 2005: 818-821; SAVY, 2003.

17 Ruling of the ECJ 1/78, of 14 November 1978, ECR (1978) 2151.

by the Euratom Community[18]. The Court was, thus, clarifying, *post facto*, the legal effects of ratification for the Community and for the Member States[19].

As interpreted by the ECJ, Art. 30(4)(iii) of the NSC aims at making it clear between the Parties *"the fields covered by the Convention in which* [a participating regional integration organisation, i.e. Euratom] *has competence to fulfil the obligations and exercise the rights which flow from it and the extent of that competence"*, requiring the indication of *"all the articles which are legally binding on a contracting party, including articles which do not create either rights or obligations and in respect of which the question of the competence of the regional organisation therefore does not arise"*[20]. Furthermore, the *"declaration of competences under that provision must be complete"*[21]. To comply with this requirement[22], the Council added a declaration on Euratom competences to its Decision approving accession to the treaty[23].

It was (part of) this declaration that the Commission asked the Court to annul, to the extent that it did not include all of the Euratom's relevant competences. In other words, the Commission and the Council (i.e. the majority of Member States) disagreed on the extent of the Community's attributions relating to nuclear safety and the Court was asked to settle the issue.

The issue of admissibility had to be tackled. This provided several important clarifications of issues of general EU Law.

---

18 The Commission proceeded with the ratification of the treaty (Commission Decision 1999/819/Euratom, of 16 November 1999, concerning the accession to the 1994 Convention on Nuclear Safety by the European Atomic Energy Community (OJ L 318/20, 11/12/1999)), as instructed by the Council, even though it had in the meantime instituted these proceedings. The NSC entered into force for the EAEC on 30 April 2000.

19 AG Jacobs noted that *"nothing in the Convention precludes the Community from submitting at a later stage an alternative or modified declaration"* (AG Opinion in *Nuclear Safety Convention*, §65).

20 ECJ Judgment in *Nuclear Safety Convention*, §49.

21 ECJ Judgment in *Nuclear Safety Convention*, §70.

22 Note the very significant difference with the situation in the *Physical Protection Convention* case, where the Court could instruct that such clear statements of competences be avoided (see, e.g., Ruling of the ECJ 1/78, of 14 November 1978, ECR (1978) 2151, §35).

23 Council Decision of 7 December 1998, approving the accession of the EAEC to the Nuclear Safety Convention. The relevant part of the declaration was worded as follows: *"The Community declares that Articles 15 and 16(2) of the Convention apply to it. Articles 1 to 5, Article 7(1), Article 14(ii) and Articles 20 to 35 also apply to it only in so far as the fields covered by Articles 15 and 16(2) are concerned.The Community possesses competence, shared with the abovementioned Member States, in the fields covered by Articles 15 and 16(2) of the Convention as provided for by the Treaty establishing the European Atomic Energy Community in Article 2(b) and the relevant articles of Title II, Chapter 3 Health and safety"*.

The Council argued (not unreasonably) that the Commission's intention was to obtain the Court's opinion on the extent of the Community's competence in the context of accession to a treaty, a procedure provided for under Art. 218(11) TFEU[24], but not under the Euratom Treaty[25]. The Court dismissed this by noting there was *"no indication"* of such and that the Court must be able to exercise its control over the lawfulness of decisions to ratify treaties[26]. According to the Court, such declarations are an integral part of decisions to ratify international treaties, and the elements whose annulment was specifically sought were severable and challengeable as such[27].

The Court added additional explanations for why its control of the lawfulness of the decision could extend to the attached list of competences. First, the Council has to respect the conditions set out in a treaty when approving accession to it[28]. Second, *"it follows from the duty of sincere cooperation between the institutions* (…) *that the Council decision approving accession to an international convention must enable the Commission* [when adopting the accession decision] *to comply with international law"*[29]. And since this treaty required a complete declaration of competences, *"the Council was, under Community law, required to attach"* it[30].

Moving on to the substance of the case – the clarification of the EAEC's competences concerning nuclear safety –, the Court began by noting the points of agreement between the Parties:

24 Previously, Art. 300(6) EC.

25 ECJ Judgment in *Nuclear Safety Convention*, §52.

26 ECJ Judgment in *Nuclear Safety Convention*, §§53-54.

27 ECJ Judgment in *Nuclear Safety Convention*, §§40-41 and 45-47. Paragraphs 45-46 were reaffirmed in: Judgment of the ECJ of 30 September 2003, *Germany v Commission* (C-239/01), ECR (2003) I-10333, §33; Judgment of the ECJ of 24 May 2005, *France v EP and Council* (C-244/03), ECR (2005) I-4021, §12; Judgment of the ECJ of 30 March 2006, *Spain v Council* (C-36/04), ECR (2006) I-2981, §9; Judgment of the ECJ of 27 June 2006, *EP v Council* (C-540/03), ECR (2006) I-5769, §27; Judgment of the ECJ of 23 September 2009, *Poland v Commission* (T-183/07), ECR (2009) II-3395, §156; and Judgment of the ECJ of 23 September 2009, *Estonia v Commission* (T-263/07), ECR (2009) II-3463, §28.

28 ECJ Judgment in *Nuclear Safety Convention*, §68.

29 ECJ Judgment in *Nuclear Safety Convention*, §69.

30 ECJ Judgment in *Nuclear Safety Convention*, §§70-71. See algo AG Opinion in *Nuclear Safety Convention*, §§107-115.

- No competence to regulate, in itself, the *"opening and operation of nuclear installations"*[31];
- Competence to regulate the radiological protection of workers and of the public (ALARA and dose limits)[32];
- Competence to regulate radiological emergencies (information to possibly affected States)[33];

As for the areas on which competence was disputed, since the Treaty *"does not contain a Title relating to installations for the production of nuclear energy"*[34], the Court turned to Chapter III of Title II of the Euratom Treaty, interpreting it, not only in light of the attribution set out in Art. 2(b) (radiological protection of workers and the population), but also of an objective mentioned in the Preamble: *"to create the conditions of safety necessary to eliminate hazards to the life and health of the public"*[35].

It stressed that the protection envisaged in Art. 2(b) *"cannot be achieved without controlling the sources of harmful radiation"*[36]. Later it added: *"it is not appropriate, in order to define the Community's competences, to draw an artificial distinction between the protection of the health of the general public and the safety of sources of ionising radiation"*[37]. While true, it can be argued that these statements would only be relevant to determine the distribution of competences between the Community and the Member States if it were found that the Community could not achieve the tasks specifically assigned to it without directly regulating the sources of radiation.

The ECJ also recalled that the Council had already adopted a resolution in the area of nuclear safety, where it seemed to suggest that some kind of *"appropriate action"* was required at Community level, while respecting the

31 ECJ Judgment in *Nuclear Safety Convention*, §63.

32 ECJ Judgment in *Nuclear Safety Convention*, §72.

33 ECJ Judgment in *Nuclear Safety Convention*, §72.

34 ECJ Judgment in *Nuclear Safety Convention*, §74.

35 ECJ Judgment in *Nuclear Safety Convention*, §§75-76. This part of the Preamble had already been quoted in the *Physical Protection Convention* case.

36 ECJ Judgment in *Nuclear Safety Convention*, §76.

37 ECJ Judgment in *Nuclear Safety Convention*, §82. For further development of this idea, see AG Opinion in *Nuclear Safety Convention*, §§123-132. See also ECJ Judgment in *Land Oberösterreich*, §102.

competences of Member States[38], and that Directive 96/29/Euratom showed a very broad interpretation of Chapter III of Title II[39]. Turning to its own case-law, it stressed the broad interpretations previously given to that Chapter, in two judgments[40].

Finally, analyzing the relevant provisions of the NSC, the ECJ agreed with the Commission on all but the introductory articles, concluding that Euratom competences extended to the provisions on assessment and verification of safety, siting, design, construction and operation of nuclear installations (Arts. 7, 14, 16(1) and (3) and 17 to 19 of the NSC)[41].

In a truly broad reading of the Treaty, the Court seemed to go even farther than the Commission, apparently suggesting that, while the Community is not empowered *"to authorise the construction or operation of nuclear installations"*, it could regulate the terms of authorization of such construction and operation, since it *"possesses legislative competence to establish, for the purpose of health protection, an authorizing system which must be applied by the Member*

38 ECJ Judgment in *Nuclear Safety Convention*, §77: *"states that the technological problems relating to nuclear safety, particularly in view of their environmental and health implications, call for appropriate action at Community level, which takes into account the prerogatives and responsibilities assumed by national authorities"* – Council Resolution of 22 July 1975 on the technological problems of nuclear safety (OJ C 185/1, 14/08/1975).
This resolution was completed by Council Resolution of 18 June 1992 (OJ C 172/2, 08/07/1992). The Court also did not mention that the Community had by then already assumed a role in the promotion of nuclear safety, at the level of international cooperation. See: Agreement in the form of exchanges of letters between the European Community and the European Bank for Reconstruction and Development on the contribution of the Community to the nuclear safety account (OJ L 200/35, 03/08/1994); Agreement for cooperation between the EAEC and the Government of the Russian Federation in the field of nuclear safety, of 3 October 2001 (OJ L 287/24, 31/10/2001); and Agreement for Cooperation between the EAEC and the Cabinet of Ministers of Ukraine in the field of nuclear safety (OJ L 322/33, 27/11/2002). Subsequently, another such agreement was adopted: Cooperation Agreement between the EAEC and the Republic of Kazakhstan in the field of nuclear safety (OJ L 89/37, 26/03/2004).

39 ECJ Judgment in *Nuclear Safety Convention*, §81. In this regard, Advocate-General Jacobs noted: *"Interpretation in the light of subsequent practice is a common feature of the interpretation both of international treaties and of national constitutions. An interpretation in the light of subsequent practice is particularly legitimate and appropriate where the provisions in question were drafted long ago, where they have not been amended since and where there is a common and consistent practice of all actors entitled to interpret, apply or modify the rules in question"* (AG Opinion in *Nuclear Safety Convention*, §148).

40 ECJ Judgment in *Nuclear Safety Convention*, §§78-80, referring to Judgment of the ECJ of 22 September 1988, *Land de Sarre* (187/87), ECR (1988) 5013; and to Judgment of the ECJ of 4 October 1991, *Parliament v Council* (C-70/88), ECR (1991) I-4529. Reaffirmed in ECJ Judgment in *Land Oberösterreich*, §100, which presented this as one of the occasions on which the Court held that the provisions of Chapter 3 were to be *"interpreted broadly in order to give them practical effect"*.

41 See also ECJ Judgment in *Land Oberösterreich*, §105.

States. Such a legislative act constitutes a measure supplementing" the basic safety standards (i.e. based on Art. 32 Euratom)[42].

In what concerns prior assessment and verification of safety of nuclear facilities, the EAEC's competence derives, according to the Court, from Arts. 33(2) (which only gives the Community a power to issue recommendations) and 35 Euratom[43].

As for the regulation of emergency preparedness, Arts. 30 and 32 Euratom empower the Community to *"lay down basic standards for emergency measures, which include the power to require Member States to draw up plans laying down measures in respect of nuclear installations"*[44].

Since the *"siting of a nuclear installation* (…) *necessarily includes taking into account factors relating to radiation protection*", and considering the powers relating to radioactive waste disposal provided for in Art. 37, Euratom competences must be understood as also extending to siting issues[45].

Finally, in what concerns safety requirements for design and construction of nuclear installations, for their initial authorization and for their operation, the Court once again derived Community competence in this domain from the power to issue recommendations included in Art. 33 Euratom[46].

In his Opinion, AG Jacobs made a crucial observation of general relevance for the interpretation of the Euratom Treaty:

> *"It is true that in the context of the EC Treaty the Court has held that mere practice cannot override Treaty provisions. What is in issue in the present case is however the interpretation of the Euratom Treaty and there are in my view good reasons for the Court to interpret Articles 30 to 39 of that Treaty in the light of subsequent practice and in particular of the Basic Standards Directive.*
> *Interpretation in the light of subsequent practice is a common feature of the interpretation both of international treaties and of national constitutions. An interpretation in*

42 ECJ Judgment in *Nuclear Safety Convention*, §89. See also ECJ Judgment in *Land Oberösterreich*, §103.

43 ECJ Judgment in *Nuclear Safety Convention*, §§92-95.

44 ECJ Judgment in *Nuclear Safety Convention*, §97.

45 ECJ Judgment in *Nuclear Safety Convention*, §§102-103.

46 ECJ Judgment in *Nuclear Safety Convention*, §105. AG Jacobs disagreed, arguing that, in what concerned these matters covered by Arts. 18 and 19 of the NSC, the Community *"has no competence* (…) *or such competence is so insignificant that it should not be declared to the other contracting parties"* (AG Opinion in *Nuclear Safety Convention*, §193). Further on Art. 33 Euratom, see ECJ Judgment in *Land Oberösterreich*, §114.

the light of subsequent practice is particularly legitimate and appropriate where the provisions in question were drafted long ago, where they have not been amended since and where there is a common and consistent practice of all actors entitled to interpret, apply or modify the rules in question.
It must be recalled that the Euratom Treaty was drafted more than 40 years ago at a time when knowledge about and the economic prospects of nuclear energy were very different from today. It must also be borne in mind that despite that different political, economic and scientific context the substantive rules of the Treaty have not been modified. It is not only the chapter on Health and Safety but also several other parts of the Euratom Treaty such as the chapters concerning supplies (Articles 52 to 76) or safeguards (Articles 77 to 85) which cannot be properly interpreted or understood without an analysis of the practice in their application."[47]

While in complete agreement with the Court's conclusion, I cannot but stress the bold nature of this ruling[48]. As usual, the ECJ preferred an interpretation based on what was required for the full effectiveness of the Treaty's provisions to an interpretation based on the intentions of the drafting Parties[49]. Clearly, this judgment could potentially have had a very broad impact on the reality of the Euratom Treaty[50].

In practice, however, the judgment's impact was limited by the fact that legislative power in this domain rests almost exclusively with the Council. Nuclear safety issues have revealed profound tensions at the level of EU

47 AG Opinion in *Nuclear Safety Convention*, §§147-149.

48 For additional analysis of this issue, see: SOUSA FERRO, 2008: section 2.

49 AG Jacobs noted the contrast between the plan proposed in the Spaak Report and the option retained in the Euratom Treaty:
"The Spaak Report envisaged in that regard:
- common minimum rules which would regulate nuclear installations as well as the conditions of the storage, transport and treatment of nuclear material;
- control of the safety of nuclear installations by the institutions of the Community;
-the need to notify planned installations to the Community and the possibility for the Community to object for security reasons to such an installation, with the consequence that the installation would not receive fissile material;
- the day-to-day monitoring of nuclear installations by the authorities of the Member States under the control of the Community.
The authors of the Treaty however gave the Community more limited powers. (...) *It follows that the authors of the Treaty did not wish to grant the Community far-reaching powers as regards nuclear safety (as understood in 1957) and that they intended the Community to act mainly in the fiel of radiation protection (also as understood in 1957)"* (AG Opinion in *Nuclear Safety Convention*, §§134-136).

50 Its consequences were discussed in a document prepared by the Council's Legal Service (Council Doc. no. 13909/03). Unfortunately, the relevant parts of this document were deleted in its public version.

integration. The Commission may have won this "battle", but it was far from winning the "war". Simply put, several Member States with nuclear power plants have systematically and steadfastly refused to allow any kind of significant Euratom interference in nuclear safety, constituting a sufficient blocking minority.

In the follow-up to this judgment, the Commission amended the declaration annexed to its decision ratifying the NSC, in accordance with the Court's judgment[51]. One month before the judgment was known, the Commission presented its plan to deal with nuclear safety issues at the Community level[52]. Subsequently, it proposed the adoption of two mildly ambitious Directives on nuclear safety and on the management of irradiated nuclear fuel and radioactive waste[53]. The "Nuclear Package", as it came to be known, was soon dead in the water, despite attempts to ensure its access by watering down its content[54].

The Commission then went back to the drawing board. Aside from continuing to invest in nuclear safety at the level of international cooperation with third countries[55], it eventually set up a High Level Group, made up of representatives of the national nuclear regulators, whose initial objective was primarily to find a way to surpass the block of the Nuclear Package, in some revised form[56]. Finally, the Council adopted a Directive on Nuclear Safety[57], the content of which, in a strange reversal of the usual consequences of integration within the Community, does not even go as far as existing international obligations under the NSC[58].

---

51 Commission Decision 2004/491/Euratom, of 29 April 2004 (OJ L 172/7, 06/05/2004).

52 Communication from the Commission to the Council and the European Parliament, of 6 November 2002 – Nuclear safety in the European Union (COM/2002/605 final).

53 Proposal for a Council (Euratom) Directive Setting out basic obligations and general principles on the safety of nuclear installations and for a Council (Euratom) Directive on the management of spent nuclear fuel and radioactive waste (COM/2003/0032 final).

54 See amended proposal in COM/2004/526 final.

55 Council Regulation (Euratom) 300/2007, of 19 February 2007, establishing an Instrument for Nuclear Safety Cooperation (OJ L 81/1, 22/03/2007).

56 Commission Decision 2007/530/Euratom of 17 July 2007 on establishing the European High Level Group on Nuclear Safety and Waste Management (OJ L 195/44, 27/07/2007)

57 Council Directive 2009/71/Euratom, of 25 June 2009, establishing a Community framework for the nuclear safety of nuclear installations (OJ L 172/18, 02/07/2009).

58 For a more in-depth analysis of these issues, see: SOUSA FERRO, 2010(1); and SOUSA FERRO, 2008.

3.1.2. Sellafield MOX Plant[59]

The *Sellafield MOX plant* case stands out as a nuclear sector case that led to the clarification of an important issue of general EU Law, as the first case where the exclusive jurisdiction of the ECJ was alleged to have been infringed by a Member State.

There had long been disputes between Ireland and the UK concerning the nuclear facilities at Sellafield, on the coast of the Irish Sea, ran by British Nuclear Fuel plc, including a MOX plant[60]. The construction of this plant was authorized by the UK in 1993, on the basis of an environmental statement presented by the company, and its operation was authorized in 2001, following several rounds of public consultations and a Commission opinion under Art. 37 Euratom, concluding that the radioactive waste disposal plan was not liable to lead to significant radioactive contamination in the territory of other Member States.

Ireland repeatedly participated in the consultations, but it questioned the soundness of the environmental assessment and of the conclusion on economic justification and argued it should have been given access to more information during the consultation procedure. In essence, therefore, this was a dispute between two Member States, one of which was unhappy about the other's choice to build a nuclear facility on the (maritime) border between the two. What made this case unique was the option taken by Ireland to settle the dispute: it resorted to the mandatory dispute settlement mechanisms (arbitral tribunal) under the United Nations Convention on the Law of the SEA (UNCLOS). A first case before the arbitral tribunal, concerning access to documentation, went by unchallenged. But the second case, concerning primarily movement and discharge of radioactive material and waste from the MOX plant (*"essentially criticising the United Kingdom for granting authorisation to operate the MOX plant without having met a number*

59 Judgment of the ECJ of 30 May 2006, *Commission v. Ireland* (C-459/03), ECR (2006) I-4635; Opinion of AG Poiares Maduro delivered on 18 January 2006, in *Commission v. Ireland* (C-459/03), ECR (2006) I-4635. For more on this case, see: CARDWELL & FRENCH, 2007; CARREÑO GUALDE, 2007; CASOLARI, 2007; KERBRAT & MADDALON, 2007; LAVRANOS, 2006(1); LAVRANOS, 2006(2); LAVRANOS, 2007; NEFRAMI, 2007; SCHRIJVER, 2010; and SEMMELMANN, 2006.

60 A MOX plant is *"designed to recycle plutonium from spent nuclear fuel by mixing plutonium dioxide with depleted uranium dioxide and thereby converting it into a new fuel known as MOX, an abbreviation used to designate mixed oxide fuel, intended for use as an energy source in nuclear power stations"* (ECJ Judgment in *Sellafield MOX Plant*, ¶21).

of obligations arising under the Convention"[61]), asked the arbitral tribunal to take into account, *inter alia*, provisions of EU Law[62].

The International Tribunal for the Law of the Sea issued provisional measures, finding it had *prima facie* jurisdiction. The *Sellafield MOX Plant* case was, first and foremost, a dispute for primacy between different competent supranational jurisdictions, when EU Law is involved. Since the exclusive jurisdiction clause within the EU legal order was invoked before the arbitral tribunal, it decided, on the basis of comity, to suspend proceedings until the issue had been clarified by the ECJ.

It was in this context that the Commission instituted these infringement proceedings, arguing for a violation of Art. 292 EC (now Art. 344 TFEU) and Art. 193 Euratom (exclusive jurisdiction), as well as of Art. 10 EC (now Art. 4(3) TEU) and Art. 192 Euratom (duty of cooperation) (Sweden intervened on the same side).

As expected, the Court agreed with the Commission, its task made easier by the fact that UNCLOS contains a provision (Art. 282) giving preference to regional systems of mandatory dispute settlement. Interestingly, the Court held that, since UNCLOS had been ratified by the Community and the provisions relied on by Ireland in the dispute come within the scope of Community competence[63], they *"are rules which form part of the Community legal order"*, and the ECJ *"has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State's compliance with them"*[64].

---

61 ECJ Judgment in *Sellafield MOX Plant*, §87.

62 ECJ Judgment in *Sellafield MOX Plant*, §119. The relevant EU laws included Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175/40, 05/07/1985), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ L 73/5, 14/03/1997), subsequently amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ L 156/17, 25/06/2003) and Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (OJ L 140/114, 05/06/2009); and Council Directive 93/75/EEC (OJ L 208/10, 05/08/2002), subsequently replaced by Directive 2002/59/EC of the European Parliament and of the Council, of 27 June 2002, establishing a Community vessel traffic monitoring and information system (OJ L 208/10, 05/08/2002), as amended by Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 (OJ L 131/101, 28/05/2009) and by Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 (OJ L 131/114, 28/05/2009).

63 See Council Decision 98/392/EC, of 23 March 1998, concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ L 179/1, 23/06/1998).

64 ECJ Judgment in *Sellafield MOX Plant*, §121.

This raises the question of whether Member States may bring to the ECJ any dispute concerning provisions of international treaties within the scope of Community competence (and, thus, ratified by the Community – e.g. the Nuclear Safety Convention), or whether the practical consequences of this *obiter dictum* are limited to treaties with mandatory dispute settlement mechanisms.

3.1.3. INB[65]

Expectably, given the far reaching powers given to the Community, and in particular to the Euratom Supply Agency in this domain, the activities of this Agency and the provisions of Chapter VI of Title II of the Euratom Treaty have led to a comparatively significant number of cases, abundant in legal issues.

The *INB* case, the only Euratom Supply Agency case in the 21st century, put an end to the long-standing controversy on whether uranium enrichment[66] contracts should be considered "supply contracts", subject to Art. 52 Euratom and Chapter 6 of Title II (including Agency's right of option, right of ownership and exclusive right to conclude contracts), or "transformation contracts", subject to Art. 75 Euratom (excluded from the scope of Chapter 6 – indeed, the effect of Art. 75 Euratom *"is to remove substances which are the subject of the contract work operations referred to in that provision from the ambit of the provisions relating to the supply system"*[67])[68].

65 Judgment of the ECJ of 12 September 2006, *Indústrias Nucleares do Brasil* (C-123/04 and C-124/04), ECR (2006) I-7861; Opinion of AG Poiares Maduro delivered on 6 April 2006, in *Indústrias Nucleares do Brasil* (C-123/04 and C-124/04), ECR (2006) I-7861.
For more on this case, see: Alehno, 2008; Barsi, 2008; Della Molle & Galvan, 2008; Donnat, 2006.

66 As explained by the Court, *"uranium enrichment consists in the separation of isotopes, either by gaseous diffusion or by centrifuge, in order to raise the uranium 235 content and so to render the uranium suitable for use in a reactor"* (ECJ Judgment in *INB*, §36).

67 ECJ Judgment in *INB*, §39; Ruling of the ECJ 1/78, of 14 November 1978, ECR (1978) 2151, §16.

68 One author has traced the birth of the greater focus of dispute on Art. 75 Euratom to the *Commission v France (I)* case: *"This* [case's] *reassertion of the continued application of Chapter VI did not lead to its willing and orthodox application: for those whose scruples over the effect of Article 76 had been shown to be unfounded Article 75 presented the next important legal obstacle to the application of the Chapter to an important source of supply"* (ALLEN, 1983: 478).

Under Art. 75 Euratom:

"The provisions of this Chapter shall not apply to commitments relating to the processing, conversion or shaping of ores, source materials or special fissile materials and entered into:

(a) by several persons or undertakings, where the material is to return to the original person or undertaking after being processed, converted or shaped; or

(b) by a person or undertaking and an international organisation or a national of a third State, where the material is processed, converted or shaped outside the Community and then returned to the original person or undertaking; or

(c) by a person or undertaking and an international organisation or a national of a third State, where the material is processed, converted or shaped inside the Community and is then returned either to the original organisation or national or to any other consignee likewise outside the Community designated by such organisation or national.

The persons and undertakings concerned shall, however, notify the Agency of the existence of such commitments and, as soon as the contracts are signed, of the quantities of material involved in the movements. The Commission may prevent the commitments referred to in subparagraph (b) from being undertaken if it considers that the conversion or shaping cannot be carried out efficiently and safely and without the loss of material to the detriment of the Community.

The materials to which such commitments relate shall be subject in the territories of the Member States to the safeguards laid down in Chapter 7. The provisions of Chapter 8 shall not, however, be applicable to special fissile materials covered by the commitments referred to in subparagraph (c)."

The facts of the case went back to 1984, when INB (Brazil) received enriched uranium under a contract with Urenco (UK) (notified to the Agency), and stored it at the premises of Siemens (Germany). In 1994, it entered into a loan agreement on the use of that uranium with NEAG (Switzerland), belonging to the same group as NTC (USA). In return, NEAG/NTC was supposed to supply INB at a later date with the same kind of enriched uranium and to pay an additional fee. However, both NEAG and NTC became insolvent in 1995-1996. INB asked a German court to order Siemens to release to it the uranium transferred to NEAG, kept at its facilities. Two other companies – UBS (Switzerland) and TUEC (USA) – intervened claiming right to parts of that same uranium. The first instance court agreed to the requests

of these companies, and rejected INB's claims. The appeal court referred several questions to the ECJ, leading to this landmark judgment on the legal framework deriving from Art. 75 Euratom.

The first question to be answered was the crucial one – whether the terms *"processing, conversion or shaping"* in Art. 75(1) Euratom encompass uranium enrichment. The main consequence of an affirmative reply was summarized as follows by a Supply Agency specialist: it *"leaves the* [Supply Agency] *no right to oppose a contract if it is not in line with the Community's nuclear supply policy"*[69].

The Court's conclusion was indeed affirmative (as argued by Germany, France and the Netherlands), and stated in clear and broad terms: *"the first paragraph of Article 75 EA is to be interpreted as meaning that the terms «processing», «conversion» and «shaping» in that provision also encompass the enrichment of uranium"*[70].

It is beyond dispute that both positions had merit, but the Court's conclusion was, I believe, the right one, regardless of whether one considers the common meaning of the words in question, the *ratio* and purpose of the Euratom common supply policy (and of Art. 75 Euratom in particular) or its practical implications.

One must begin by placing the Euratom provisions in their historical context. As AG Poiares Maduro pointed out, at the time the Treaty was drafted, uranium enrichment *"had not been developed on a commercial scale"*, which accounts for lack of explicit references to it[71].

---

69 Barsi, 2008: 1104.

70 ECJ Judgment in *INB*, §46. It should be noted that the AG's approach to the case viewed this dispute as concerning primarily the provision of enrichment services within the Community for non-Community owners of natural uranium (see, e.g., AG Opinion in *INB*, §1 and §44: *"In so far as it has the object of processing goods in transit, on behalf of a foreign national, and not of supplying the Community with nuclear materials, the supply and ownership rules of the EAEC Treaty should not be applied to* [uranium enrichment]*"*). However, both Art. 75 Euratom and the Court's ruling had broader implications, applying equally to purely internal enrichment contracts.
It should also be noted that, whereas AG Poiares Maduro seemed to identify in this dispute, in essence, a struggle for the primacy of a public law or of a civil and commercial law approach (AG Opinion in *INB*, §§45-46), which is clearly present, the dispute also concerned – and perhaps more decisively – the scope of Euratom powers and the extent of transfer of sovereignty from the Member States to the Community. In this regard, as the AG himself highlighted, the judgment does not change the fact that each Member State is free to impose upon its providers of uranium enrichment services whatever restrictions justified by public policy concerns they deem fit, within the limits set by Euratom and EU law.

71 AG Opinion in *INB*, §42.

First, the Court noted that, under the ordinary meaning of the term, enrichment is a form of "conversion" of a material. It dismissed the Commission's arguments of the need for a strict interpretation and of the need to distinguish according to degree of transformation[72], by stating that the three terms in Art. 75(1) Euratom *"do not lead to the conclusion that certain types of processing, conversion or shaping* [of nuclear materials] (…) *are outside the scope of Article 75 EA, for example by reason of particular technical characteristics peculiar to such processing, conversion or shaping or the value added by them"*[73].

Second, a teleological interpretation clearly leads to this conclusion. Art. 75 Euratom *"concerns situations which are deemed not to affect, or not sufficiently to affect, the regular and equitable supply to all users in the Community of ores and nuclear fuels, in order to justify the full application of the system laid down under Chapter 6"*[74]. According to the Court, enrichment contracts do not sufficiently affect the objective of ensuring a regular and equitable supply – *"[s]uch a process is inherently neutral as regards the supply of uranium to users established in the Community"*[75].

Thirdly, although it reduces the powers of the Euratom Supply Agency, it is hard to discern any practical implications of the Court's interpretation for the Community's security of supply[76]. If anything, this ruling protects the free market and arguably fosters the growth of Community providers

72 The Commission argued that Art. 75 Euratom is an exception to the rules of Chapter 6, and thus should be strictly interpreted, and that uranium enrichment *"affects the principal qualities of the materials supplied. Whereas Article 75 EA refers to minor modification operations relating to the chemical composition of the form or the materials, the enrichment of uranium brings about a substantial change in the materials, both physical and economic"* (AG Opinion in *INB*, §43).

73 ECJ Judgment in *INB*, §38.

74 ECJ Judgment in *INB*, §40.

75 ECJ Judgment in *INB*, §40. Further on the teleological approach, see AG Opinion in *INB*, §§54-55.

76 The Commission argued *"that contracts negotiated on the oligopolistic market for uranium enrichment have potentially significant effects on the security of the long-term supply of the Community and on the equal treatment of users"* (ECJ Judgment in *INB*, §41), but it is not clear from available facts on what grounds this assessment was based. If the Commission's argument amounted to the idea that a limited output of enrichment services could jeopardize the Community's access to nuclear fuel (as uranium must be enriched to different degrees in order to be used in nuclear reactors), then it is fair to say that this judgment effectively reduced the scope of Euratom to the control of access to natural uranium – enrichment services being left outside the scope of the common supply policy. This only seems relevant if it is conceivable for Community operators, at some point, not to have access to sufficient enrichment services within or outside the Community to meet their needs for nuclear fuel.

of uranium enrichment services[77], which can be said to contribute to the first objective of the Euratom Treaty (Art. 1 Euratom). Still, it is an unusual occurrence to see the Court choose an interpretation that reduces the scope of Community powers.

What conclusions should be drawn from this first part of the judgment?

Uranium enrichment contracts fall, in principle, under Art. 75 Euratom. But two reservations must be made. The Court was careful to point out that enrichment contracts are subject to the obligations foreseen in Article 75 Euratom, specifically safeguards and notification to the Supply Agency. In the latter case, this obligation *"may preclude the performance of the commitments referred to in Article 75(b) EA"*[78]. In other words, it seems the Community may prevent nuclear materials from exiting the Community in order to be enriched in a third country, if this could endanger or run counter to the common supply policy.

Furthermore, as was stressed in an in-depth analysis of the judgment, *"the conclusion* [cannot] *be drawn that all contracts involving the enrichment of uranium should come under"* Art. 75 Euratom. In order for this judgment's *ratio* to apply, *"enrichment contracts must have a substantially neutral effect on the Community supply system"*[79].

One question raised, but unanswered, concerned the legal consequences of failure to notify agreements that fall under Art. 75 Euratom. One author has argued that *"a failure to notify a transformation contract does not influence its validity"*[80], while others have stressed the uncertainty of the legal consequences and available remedies for the Supply Agency[81].

The second question answered by the Court concerned the concept of undertaking, as defined in Art. 196(b) Euratom: *"any undertaking or institution which pursues all or any of its activities in the territories of Member States within*

77 *"The INB judgment has in practical terms «liberalised» enrichment services, at least out of the Community supply system"* (BARSI, 2008: 1120).

78 ECJ Judgment in *INB*, §45.

79 Barsi, 2008: 1104. This author argues that return operations relating to enriched uranium (e.g. a Member State exports to a third country enriched uranium, on condition that it be returned) *"not involving any transformation of the material (such as loans and exchanges)"* are not encompassed by Art. 75 Euratom (Barsi, 2008: 1105).

80 Barsi, 2008: 1123.

81 Della Molle & Galvan, 2008: 219-220, adding that *"regulation should be possible (depending on the possibilities offered by the applicable national law).*

the field specified in the relevant Chapter of this Treaty, whatever its public or private legal status". The national court wanted to know if, within the scope of the activities in question, INB and NEAG should be considered undertakings, as defined in this provision, for the purposes of Art. 75 Euratom.

The Luxembourg Court clarified that Art. 196(b) Euratom *"is to be interpreted as meaning that an undertaking having its seat outside the territories of the Member States does not pursue, within the meaning of that provision, all or any of its activities in those territories if it maintains with an undertaking having its seat in those territories a commercial relationship either for the supply of raw material for the production of enriched uranium and the procurement of enriched uranium or for the storage of that enriched uranium"*[82], or *"if it* [merely] *acquires or disposes of enriched uranium stored there"*[83]. As highlighted by the Court, this is the only interpretation that does not render Art. 75(c) Euratom *"largely devoid of purpose"*[84].

In answering the third question, the Court clarified two issues. First, it established that the principle of fungibility extends to nuclear material. Specifically, it stated that Art. 75(c) Euratom *"is to be interpreted as meaning that the material supplied for treatment, conversion or shaping need not be identical to the material subsequently returned and that it is sufficient for the processed material to be commensurate in terms of quality and quantity with the material supplied"*[85]. This conclusion was based on a point of fact (*"it is impossible, in practice, to determine whether material supplied for enrichment and material subsequently returned is identical"*), and two points of law: (i) that this principle had been accepted in international practice and recognized in a Community treaty[86]; and (ii) it fits the rationale of the exclusion, since transfer of material of identical quality and quantity does not affect supplies available to Community users[87].

82 ECJ Judgment in *INB*, §51.

83 ECJ Judgment in *INB*, §66.

84 ECJ Judgment in *INB*, §50. As explained by AG Poiares Maduro, *"*[t]*he important factor in this connection is the place where the undertaking concerned carries out its own activities in the nuclear field, not the place where it has certain operations carried out by its business partners"* (AG Opinion in *INB*, §63).

85 ECJ Judgment in *INB*, §56.

86 See Art. 16(2) of the Agreement for cooperation in the peaceful uses of nuclear energy between the European Atomic Energy Community and the United States of America (OJ L 120/1, 20/05/1996).

87 ECJ Judgment in *INB*, §§53-54.

Second, it stated that these types of service contracts relating to uranium may involve transfer and re-transfer of title – Art. 75(c) Euratom also applies *"where the undertaking carrying out the process acquires title to the raw material on delivery and therefore has to transfer title to the enriched uranium back to the other contracting party on completion of the process"*[88]. Again, this *"does not affect the supply of uranium to users in the Community"*[89].

Finally, the Court interpreted Art. 73 Euratom *"as meaning that it does not apply to agreements concerning enriched uranium stored within the Community where all the parties to the agreement are nationals of third States"*[90], highlighting that such agreements *"do not affect the objective of ensuring the security of supplies to the Community"*[91]. In other words, UBS and TUEC did not have to obtain the Commission's prior consent for the agreements reached with NEAG/NTC (all non-Community companies) concerning the enriched uranium stored in Germany.

As a result of this judgment, the Euratom Supply Agency was forced to revise some of its procedures[92]. It has been argued that, with the reduction of the Supply Agency's role in the regulation of enrichment services, *"the attention of those who are still interested in regulating these services may now be drawn to other branches of the law. One of these re-discovered branches would be*

88 ECJ Judgment in *INB*, §56.

89 ECJ Judgment in *INB*, §55. AG Poiares Maduro noted: *"In the context of such operations, ownership is transferred essentially for practical reasons, taking account of the fungibility of the materials. However, it must be observed that title acquired in this way is provisional and contingent. On the one hand, title is inevitably extinguished with conversion. On the other, the grant of title is subject to the obligation to convert the original materials and to return the converted materials. The latter, which are the principal subject of the commitment, remain in any case the property of the undertaking which delivered the original materials"* (AG Opinion in *INB*, §68).

90 ECJ Judgment in *INB*, §69.

91 ECJ Judgment in *INB*, §68.

92 ALEHNO, 2008: 1086. *"Flexibilities are planned to be introduced on two accounts. Small quantities of raw material (as per Regulation 66/2006/Euratom) may be supplied by the service provider without reclassifying the return operation as a supply transaction. Similarly, very short-term (no longer than 6 months according to the ESA's proposal) advances of product material would likewise not alter the status of the return operation. Specifically in the case of enrichment contracts, not only the provisions regulating raw and product materials, but also those providing for the tails material need to be born in mind, because tails are potentially useful materials. Any tails scheduled to be re-enriched (upgraded) must be treated as source materials produced on the territory of the Community. The Community supply system channels internal production toward Community users by subjecting re-enriched tails to the ESA's right of option and the Commission's export authorization"* – BARSI, 2008: 1123.

competition law" (suggesting the possible use of Art. 102 TFEU to challenge dominant positions arising, *inter alia*, from intellectual property rights in this domain), and another would be international trade law[93]. More importantly, the same author stresses that this judgment calls for a profound reassessment of the role of the Supply Agency, which has in the past decade acted merely as a guardian of the Corfu Declaration[94].

3.1.4. France v Commission[95]

The *France v Commission* case stands out as a rare example of the Court annulling a Commission Regulation for lack of competence. While it may seem to boil down to a wrong choice of legal form for the aim pursued, its trigger was actually an attempt by the Commission to alter the mandatory legal consequences of a notification under Art. 41 Euratom.

Under Arts. 41 to 44 Euratom, persons and undertakings planning nuclear investments (direct obligation upon private individuals) must communicate such plans to the Commission, which issues an opinion to the respective Member State. The activities encompassed by these provisions are listed in Annex II to the Euratom Treaty, and may be further specified by the Council (Art. 41 Euratom), as it did in Regulation (Euratom) 2587/1999[96]. Subsequently, the Commission adopted Regulation (Euratom) 1209/2000, adopting a model for communications foreseen in Art. 41 Euratom and providing basic clarifications in this regard[97].

93 Barsi, 2008: 1120-1121.

94 Barsi, 2008: 1121-1122. The Corfu Declaration was adopted jointly by the Commission and Council in parallel to the signing of the Partnership and Co-operation agreement with Russia on 24 June 1994, essentially to protect Community uranium suppliers and enrichment service providers from the threat of an excessive inflow of Russian supplies.

95 Judgment of the EGC of 17 September 2007, *France v Commission* (T-240/04), ECR (2007) II-4035.

96 Council Regulation (Euratom) 2587/1999 of 2 December 1999 defining the investment projects to be communicated to the Commission in accordance with Article 41 of the Treaty establishing the European Atomic Energy Community (OJ L 315/1, 09/12/1999).

97 Commission Regulation (Euratom) 1209/2000, of 8 June 2000, determining procedures for effecting the communications prescribed under Article 41 of the Treaty establishing the European Atomic Energy Community (OJ L 138/12, 09/06/2000). This Regulation is listed in EUR LEX as "Regulation (EC) 1209/2000", but it should accurately be referred to as "Regulation (Euratom) 1209/2000", as it was adopted under a provision of the Euratom Treaty.

The Commission then decided to further develop that legal framework and adopted Regulation (Euratom) 1352/2003[98]. France asked the Court to annul the Regulation, and was supported by Germany and Belgium.

Although the interpretation of the Euratom Treaty was at stake, the Court relied on case-law relating to the interpretation of the analogous provisions of the EC Treaty, stating that: *"*[t]*he case-law developed in the context of the EC Treaty should* (…) *be applied in relation to the review of the legality of a regulation in the context of the EAEC Treaty, unless there are special provisions in that area or the scheme of which proves different from the overall scheme and the spirit of the EC Treaty"*[99].

After recalling the principles of allocation of powers and of legal certainty (requiring *"that the binding nature of any act intended to have legal effects must be derived from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis"*[100]), taking into account the division of powers and institutional balance under the Treaty, the Court began by noting that neither Arts. 41-44 Euratom nor Regulation (Euratom) 2587/1999 give the Commission *"the explicit power to adopt such a regulation"*[101].

Thus, *"in the absence of a specific provision empowering the Commission to adopt a regulation, if such an act proved necessary, it should have followed the procedure laid down in Article 203* [Euratom (equivalent to current Art. 308 TFEU)], *that is, to submit a proposal to the Council, which could have adopted such a regulation by unanimity, after consultation with the European Parliament"*[102]. The conclusion could only have been different if the Treaty and/or Regulation implicitly gave the Commission the power to adopt such a Regulation, it being *"actually necessary to give practical effect"* to the provisions in question[103].

The Commission argued that the contested regulation was not a regulation at all, but a *sui generis* act, imposing obligations only on the Commission, and

98 Commission Regulation (Euratom) 1352/2003, of 23 July 2003, amending Regulation (Euratom) 1209/2000 determining procedures for effecting the communications prescribed under Article 41 of the Treaty establishing the EAEC (OJ L 192/15, 31/07/2003).

99 EGC Judgment in *France v Commission*, §30. See also §§31, 42-43, 45 and 48-49.

100 EGC Judgment in *France v Commission*, §31.

101 EGC Judgment in *France v Commission*, §§32-33.

102 EGC Judgment in *France v Commission*, §34.

103 EGC Judgment in *France v Commission*, §§35-38.

not on third parties outside that institution[104]. The question for the Court was not whether the Commission could have adopted the rules in question (e.g. in the form of internal rules), but whether it was necessary to adopt *"those measures in the form of a regulation, binding in its entirety and directly applicable in all Member States"*[105].

It is also important to stress that the Member States had not challenged the Regulation previously adopted by the Commission under the same provisions[106]. What made this one different was how it would change the legal consequences of notifying a project under Art. 41 Euratom, as summarized in the Court's conclusion: *"the Court considers that it was not necessary, in order to give practical effect to those articles of the EAEC Treaty, to confer on the Commission the power to recommend the suspension of investment projects before finishing the examination of them, as Article 3c(2) of Regulation No 1209/2000 – as introduced by the contested regulation – provides, since such a suspension was not in any way envisaged in the EAEC Treaty*[107]*. Similarly, the fact that the Commission, in accordance with Article 4b of Regulation No 1209/2000, as provided for by the contested regulation, insists on publishing the investment projects which are communicated to it cannot be considered as necessary for the proper implementation of Article 44 EA, which already provides for such a possibility itself, without making it obligatory"*[108].

Crucially, *"the adoption of measures providing details of the Commission's examination procedure of investment projects* (…) *does not need to be carried out in the form of a regulation. Simple internal rules of organisation would suffice to achieve the goals"*[109]. A communication or guidelines would have equally guaranteed transparency and legal certainty (because internal rules are binding on the Commission). Moreover, the Commission's choice of legal

104 EGC Judgment in *France v Commission*, §28.

105 EGC Judgment in *France v Commission*, §39.

106 The Court dismissed the Commission's argument that a Regulation was needed to amend the existing Commission Regulation on the implementation of Art. 41 Euratom (EGC Judgment in *France v Commission*, §45).

107 This should be contrasted with the Court's finding in Judgment of the ECJ of 22 September 1988, *Land de Sarre* (187/87), ECR (1988) 5013, relating to what was required in order for a Commission opinion under Art. 37 Euratom to be fully effective.

108 EGC Judgment in *France v Commission*, §41.

109 EGC Judgment in *France v Commission*, §42. See also §46.

form actually created *"a risk of confusion damaging to legal certainty as regards the legal scope of that act for third parties"*[110].

Following the Court's annulment of this Regulation, the Commission apparently did not adopt guidelines or any other sort of internal rules relating to Art. 41 Euratom. However, Regulation (EU, Euratom) 617/2010[111], implemented by Regulation (EU, Euratom) 833/2010[112], has instituted a legal framework for notification of investment projects in energy infrastructures that encompasses nuclear power plants.

3.1.5. Land Oberösterreich[113]

The *Land Oberösterreich* case was the first and only time (so far) the ECJ was confronted – through a reference for a preliminary ruling – with a civil dispute relating to cross-border damages arising from the operation of a nuclear power plant. It was, in more than ways than one, a historical case[114].

In 2001, shortly after initiation of operations, an Austrian regional authority (and several private parties), owner of agricultural lands 10 km from the border, brought a liability (nuisance) claim under Austrian civil law in a national court against the Czech nuclear operator, relating to the Temelín plant, 50 km from the Austrian border.

Temelín had repeatedly been the focus of attention at EU level. Accession negotiations integrated a bilateral agreement between Austria and the Czech Republic concerning the monitoring of the plant's safe operation

110 EGC Judgment in *France v Commission*, §§47 and 50.

111 Council Regulation (EU, Euratom) 617/2010, of 24 June 2010, concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) 736/96 (OJ L 180/7, 15/07/2010). Annulment proceedings are pending concerning this regulation – see *Parliament v Council*.

112 Commission Regulation (EU, Euratom) 833/2010, of 21 September 2010, implementing Council Regulation (EU, Euratom) 617/2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union (OJ L 248/36, 22/09/2010).

113 For more on this case, see: Galante, 2010; Möstl, 2010.

114 AG Poiares Maduro summarized the core of the dispute thus: *"This case may be characterised as one which turns on the question of reciprocal externalities. On the one side, Austria and, in particular, the Land Oberösterreich believe they are victims of an externality imposed on them by □EZ and the Czech authorities in installing a nuclear power plant next to the Austrian border without taking into account the risks imposed on those living on the other side of the border. On the other side, □EZ and the Czech Republic argue that it is the interpretation of Austrian law made by the Austrian Supreme Court that imposes on them an externality by requiring them to close the Czech nuclear power plant simply to protect the interests of Austrian citizens and without taking into account the situation in the Czech Republic"* (AG Opinion in *Land Oberösterreich*, §1).

and included an evaluation of nuclear safety at that facility, completed by annual checks after accession and an Art. 37 opinion on the radioactive waste disposal plan[115].

Applicable Austrian law limited such claims to damages, excluding the possibility of interdiction, when the activity had been authorized by the national authorities. In this case, the national courts disagreed on whether this meant that authorizations by the authorities of another Member State had the same effect. In other words, did the national court have the power, not only to order the payment of damages, but also to prohibit the operation of the nuclear power plant[116]? Austria intervened in support of the interpretation that would grant greater power to its national courts, while the Czech Republic, France, Poland and the Commission intervened identifying a violation of EU Law (*in casu*, in a position protective of the interests of nuclear energy).

A very interesting issue was invoked, concerning the enforcement of Regulation (EC) 44/2001[117]. While not generally challenging the applicability of this Regulation to the nuclear sector, the Czech Republic argued that an order by the national court to cease operation of the Temelín plant did not have to be complied with, since Art. 34(1) of Regulation (EC) 44/2001 *"provides that a judgment is not to be recognized where such recognition is manifestly contrary to public policy in the Member State in which recognition is sought"*[118]. The Court avoided tackling this issue, as it was not required given its conclusion[119].

The Court summarized the dispute in the main proceedings as concerning *"essentially the issue whether an industrial activity consisting in the operation of a nuclear power plant may be pursued and, if so, what are the technical conditions which may be imposed on such a power plant because of an actual or potential*

115 ECJ Judgment in *Land Oberösterreich*, §§43-49.

116 There was an interpretative dispute in this regard – see ECJ Judgment in *Land Oberösterreich*, §§55-56.

117 Council Regulation (EC) 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12/1, 16/01/2001), last amended by Commission Regulation (EU) 416/2010, of 12 May 2010.

118 ECJ Judgment in *Land Oberösterreich*, §61.

119 ECJ Judgment in *Land Oberösterreich*, §62. See AG Opinion in *Land Oberösterreich*, §9.

nuisance allegedly caused to land situated in another Member State due to its possible exposure to ionizing radiation originating from that power plant"[120].

On a procedural matter, given the identity of its jurisdiction under both treaties, the Court considered it could answer the national court's questions by interpreting also provisions of the Euratom Treaty, even if it had formally only referred questions under the EC Treaty[121].

It then went on to establish that the prohibition of discrimination on the grounds of nationality was a general principle of EU Law, applicable also under the Euratom Treaty, even though it was only explicitly foreseen in Art. 12 of the EC Treaty (now Art. 18 TFEU)[122]:

> *"Although the EAEC Treaty does not contain any explicit provision which corresponds to that article of the EC Treaty, the fact remains that* (…) *the principle laid down in Article 12 EC forms part of the 'principles' of the Community and the rule on equal treatment with nationals is one of the fundamental legal provisions of the Community. Article 12 EC* (…) *is a specific expression of the general principle of equality, which itself is one of the fundamental principles of Community law* (…).
> … *it would appear to be contrary to both the purpose and the consistency of the treaties to allow discrimination on grounds of nationality, which is prohibited under the EC Treaty by virtue of Article 12 EC, to be tolerated within the scope of application of the EAEC Treaty*"[123].

It was then a simple matter to conclude that the Austrian legal provisions in question, as interpreted by the national court, led *"to the same outcome as a difference in treatment on grounds of nationality"*[124], but it was still necessary to *"ascertain whether in the present case* [the discrimination] *comes within the scope of application of the EAEC Treaty"*[125].

This was done by recalling the broad interpretation given by the Court to Chapter III of Title II of the Euratom Treaty, particularly in the *Nuclear*

120 ECJ Judgment in *Land Oberösterreich*, §82.

121 ECJ Judgment in *Land Oberösterreich*, §84.

122 ECJ Judgment in *Land Oberösterreich*, §91.

123 ECJ Judgment in *Land Oberösterreich*, §§88-90.

124 ECJ Judgment in *Land Oberösterreich*, §97.

125 ECJ Judgment in *Land Oberösterreich*, §98.

Safety Convention case, implying that this Treaty also governs, in a way, the safety of nuclear installations[126]. Thus, *"the granting of official authorizations for the construction and operation of nuclear installations, in their various aspects relating to health protection against the dangers of ionizing radiations for the general public, comes within the scope of application of the EAEC Treaty"*[127].

De facto differential treatments on the basis of nationality may be justified *"by objective considerations unrelated to nationality"*, as long the principle of proportionality in relation to the legitimately pursued objective is respected[128]. The clarification of this point is interesting insofar as it extended to the Euratom Treaty the abundant case-law on these matters under the TFEU.

Aims of a purely economic nature cannot, of course, be used as justification:

> *"it must be noted that the willingness of the Austrian legislature to take account of the interests of domestic economic operators, to the exclusion of those of economic operators established in other Member States, cannot be accepted as justification for the difference in treatment resulting from the legislation at issue in the main proceedings. Just as they cannot justify a barrier to the fundamental principles of free movement of goods or the freedom to provide services* (…)*, aims of a purely economic nature cannot justify discrimination on grounds of nationality within the scope of application of the EAEC Treaty."*[129]

But, more relevantly, concerns with the protection of life, of health, of the environment or of property rights also cannot be used to justify differences in treatment relating to authorizations of nuclear power plants given by another Member State, since the Euratom Treaty gives the Community extensive powers to regulate, supervise and guarantee compliance with the requirements of health and environmental protection from the dangers of ionizing radiation, and the Commission had carried out safety checks of this nuclear power plant, made recommendations during accession to ensure a *"level of safety comparable to that prevailing"* in the EU, and approved its

126 ECJ Judgment in *Land Oberösterreich*, §§99-104.

127 ECJ Judgment in *Land Oberösterreich*, §105.

128 ECJ Judgment in *Land Oberösterreich*, §108.

129 ECJ Judgment in *Land Oberösterreich*, §109.

radioactive waste disposal plan[130]. The Court also based this conclusion on the ratification of the Nuclear Safety Convention by the Community and the Member States[131]. Finally, if the Euratom protection system malfunctions, Member States *"have a number of remedies at their disposal for obtaining the corrections necessary"*: (i) request the revision of the basic safety standards (Art. 32 Euratom)[132]; (ii) initiate infringement proceedings (Art. 142 Euratom), which may even be urgent in some circumstances (Art. 38 Euratom); and/or (iii) act against an unlawful measure or omission of the Council or Commission (Arts. 145 to 149 Euratom).

Therefore, the Court concluded:

> *"if a Member State has enacted a domestic provision which* (…) *prevents an action for an injunction to prevent an actual or potential nuisance from being brought when the alleged nuisance originates from an officially authorized industrial installation, that Member State cannot, in principle, exclude from the scope of application of such a provision authorizations granted in respect of nuclear installations situated in other Member States by maintaining that such an exclusion is justified on grounds of protecting life, public health, the environment or property rights.*
>
> *Such an exclusion disregards completely the fact that the Community legislative framework* (…) *contributes precisely and essentially towards ensuring such protection. That exclusion cannot be regarded as necessary for the purposes of protection and therefore cannot be held to satisfy the requirement of proportionality, either"*[133].

This exclusion of justifiability will almost certainly prove to be historical, although its precise scope is still to be clarified, as it seemed to be tempered in this case by the absence of actual identifiable damage and the exhaustive checks carried out by the Commission of that specific nuclear power plant.

The ECJ concluded by extending to the scope of the Euratom Treaty general principles of EU Law long affirmed under the TFEU, relating to the obligations of national courts when confronted with national law in conflict with EU Law:

---

130 ECJ Judgment in *Land Oberösterreich*, §§110-126 and 130.

131 ECJ Judgment in *Land Oberösterreich*, §§127-129. It would stand to reason that the Court's logic would today necessarily encompass the Nuclear Safety Directive.

132 ECJ Judgment in *Land Oberösterreich*, §§131-132.

133 ECJ Judgment in *Land Oberösterreich*, §§135-136.

"When applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law. Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereby on individuals, if necessary disapplying any provision if its application would, in the circumstances of the case, lead to a result contrary to Community law"[134].

3.1.6. Parliament v Council[135]

Regulation (EU, Euratom) 617/2010[136], implemented by Regulation (EU, Euratom) 833/2010[137], has instituted a legal framework for notification of investment projects in energy infrastructures, including nuclear power plants.

In October 2010, the European Parliament asked the Court to annul Regulation (EU, Euratom) 617/2010, adopted under the dual legal basis of Articles 337 TFEU and 187 EA (collection of information and verifications required for the Commission to carry out its functions), arguing that the measures in question *"fall within the energy responsibilities of the Union which are specifically governed by Article 194 TFEU"*[138]. The practical consequence is that, instead of having no legally required role under the provisions used as legal basis (although it did issue an opinion on the proposed Regulation), the EP would have been co-legislator if Art. 194(2) TFEU had been used (ordinary legislative procedure). Furthermore, the Parliament argued that Art. 194(2) should have been the sole legal basis, excluding Art. 187 Euratom.

This is the second time the EP has gone before the Court to dispute the legal basis of legislation adopted by the Council under a Euratom provision[139],

134 ECJ Judgment in *Land Oberösterreich*, §138. Reaffirmed in: Judgment of the ECJ of 19 November 2009, *Fillipiak* (C-314/08), ECR (2009) I-11049, §81; and Judgment of the ECJ of 22 June 2010, *Aziz Melki* (C-188/10 and C-189/10), ECR not yet reported, §50.

135 Action brought on 12 October 2010, *Parliament v Council* (C-490/10) (OJ C 12/18, 15/01/2011).

136 Council Regulation (EU, Euratom) 617/2010, of 24 June 2010, concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) 736/96 (OJ L 180/7, 15/07/2010).

137 Commission Regulation (EU, Euratom) 833/2010, of 21 September 2010, implementing Council Regulation (EU, Euratom) 617/2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union (OJ L 248/36, 22/09/2010).

138 Notice published in OJ C 12/18, 15/01/2011.

139 See: Judgment of the ECJ of 4 October 1991, *Parliament v Council* (C-70/88), ECR (1991) I-4529; and Judgment of the ECJ of 22 May 1990, *Parliament v Council* (C-70/88), ECR (1990) I-2041.

both times attempting to exclude the relevance of Euratom as a legal basis, given the extremely limited role it is awarded under this Treaty.

This case is still pending.

3.2. Military activity cases

There had long been discussions on whether the Euratom Treaty applied to military activities. In 1960, France had notified to the Commission its plans to conduct nuclear tests in the Sahara[140]. In 1995, this dispute was raised before the EGC in the *French nuclear tests* case (see section 3.1.4), with the Commission[141] and the European Parliament arguing for applicability and France arguing against, but the Court did not have to tackle the issue.

In the *Nuclear Safety Convention* case, the Court had stated, in the broadest terms, that Art. 37 Euratom gives the Community competences *"as regards any plan for the disposal of radioactive waste in whatever form if the implementation of that plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State"*[142]. The ECJ also recalled an earlier judgment where it had *"held that the purpose of those articles was to ensure consistent and effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source"*[143]. Thus, at this point it seemed that the source of ionizing radiation was irrelevant to the applicability of the Euratom Treaty, since source was irrelevant to the objective of ensuring effective health protection. But the issue of military activities had not yet been specifically dealt with.

It was only in 2005 and 2006 (with a restatement in 2011), in cases that pitted the Commission against the UK and France (i.e. the Member States with nuclear military programmes) that the ECJ ruled on this issue. In what was, in my view, the least fortunate moment of EU case-law in the nuclear sector, the Court concluded that Euratom does not apply to any military activity, seemingly in an absolute and unconditional exclusion.

---

140 See AG Opinion in *Commission v UK (II)*, §96.

141 The Commission had also expressed this opinion, in the context of interpreting Art. 37 Euratom, in Commission Recommendation 1999/829/Euratom of 6 December 1999 on the application of Article 37 of the Euratom Treaty (OJ L 324/23, 16/12/1999).

142 ECJ Judgment in *Nuclear Safety Convention*, §103.

143 ECJ Judgment in *Nuclear Safety Convention*, §80 (our underlining); Judgment of the ECJ of 4 October 1991, *Parliament v Council* (C-70/88), ECR (1991) I-4529, §14.

3.2.1. Commission v UK (II)[144]

Just as *Land de Sarre*[145], this case also dealt with a failure to comply with Art. 37 Euratom (radioactive waste management), but this time in the context of infringement proceedings initiated by the European Commission.

In 1998-1999, the UK decommissioned the "Jason reactor", a nuclear reactor used for training and research associated to the Royal Navy's nuclear propulsion programme for submarines. The Commission was informed that this would be carried out, but did not receive the information required by Art. 37 Euratom (decommissioning naturally involves disposal of radioactive waste) prior to the issuing of the authorization by the UK authorities[146].

The Court began by highlighting that *"the signatories of the Treaty, by referring in the preamble thereto to the advancement of the cause of peace, the applications of the nuclear industry contributing to the prosperity of their peoples and the peaceful development of atomic energy, intended to emphasize the non-military character of that Treaty and the supremacy of the aim of promoting the use of nuclear energy for peaceful purposes"*[147]. Furthermore, Arts. 1 and 2 Euratom *"confirm that the objectives pursued by the Treaty are essentially civil and commercial"*[148].

However, the Treaty has no provision expressly excluding military activities, in contrast to the special rules in the TFEU. The UK and France argued this contrast showed military activities were excluded, or they would have included provisions to safeguard their interests in this domain, as they did under the EEC Treaty[149].

---

144 Judgment of the ECJ of 12 April 2005, *Commission v UK* (C-61/03), ECR (2005) I-2477; Opinion of AG Geelhoed delivered on 2 December 2004, in *Commission v UK* (C-61/03), ECR (2005) I-2477.
For more on this case, see: ANDRES-ORDAX, 2008; BREDA, 2005; GERVASONI, 2005.

145 Judgment of the ECJ of 22 September 1988, *Land de Sarre* (187/87), ECR (1988) 5013.

146 *"Jason was not an isolated case. Other infringement cases had been also initiated by the Commission for failure to notify the general data under Article 37 Euratom, where the United Kingdom had systematically invoked the «military exception». The most recent cases, which never reached the Court, concerned the authorisation granted for increased discharges of radioactive waste into the Tamar river by Devonport Royal Dockyards Ltd (waste resulting from refitting, refuelling and dismantling of the Vanguard class trident submarines), and the increased discharges authorised at the Aldermaston and Burghfield sites (activities of manufacture and servicing of Trident nuclear warheads; warhead technology research; decommissioning of nuclear warheads)"* – ANDRES-ORDAX, 2008: 539.

147 ECJ Judgment in *Commission v UK (II)*, §26.

148 ECJ Judgment in *Commission v UK (II)*, §27.

149 ECJ Judgment in *Commission v UK (II)*, §§30 and 34.

This was despite the inclusion in the Treaty of some provisions dealing specifically with the military sector (see Arts. 24 to 28 and 84 Euratom). According to the Court, the *"existence of those provisions may also be explained by the fact that the application of certain rules introduced by that Treaty, even if it relates only to civil activities, is nevertheless liable to have an impact on activities and interests within the field of the national defence of the Member States"*[150]. Perhaps, but is there no conclusion to be drawn from the absence of identical safeguards in the other Chapters that are also liable to have an impact on military activities (radiological protection, supply, etc.)?

As was stressed by the Court, the drafters of the Treaty had differing opinions on this issue and left it unresolved[151]. This was a rather selective way of describing the negotiations. It should be recalled that, at the time of the drafting of the Euratom Treaty, none of its Parties had nuclear military activities – *"it was, therefore, not at the time strictly necessary to decide whether the EAEC Treaty applied to the nuclear defence sector"*[152]. Furthermore, the *Travaux Préparatoires* of the Treaty recorded that: *"*[t]*he general view of the Ministers was that it was more important to find a solution that did not definitely exclude military uses, while at the same time ensuring that such a solution could not endanger the safeguards that were recognised as being of primordial importance"*[153].

As expressed by ANDRES-ORDAX:

> *"The lack of a general clause safeguarding the defence interests of Member States is in my view an indication that the founding fathers did not wish to openly allow Member States to exclude from the Euratom mechanisms the use of ionising radiation for defence*

150 ECJ Judgment in *Commission v UK (II)*, §32.

151 ECJ Judgment in *Commission v UK (II)*, §29.

152 AG Opinion in *Commission v UK (II)*, §79. *"This is not to say that the issue was not discussed by the founders of the Community in preparing the Treaty. It should be remembered that the discussions took place in the context of international disarmament negotiations, as well as general speculation that the French Republic was considering joining the ranks of the nuclear military powers. The potential application of the future EAEC Treaty to nuclear defence was thus, at the time, an issue of certain political sensitivity"* AG Opinion in *Commission v UK (II)*, §80, quoting M. Faure (*Travaux Préparatoires* of the EAEC Treaty), in the name of the French Government: *"If France decides to proceed with military applications and to prepare and then to explode a bomb after four years, France does not intend to forego necessary consultation of its partners or Community control"*. The Spaak Report had left the issue to be decided at the highest political level – see AG Opinion in *Commission v UK (II)*, footnote 48. One should also consider the subsequent developments in France and the reversal of position concerning Euratom, which was in itself revealing of the way France perceived the impact of this Treaty on its military activities.

153 AG Opinion in *Commission v UK (II)*, §81.

related purposes, save where expressly indicated (related to Chapters 2 and 7 of Title II, dealing respectively with knowledge dissemination and safeguards). The lack of a general clause similar to Article 296 EC was compensated with the general provisions on security contained in Article 194, in particular concerning the security clearance on the staff of the Euratom institutions, drafted in different, much more detailed terms than its equivalent under the EEC Treaty".[154]

On a point of general interest for the interpretation of the Euratom Treaty, the Court noted that the *"evidence on interpretation to be taken into consideration cannot be limited to the historical background to the drawing up of the Treaty, or to the contents of the unilateral declarations made by the representatives of certain States who took part in the negotiations which led to the signature of that Treaty"*[155].

Considering that the Euratom Treaty gives the Commission *"substantial powers which enable it to intervene actively, by means of legislation or in the form of an opinion containing individual decisions, in various spheres of activity"* connected to the use of nuclear energy (such as Arts. 34, 35 and 37 Euratom)[156], the Court thought it:

"clear that the application of such provisions to military installations, research programmes and other activities might be such as to compromise essential national defence interests of the Member States. Consequently (…)*, the absence in the Treaty of any derogation laying down the detailed rules according to which the Member States would be authorized to rely on and protect those essential interests leads to the conclusion that activities falling within the military sphere are outside the scope of that Treaty"*[157].

The Commission also argued that, if a material is considered "waste", it is no longer assigned to military use, and should no longer be covered by an exclusion of military activities from the scope of Euratom[158]. But this would, according to the Court, require that Member States would be free to *"decide*

154 ANDRES-ORDAX, 2008: 546-547. This author adds that the Commission's access to defence related information is implied in rules laid out for dealing with patents and research information.

155 On this issue, see AG Opinion in *Nuclear Safety Convention*, §§147-149 (quoted above in section 3.1.5).

156 ECJ Judgment in *Commission v UK (II)*, §35. Reaffirmed in ECJ Judgment in *Land Oberösterreich*, §119, and in ECJ Judgment in *Commission v UK (III)*, §17.

157 ECJ Judgment in *Commission v UK (II)*, §36. Reaffirmed in ECJ Judgment in *Commission v UK (III)*, §§18-19.

158 ECJ Judgment in *Commission v UK (II)*, §37.

both the time from which a military source of radioactive waste must be regarded as civil waste and the actual content of the data which must be communicated to the Commission", which would be contrary to the purpose of Art. 37 Euratom, as clarified in *Land de Sarre*[159].

The impact of this judgment was substantial. It made clear that the *"Commission is not justified in relying on Article 37* [Euratom] *in order to require Member States to provide it with information on the disposal of radioactive waste from military installations"*[160]. But it was not immediately clear whether it definitely solved the applicability of the Euratom Treaty, in its entirety, to any and all military activities of Member States.

The wording of the judgment revealed an internal tension between the exclusion of military activities from the scope of Euratom, altogether, and the care in leaving the door open for a revision of the matter in future cases. Thus, the Court's conclusion is said to be based on the specific provisions in question and was qualified by the conclusion that *"the Commission has not demonstrated that the application of Article 37 EA to the decommissioning of the military installation in question is justified"*[161], suggesting the Court might revise the conclusion on a case by case basis.

Immediately after, the conclusion was restated in completely general terms – *"the fact that the Treaty is not applicable to uses of nuclear energy for military purposes"* – but was followed by what sounded like a safeguard against abuse of the exclusion, stating that this:

> *"does not by any means reduce the vital importance of the objective of protecting the health of the public and the environment against the dangers related to the use of nuclear energy, including for military purposes. In so far as that Treaty does not provide the Community with a specific instrument in order to pursue that objective, it is possible that appropriate measures may be adopted on the basis of the relevant provisions of the EC Treaty"*[162].

The Court's reference to the provisions of the EC Treaty should be read in the context that both the EC Treaty (now Art. 352 TFEU) and the Euratom

159 ECJ Judgment in *Commission v UK (II)*, §§40-41.

160 ECJ Judgment in *Commission v UK (II)*, §44.

161 ECJ Judgment in *Commission v UK (II)*, §43.

162 ECJ Judgment in *Commission v UK (II)*, §44. Reaffirmed in ECJ Judgment in *Commission v UK (III)*, §28.

Treaty (Art. 203 Euratom) contain a residual competence clause to allow necessary steps for the pursuit of their objectives when no competences are awarded by their provisions. The Court seemed to want to leave it to the Member States to adopt rules applicable to military activities involving ionizing radiation.

But it's not clear what the Court was actually suggesting. The provisions of the TFEU which could most obviously be used for this purpose would be those establishing the competence to regulate environmental matters, public health and the residual competence clause[163]. In any of those cases, since the main concern of any radiological protection rules tends to be the protection of the health of the population, it could always be argued that the appropriate legal basis for such rules would be the Euratom Treaty, and that the use of the TFEU would have, as single purpose, the circumventing of the Court's ruling that Euratom does not apply to military activities.

It should also be kept in mind that the use of the environmental protection basis would be limited in object; Art. 168 TFEU, on public health, seems to be somewhat restrictive of the scope of the Union's interference in this domain; and the use of the residual competence clause would require unanimity in the Council (and thus would be likely to be blocked by the UK and France). Could the Court have been considering the use of Art. 337 TFEU (on collection of necessary information), in which case wouldn't the same issue arise, given the existence of the exact same provision in the Euratom Treaty (Art. 187)? The European Commission also seems not to be clear on what legal basis is available to it (see below).

A possible approach would be to re-adopt existing Euratom legal acts under a dual legal basis (possibly at the time of their next substantive revision), under both Euratom and TFEU. The procedural consequences of this approach are significant, however, and its viability is dependent on the compatibility between the different legal bases. Finally, it must be kept in mind that any legal act with an impact on military activities adopted under the TFEU would be subject to the general reservations provided for in Art. 346 TFEU.

It should be stressed that Advocate-General Geelhoed disagreed with the Court's conclusion. Noting that *"substantial negative repercussions for an*

163 Another option is the issuing of a recommendation under the TFEU, an option favoured by one author (Andres-Ordax, 2008), but which would have no legally binding consequences for the Member States.

important interest would inevitably be entailed by an unqualified finding in favour of either party", the AG proposed a commendable compromise solution[164], based on a case by case approach[165], that he believed to be more in line with the intention of the original drafters of the Treaty[166].

The inclusion of military activities was also supported by a purely textual interpretation of Art. 37 Euratom[167] and by the explicit tackling of military activities in some Euratom provisions (Arts. 13, 24 to 28, 84 and 194 Euratom)[168], demonstrating *"the sensitivity of the Treaty authors to the need to preserve nuclear defence and other secrets. Each represents a balance struck between, on the one hand, the overarching objective of the relevant Treaty chapter (e.g., dissemination of information) and, on the other hand, Member States' legitimate interest to ensure confidentiality in the defence sector and beyond"*[169]. The exclusion of all military activities from the scope of Euratom would *"mean that the provisions of the Treaty dealing expressly with its application to defence would be redundant and serve no purpose"*[170]. The AG also suggested an analogy with the EC Treaty (especially Art. 296(1)), where military activities are included – e.g. in the scope of environmental protection Directives – as long as essential interests of national security are not threatened[171].

In light of all the above, the Advocate-General concluded:

> "[T]*he health and safety provisions of the EAEC Treaty are of vital importance and should be interpreted in a manner that ensures effective protection of public health. Further, as we have seen, the contention that the nuclear defence sector falls per se outside the scope of application of the EAEC Treaty is not, on a systematic interpretation of the Treaty, valid.*

164 AG Opinion in *Commission v UK (II)*, §§58-60.

165 AG Opinion in *Commission v UK (II)*, §117.

166 AG Opinion in *Commission v UK (II)*, §82 (see also §§88 and 109-110).

167 AG Opinion in *Commission v UK (II)*, §62.

168 AG Opinion in *Commission v UK (II)*, §§84-87. In a subsequent Opinion, AG Geelhoed noted that *"Member States' duty to report on the overall level of radioactivity in the air, water and soil (see Articles 35 and 36 EA) will necessarily include measuring, purely incidentally and as part of these global levels, radioactivity emanating from military sources"* AG Opinion in *Commission v UK (III)*, footnote 20.

169 AG Opinion in *Commission v UK (II)*, §88.

170 AG Opinion in *Commission v UK (II)*, §93.

171 AG Opinion in *Commission v UK (II)*, §§100-102.

It follows that the obligation imposed by Article 37 EA on Member States to provide the Commission with general data relating to any plan for the disposal of radioactive waste should, in principle, apply equally to the defence sector. As a result, it should not be acceptable for a Member State to refuse to supply any information relating to a plan to dispose of military radioactive waste on the sole ground that the waste results from defence activities.

[That being said, the] *Article 37 obligations should not* (…) *apply where, in a particular case, a Member State considers that its essential security interests may be harmed by supplying certain information required under this article*"[172].

3.2.2. Commission v UK (III)[173]

The *Commission v UK (II)* case left questions unanswered, and could, in my opinion, still have been interpreted to arrive at a compromise solution, allowing for a case by case solution that could have, in some situations, allowed for the applicability of Euratom provisions to military activities. This changed a year later, with *Commission v UK (III)*. In this judgment of the ECJ's First Chamber, the internal tension evidenced in the language of the Court's previous Grand Chamber ruling disappeared entirely.

Just as in *Commission v UK (I)*, this case concerned lack of implementation of a Directive in Gibraltar, specifically, a failure to inform the public likely to be affected in the event of a radiological emergency about the local emergency plan, in violation of Art. 5(3) of Directive 89/618/Euratom[174]. The case arose from complaints received by the Commission about repairs to the UK's nuclear powered submarine *Tireless* being carried out during a year in the Gibraltar harbour.

The Commission argued that information to the public on measures to be adopted in the event of a radiological emergency should not be considered a

172 AG Opinion in *Commission v UK (II)*, §§111-113. The AG further argued that this assessment by Member States should be made in accordance with the duty of loyal cooperation and, thus, on the basis of an *"open and constructive dialogue with the Commission"*, attempting, where possible, to identify less extreme means to protect their defence interests than total withholding of the information (§115).

173 Judgment of the ECJ of 9 March 2006, *Commission v UK* (C-65/04), ECR (2006) I-2239; Opinion of AG Geelhoed delivered on 1 December 2005, in *Commission v UK* (C-65/04), ECR (2006) I-2239.
For more on this case, see: ANDRES-ORDAX, 2008.

174 On a point of relevance for the interpretation of Directive 89/618/Euratom, the Commission stated that making an emergency plan available in a public library was insufficient to meet the obligations arising from Article 5(3) of this Directive (ECJ Judgment in *Commission v UK (III)*, §8.

military, but rather a civil defense matter[175]. In this regard, it should be recalled that the EU has exercised competences relating to the harmonization of civil protection, and that these rules (adopted simultaneously under the EC and Euratom treaties) expressly encompass radiological emergencies[176]. This was similar to the Commission's argument in *Commission v UK (II)*, that any impact on military activities was merely incidental to the regulation of the radiological protection of the environment and the population, in particular in light of possible cross-border effects. More to the point, according to the Commission (rightfully, it seems), in this case there was *"no possible way in which provision of such information to the general public could harm Member States' military interests"*[177].

The Court dismissed this argument, stating that what is relevant is that *"the source of the nuclear energy is of military origin"*[178]. It then went on to interpret *Commission v UK (II)* as explicitly excluding a case by case assessment of the *"damage which performance of* [Euratom] *obligations may cause to the essential national defence interests of those States"*[179], stating, in the clearest of terms:

175 ECJ Judgment in *Commission v UK (III)*, §21.

176 See Council Decision 2007/779/EC, Euratom, of 8 November 2007, establishing a Community Civil Protection mechanism (recast) (OJ L 314/9, 01/12/2007), Art. 1(2); and Commission Decision 2004/277/EC, Euratom, of 29 December 2003, laying down rules for the implementation of Council Decision 2007/779/EC, Euratom (OJ L 87/20, 25/03/2004), as amended by Commission Decision 2008/73/EC, Euratom, of 20 December 2007 (OJ L 20/23, 24/01/2008), and by Commission Decision 2010/481/EU, Euratom, of 29 July 2010 (OJ L 236/5, 07/09/2010), Art. 11(2).

177 AG Opinion in *Commission v UK (III)*, §15. In this respect, AG Geelhoed stated: "I [admit] *that I have considerable sympathy for the substance of the outcome espoused by the Commission. It seems to me indeed very difficult to argue that Member States' military interests could be damaged by the provision of basic information to the public on how best to protect themselves in the event of a nuclear accident or emergency. As is clear from the terms of Annex I to Directive 89/618, the information covered by the Article 5(3) obligation is purely general in nature..."* and noted that the effort required of the UK to comply with the provision was minimal – it merely had to distribute to mailboxes in Gibraltar the plan already made available at the public library. *"On the facts of the present case, therefore, the position of the United Kingdom and the French Republic refuting the existence of such an obligation is plainly unattractive"* (AG Opinion in *Commission v UK (III)*, §§33-34). The exclusion of military activities from the scope of Euratom will indeed often have little practical impact in national legislation – it has been noted, namely, that *"applying the basic safety standards to workers in defence related sectors is certainly already a fact (in particular, the legislation on Radiation Protection in defence related activities in the United Kingdom is contained in the general regulations that were notified to the Commission as transposing measures for Directive 96/29/Euratom"* (Andres-Ordax, 2008: 558).

178 ECJ Judgment in *Commission v UK (III)*, §23.

179 ECJ Judgment in *Commission v UK (III)*, §§25-26.

"It is very clear from the judgment that the use of nuclear energy for military purposes falls outside the scope of all the provisions of the EAEC Treaty, not just some of them"[180].

Advocate-General Geelhoed also issued an Opinion in this case, agreeing (albeit unhappily) with the Court's broad reading of the previous judgment, and rejecting any possibility for distinction of this case on the basis of a nuanced interpretation of *Commission v UK (II)*[181]. The AG whose opinion was not followed by the Court concluded with the following saddened assessment: *"for as long as the Community has not made use of its competence under the EC Treaty to legislate in this sphere, a gap exists in the protection of the health of the general public. It is clear from the judgment's terms that the Court has accepted this consequence"*[182].

Thus, in the absence of a reversal of the case-law – which I hope will one day come –, it would seem the issue has been resolved. But I do not believe all problems connected to the applicability of Euratom military uses of nuclear energy or ionizing radiation have been solved.

For one thing, the qualification of an activity as being of a military nature can certainly not be left entirely to an arbitrary decision of the Member States, or the full effectiveness of the Euratom Treaty would be irremediably jeopardized.

If the military nature of the source of radiation excludes the applicability of Euratom and its implementing Directives and Regulations, does this mean that it is never applicable to military activities, even if they are ascribable to third States (e.g. not applicable to a visiting American nuclear ship)? Does this mean that environmental radioactivity data required by Art. 35 Euratom need not include radioactivity arising from military installations, and how is one to separate the two? What if a Member State completes a supply contract for military purposes, but then internally redirects the material to civilian uses? If the EU is the target of a terrorist attack with a "dirty bomb", in a context qualified by the USA and perhaps one or more Member States as

180 ECJ Judgment in *Commission v UK (III)*, §26.

181 *"*[T]*he statements in the judgment excluding military uses of nuclear energy from the ambit of the EAEC Treaty are couched in broad and unequivocal terms. The Court's conclusion at paragraph 44 of the judgment that 'the Treaty is not applicable to uses of nuclear energy for military purposes' is* prima facie *categorical and absolute"* – AG Opinion in *Commission v UK (III)*, §28. See also §§29-37.

182 AG Opinion in *Commission v UK (III)*, §37.

falling under *jus bellum*, does that mean that Euratom provisions will not be applicable thereto? Should one now expect the Court to immediately exclude the applicability of Euratom to nuclear tests carried out by a sovereign State?

And these are far from being merely theoretical issues, as a recent case before the Court has proved. Indeed, in the *Thule nuclear accident* cases (see section 3.5.3), concerning damages suffered by Danish citizens in Greenland, following the crash of an American airplane carrying nuclear weapons, the Commission argued to exclude its liability, *inter alia*, on the grounds that *"Directive 96/29*[/Euratom] *cannot apply to the accident at Thule, because the EAEC Treaty does not apply to military uses of fissile materials"*[183]. Applicants relied on the Court's previous ruling in the *Nuclear Safety Convention* case[184], but the ECJ confirmed (qualifying this issue as "settled case-law", no less) that:

> *"as regards the application of the Euratom Treaty to military activities,* (…) [i]*t is clear from settled case-law that that treaty does not apply to military activities*"[185].

In the context of a petition presented to the European Parliament by an association of victims of the Thule nuclear accident, the Commission noted that it *"was examining the possibility of proposing radiation protection requirements in situations arising from any source of emission or contamination"*, but that the *"compatibility of such a provision with the established case-law needs to be further assessed, in the light of the Court of Justice case-law which excludes military uses of nuclear energy from the scope of Euratom law"*[186]. No further action is known.

These three cases have threatened serious harm to the settled case-law on the single EU legal order, threatening to create bizarre internal contradictions. If the EU is affected by radioactive fallout from a military use of nuclear energy or ionizing radiation, does this mean that the Regulations on foodstuffs contaminated by radiation will be applicable – because they are

183 EGC Order in *Eriksen v Commission*, §20.

184 ECJ Order of 2011 in *Eriksen et al v Commission*, §61.

185 ECJ Order of 2011 in *Eriksen et al v Commission*, §66.

186 Communication from the Commission: Summary of Commission activities carried out in 2007 in implementation of Title II, Chapters 3 to 10, of the Euratom Treaty (COM/2008/0417 final), §3.5.4

adopted under the EC Treaty – but not the Euratom Treaty and any of its implementing radiological protection provisions, including those relating to emergency response?

These rulings of the ECJ, which usually places the guarantee of the *effet utile* of EU provisions above all other considerations, were surprising, to say the least. Indeed, several Euratom objectives cannot *"be fully achieved if the applications of ionizing radiation in defence related activities are excluded from the scope of the Treaty"*[187]. Its practical consequence is that Member States are not guaranteed by the Euratom system against the dangers of ionizing radiation arising from military activities of any State with military nuclear programmes, on the assumption that any military activity involving ionizing radiation involves vital national security interests (and that this is grounds for exclusion of applicability even in the case of the security interests of third countries).

The final conclusion that must be drawn from these cases is that, as interpreted by the Court, ensuring the safety of persons and of the environment is apparently not an overriding interest within the Euratom Treaty[188].

3.3. Other infringement proceedings

3.3.1. Commission v Belgium[189]

Commission v Belgium was the only case to go before the Court concerning Directive 90/641/Euratom, on the radiological protection of outside workers[190]. It was a straightforward infringement case. Belgium did not challenge that it had failed to transpose, within the period set out in the Commission's reasoned opinion, Arts. 4(2), 5 and 6 and Annexes I and II of the Directive.

On issues of substance, it is worth noting that Art. 4(2) and Annexes I and II had been partly transposed, but never regulated, as foreseen in the national

187 Andres-Ordax, 2008.

188 On the overriding nature of this objective, see AG Opinion in *INB*, §57.

189 Judgment of the ECJ of 6 June 2002, *Commission v Belgium* (C-146/01), ECR (2002) I-5117; Opinion of AG Geelhoed delivered on 5 March 2002, in *Commission v Belgium* (C-146/01), ECR (2002) I-5117.

190 Council Directive 90/641/Euratom, of 4 December 1990, on the operational protection of outside workers exposed to the risk of ionizing radiation during their activities in controlled areas (OJ L 349/21, 13/12/1990).

law, leading the Court to conclude that the absence of detailed rules implied an incomplete transposition[191].

3.3.2. Commission v France (I)[192]

In *Commission v France (I)*, France did not challenge that it had failed to transpose Directive 96/29/Euratom, invoking heavy legislative workload as the reason why the required action had not yet been taken[193]. Since on the expiry of the period laid down in the reasoned opinion, the Directive had not yet been fully transposed, the Court declared the infringement[194].

3.3.3. Commission v France (II)[195]

This case concerned a failure to transpose the special rules on the health protection of individuals against the dangers of ionizing radiation in the context of medical exposure (included first in Directive 84/466/Euratom[196], and then in Directive 97/43/Euratom[197]). It was another straightforward case, that ran in parallel with and with the same characteristics as *Commission v France (I)*[198].

3.3.4. Commission v UK (I)[199]

In *Commission v UK (I)*, the UK successfully tackled, during the pre-litigation procedure, several shortcomings identified by the Commission in

191 ECJ Judgment in *Commission v Belgium*, §§20 and 27.

192 Judgment of the ECJ of 15 May 2003, *Commission v France* (C-483/01), ECR (2003) I-4961; Opinion of AG Tizzano delivered on 16 January 2003, in *Commission v France* (C-483/01), ECR (2003) I-4961.

193 ECJ Judgment in *Commission v France (I)*, §20.

194 ECJ Judgment in *Commission v France (I)*, §§22-23.

195 Judgment of the ECJ of 15 May 2003, *Commission v France* (C-484/01), ECR (2003) I-4975; Opinion of AG Tizzano delivered on 16 January 2003, in *Commission v France* (C-484/01), ECR (2003) I-4975.

196 Council Directive 84/466/Euratom, of 3 September 1984, laying down basic measures for the radiation protection of persons undergoing medical examination or treatment (OJ L 265/1, 05/10/1984.

197 Council Directive 97/43/Euratom, of 30 June 1997, on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure, and repealing Directive 84/466/Euratom (OJ L 180/22, 09/07/1997).

198 See ECJ Judgment in *Commission v France (II)*, §20.

199 Judgment of the ECJ of 28 January 2004, *Commission v UK* (C-218/02), ECR (2004) I-1241.

its transposition of Directive 96/29/Euratom[200]. However, as it admitted, the transposition measures did not cover all of the UK's territory, as they were not applicable in Gibraltar[201], and thus the failure to fully transpose was declared.

3.3.5. Commission v France (III)[202]

In *Commission v France (III)*, the Court returned to an issue discussed in *Commission v France (I)* – temporal limitations for initiation of infringement proceedings –, although in a different perspective. It expressed displeasure with the Commission's option of instituting infringement proceedings on the basis of a first reasoned opinion, even though the national legal framework had substantially changed in the meantime[203].

Two years and a half had passed between the end of the period foreseen in the Commission's reasoned opinion and the initiation of the infringement proceedings. After recalling the case-law according to which a Member State's failure *"to fulfil its obligations must be determined by reference to the situation prevailing* (…) *at the end of the period laid down in the reasoned opinion and* (…) *the Court cannot take account of any subsequent changes"*[204], the ECJ stated:

> *"Where the relevant national provisions have fundamentally changed between the expiry of the period laid down for compliance with the reasoned opinion and the lodging of the application, that change in circumstances may render the judgment to be given by the Court otiose. In such situations, it may be preferable for the Commission not to bring an action but to issue a new reasoned opinion precisely identifying the complaints which it intends pursuing, having regard to the changed circumstances"*[205].

200 Specifically: Art. 42 of Directive 96/29/Euratom, relating to the protection of air crew; Arts. 48 to 53 of Directive 96/29/Euratom, relating to radiological emergencies; and the transposition of the Directive for territory of Northern Ireland (ECJ Judgment in *Commission v UK (I)*, §§10-11).

201 ECJ Judgment in *Commission v UK (I)*, §§11-13.

202 Judgment of the ECJ of 9 December 2004, *Commission v France* (C-177/03), ECR (2004) I-11671; Opinion of AG Geelhoed delivered on 1 July 2004, in *Commission v France* (C-177/03), ECR (2004) I-11671.

203 See also AG Opinion in *Commission v France (III)*, §§22-23.

204 ECJ Judgment in *Commission v France (III)*, §19.

205 ECJ Judgment in *Commission v France (III)*, §21.

However, even though the circumstances made the Court's analysis *"more complex"*, the action was nonetheless admissible[206]. In practice, this meant the ECJ had to declare infringements that had allegedly been corrected in the national law after the end of the period foreseen in the reasoned opinion, but before initiation of the proceedings before the Court[207].

The Commission's option had at least partly to do with the desire to clarify the obligations under the Directive. Indeed, the judgment allowed for the clarification of the following provisions of the Directive:

- Art. 2(1)(b) and (c): transposition cannot be limited to emergencies arising from facilities situated in the Member States in question[208];
- Art. 2(2)(a): transposition must relate to emergencies arising from all nuclear reactors (cannot be limited to those above a certain power)[209];
- Art. 3: requires an *"indication of the dose limits of which the risk of excedence necessarily triggers the taking of measures to inform the general public"*[210];
- Art. 6: it is not sufficient for national law to foresee that this information should be provided *"within the time-limits laid down"* by an authority, it must foresee its diffusion *"without delay"*[211];
- Art. 7: it is not sufficient to organize first-day medical care[212];
- Art. 8: even though it's not foreseen in national law, it is sufficient for Member States to have a practice of including these details in the media used for informing the general public[213];

The position of the Court concerning the interpretation of France's compliance with Art. 8 of the Directive is extremely noteworthy. Whereas in a 1997 case[214] the Court had apparently taken a formalist approach, saying

206 ECJ Judgment in *Commission v France (III)*, §22.

207 See, e.g., ECJ Judgment in *Commission v France (III)*, §§24-25 and 45-46.

208 ECJ Judgment in *Commission v France (III)*, §32.

209 ECJ Judgment in *Commission v France (III)*, §28.

210 ECJ Judgment in *Commission v France (III)*, §38.

211 ECJ Judgment in *Commission v France (III)*, §48.

212 ECJ Judgment in *Commission v France (III)*, §50.

213 ECJ Judgment in *Commission v France (III)*, §§56-61.

214 Order of the President of the ECJ of 11 March 1997, *Commission v Luxembourg* (C-46/95), ECR (1996) 1279.

that the transposition of the Directive required explicit provisions in national legislation, and disregarded the implementation in practice of the obligations, here, 7 years later, it seemingly reversed its position:

> *"according to the very terms of the third paragraph of Article 161 EA, the Member States are entitled to choose the form and methods for implementing directives which best ensure the result to be achieved by the directives. It is clear from that provision that the transposition of a directive into national law does not necessarily require legislative action in each Member State. Thus, the Court has repeatedly held that it is not always necessary formally to enact the requirements of a directive in a specific express legal provision.* (…)
> *In this case, the Commission has not in any way demonstrated that compliance with the obligation laid down in Article 8 of the Directive requires specific implementing measures to be incorporated into national law.*
> *Moreover, the Commission acknowledges the existence of a practice on the part of the French authorities, whereby details of the responsible authorities are given through the media used for informing the general public, but has not shown how that practice is contrary to the obligation laid down in Article 8 of the Directive*"[215].

The principle invoked by the Court was based on case-law adopted after 1997, but it must be noted that it actually went as far back as 1985[216]. Furthermore, even though the Commission had explicitly criticized the lack of legal certainty, the Court omitted, from the same paragraphs of case-law it quoted, that it is *"essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations"*[217]. Finally, the cases invoked by the ECJ were significantly different from the situation at hand.

---

215 ECJ Judgment in *Commission v France (III)*, §§57, 59 and 60.

216 See, e.g., cases quoted in Judgment of the ECJ of 26 June 2003, *Commission v France* (C-233/00), ECR (2003) I-6625, §76.

217 Judgment of the ECJ of 26 June 2003, *Commission v France* (C-233/00), ECR (2003) I-6625, §76; Judgment of the ECJ of 20 November 2003, *Commission v France* (C-296/01), ECR (2003) I-13909, §55. And: *"the provisions of directives must be implemented with unquestionable binding force, and with the necessary specificity, precision and clarity, in order to satisfy the requirements of legal certainty. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfillment of a Member State's obligations flowing from Community law since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights and obligations in a field governed by that law"* – Judgment of the ECJ of 20 November 2003, *Commission v France* (C-296/01), ECR (2003) I-13909, §54.

The first related to an issue clarified in national case-law, and invoked case-law relating to legal issues made clear by general principles[218]. The second was a mere restatement of the case-law principles, while on the facts a failure to transpose the Directive was identified[219].

Even if one were to interpret this as a dispute over whether Art. 8 specifically required transposition into legal norms, it should be highlighted that the Court seemed to state that the burden of proof was on the Commission to show that a mere practice of the authorities was insufficient to meet the respective obligation (even though it was merely an issue of interpreting the provision).

It is far from clear that the Court's reading of the principle in question, in its application to Art. 8 of this Directive, should be considered settled case-law. On the one hand, it does not seem entirely unreasonable to wonder if the same conclusion would have been arrived at by the Court if it had not been in a frame of mind contrary to the Commission, as a result of its decision to initiate Court proceedings without issuing a new reasoned opinion (as discussed above)[220]. On the other hand, subsequent case-law seems to have been more restrictive, and more in line with the case-law that had preceded this judgment[221].

3.3.6. Commission v UK (IV)[222]

Commission v UK (IV) concerned the failure to transpose Art. 53 of Directive 96/29/Euratom, in Title IX (intervention)[223]. Specifically, national law did not require the adoption of the measures provided for in that article in all cases where a situation had been identified as leading to lasting exposure,

218 Judgment of the ECJ of 26 June 2003, *Commission v France* (C-233/00), ECR (2003) I-6625, §§71 and 76.

219 Judgment of the ECJ of 20 November 2003, *Commission v France* (C-296/01), ECR (2003) I-13909, §§57-59.

220 It should be noted that, while the Commission was only successful on 4 of the 6 issues it brought before the Court, AG Geelhoed had suggested it should be successful on all issues (AG Opinion in *Commission v France (III)*, §24).

221 See, e.g., Judgment of the ECJ of 16 June 2005, *Commission v Italy* (C-456/03), ECR (2005) I-5335, §44 *et ss.*; Judgment of the ECJ of 30 November 2006, *Commission v Luxembourg* (C-32/05), ECR (2006) I-11323, §32 *et ss.*; Opinion of AG Mazák delivered on 23 September 2008, in *Age Concern England* (C-388/07), ECR (2009) I-1569, §44 *et ss.*

222 Judgment of the ECJ of 18 July 2007, *Commission v UK* (C-155/06), ECR (2007) I-103.

223 This case was sparked by a complaint to the European Commission – ECJ Judgment in *Commission v UK (IV)*, §7.

resulting from the after-effects of a radiological emergency or a past practice, but only for cases where the activity in question had been granted a license[224]. The UK did not challenge the Commission's assessment, and the Court declared the infringement.

3.3.7. Commission v Greece[225]

In July 2010, in what was the 3rd time an issue connected to radioactive waste management was taken before the Court, the Commission asked the Court to declare Greece had failed to transpose Directive 2006/117/Euratom[226]. In October, Greece having completed the transposition, the Commission withdrew its request (with Greece bearing the costs of the proceedings[227]), so that no judgment was issued by the Court.

3.4. Competition Law cases

The enforcement of competition law to Euratom activities has required the clarification the *lex specialis* nature of that Treaty and the interrelation with the EC Treaty (now TFEU), since there are no competition provisions in the Euratom Treaty itself[228]. The conclusion on this issue, as clarified by the Court is that:

> *"Although the Euratom Treaty is a lex specialis in relation to the TFEU, specific derogations must be identified in order to exclude the applicability of TFEU provisions. Apart from practices effectively excluded from the scope of competition by Chapter 6,*

224 ECJ Judgment in *Commission v UK (IV)*, §§17-19.

225 Order of the ECJ of 22 November 2010, *Commission v Greece* (C-353/10) ECR not yet reported.

226 Council Directive 2006/117/Euratom, of 20 November 2006, on the supervision and control of shipments of radioactive waste and spent fuel (OJ L 337/21, 05/12/2006).

227 EGC Order in *Commission v Greece*, §§3-5.

228 It may be of historical interest to note that the last Commission proposal for a revision of Chapter 6 of Title II of the Euratom Treaty, in accordance with Art. 76 Euratom, which was never adopted (Commission Proposal for a Council Decision adopting new provisions relating to Chapter 6 "Supplies" of the Treaty establishing the European Atomic Energy Community – COM/82/732 final, OJ C 330/4, 16/12/1982, amended by COM/1984/606 final), would have explicitly stated: *"Articles* [101] *to* [106] *of the* [TFEU] *shall apply to those restrictions, conditions and measures relating to supplies which are not mentioned in Article 53(1)"*. This suggestion was criticized at the time, first for being superfluous and *"simply declaratory, intended as no more than a helpful reminder to the reader"*, but also because: *"the drafting seems to leave no room for overlapping"*, as further explained by the author (ALLEN, D., "The Euratom Treaty, Chapter VI: New hope or false dawn?", (1983) *Common Market Law Review* 473, at p. 491).

and of Annex III advantages granted to joint undertakings, no such derogations exist, in general and abstract terms, in the Euratom Treaty"[229].

3.4.1. Dessauer Versorgungs[230]

Twenty years after the first and only case on competition law in the nuclear sector before the ECJ in the 20th century[231], state aid relating to nuclear activities once again went before the Court in *Dessauer Versorgungs*.

Municipal electricity distribution utilities asked the Commission to examine non-notified aid granted by Germany to nuclear power station operators, in the form of tax exemptions (to finance decommissioning and disposal of irradiated fuel and radioactive waste), and then went before the EGC to challenge the Commission's lack of response. Shortly thereafter, the Commission adopted a Decision considering that the tax exemptions in question were not state aid within the meaning of Art. 107 TFEU. The action for failure to act thus became devoid of purpose, no judgment being required. Implicitly, of course, this case reconfirmed the applicability of EU State aid law to the nuclear sector.

3.4.2. Stadtwerke Schwäbisch Hall[232]

Stadtwerke Schwäbisch Hall brought the same issue back to the Court, and this time led to two judgments. Under general German law, companies were required to set aside funds to provide for uncertain liabilities and risks of losses resulting from their activity. Nuclear power plant operators were thus required to set aside reserves providing for the costs of irradiated fuel and radioactive waste management and decommissioning.

Three local power generation and distribution companies asked the Commission to declare that Germany had granted unlawful State aid, by giving nuclear power plant operators an advantage over competitors using other means of electricity generation. The Commission concluded that

---

229 Sousa Ferro, 2010(2). See also Allibert & Jones, 2008: 4.673-4.683.

230 Order of the EGC of 27 November 2002, *Dessauer Versorgungs- und Verkehrsgesellschaft mbH* (T-291/01), ECR (2002) II-5033.

231 Judgment of the ECJ of 6 July 1982, *France et al v. Commission* (188 to 190/80), ECR (1982) 2545.

232 Judgment of the ECJ of 29 November 2007, *Stadtwerke Schwäbisch Hall GmbH et al v Commission et al* (C-176/06 P), ECR (2007) I-170; Judgment of the EGC of 26 January 2006, *Stadtwerke Schwäbisch Hall GmbH et al v Commission* (T-92/02), ECR (2006) II-11.
For more on this case, see: Delzangles, 2007; Maitrepierre, 2008; Reich, 2006.

there was no State aid[233]. Unsatisfied, the complainants – as competitors and, therefore, interested parties – appealed to the EGC. German nuclear operators intervened in support of the Commission's position.

The most interesting aspect of this case was the contrast between the EGC's (welcoming) and the ECJ's (restrictive) attitude towards the appeal. The EGC found the action admissible[234] and went on to examine if the Commission had sufficient grounds to exclude the presence of State aid in the preliminary assessment phase. The ECJ, on the other hand, subsequently held that the EGC had gotten it wrong and annulled that judgment on the grounds of the inadmissibility of the initial appeal:

> "[Le juge communautaire] *déclare recevable un recours visant à l'annulation d'une telle décision, introduit par un intéressé au sens de l'article 88, paragraphe 2, CE* [now 108(2) TFEU], *lorsque l'auteur de ce recours tend* (…) *à faire sauvegarder les droits procéduraux qu'il tire de cette dernière disposition.* (…)
> *En revanche, si les requérant met en cause le bien-fondé de la décision d'appréciation de l'aide en tant que telle, le simple fait qu'il puisse être considéré comme intéressé* (…) *ne saurait suffire pour admettre la recevabilité du recours. Il doit alors démontrer qu'il a un statut particulier au sens de l'arrêt Plaumann/Commission* (…). *Il en serait notamment ainsi le cas où la position sur le marché du requérant serait substantiellement affectée par l'aide faisant l'objet de la décision en cause* (…).
> (…) *force est de constater, en l'espèce, que les conclusions présentées devant le Tribunal et l'ensemble des moyens soulevés à l'appui de celles-ci tendaient à obtenir l'annulation de la décision litigieuse sur le fond, au motif que le régime d'exonération fiscale des provisions en cause constituait une aide incompatible avec le marché commun. Le Tribunal ne pouvait, dès lors, requalifier, ainsi qu'il l'a fait au point 51 de l'arrêt attaqué, l'objet même du recours qui lui était soumis et estimer, à tort, que les requérantes entendaient obtenir le respect des garanties procédurales dont elles auraient dû disposer.*"[235]
> "(…) *les requérantes* (…) *ne peuvent être regardées comme étant individuellement concernées au sens de l'arrêt Plaumman/Commission* (…) *que pour autant que leur*

233 Commission Decision C(2001)3967 final, of 11 December 2001, declaring that the German provisions relating to reserves set aside by operators of nuclear power plants for the safe disposal of radioactive waste and the definitive shutdown of nuclear power plants do not constitute aid within the meaning of Article 87(1) EC (case NN 137/01).

234 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §§46-55.

235 ECJ Judgment in *Stadtwerke Schwäbisch Hall*, §§22, 24 and 25. §25 was reaffirmed in EGC Judgment of 18 December 2008, *Belgium and Commission v Genette* (T-90/07 P and T-99/07 P), ECR (2008) II-3859, §74.

position sur le marché de l'électricité est substantiellement affectée par le régime d'aides que fait l'objet de la décision litigieuse (…). (…) *aucun élément pertinent n'a été fourni ni même avancé par les requérantes pour permettre de considérer que leur position serait substantiellement affectée par le régime d'aides* (…)"[236].

In other words, on the basis of a rather formal approach[237] and of an arguable interpretation of the facts of the case[238], the ECJ seemed to close the door (but not necessarily so) to what seemed to be a promising avenue for undertakings to promote the Court's control of State aid granted to undertakings in the nuclear sector, and to challenge what has been perceived by some as the Commission's permissive attitude in this domain. The EGC's approach had instead been to allow the case, but to refuse it on the merits (making it easier for the Court to play an important role in the future, in other cases).

On the substance of the case[239], the requisite of State aid in question was the selective nature of the advantage[240]. The EGC essentially concluded that German law required nuclear power plant operators to bear the costs of

236 ECJ Judgment in *Stadtwerke Schwäbisch Hall*, §§30-31.

237 The case-law on this issue has evolved significantly. The most recent position has been summarized as follows: *"In «Arbeitsgemeinschaft Recht und Eigentum, however, the Court clearly confirmed that it is sufficient for an applicant to be an «concerned party» within the meaning of Article 88(2) EC, and that it is not necessary to show that the applicant is substantially affected by the aid* [referring to EGC cases]. (...) *It is important to note that, according to the Court, the elements of standing that must be proved ultimately depend on the legal pleas of the plaintiff. In other words, the plaintiff must explicitly include a please in law alleging an infringement of procedural rights under Article 88(2) EC. If, on the other hand, it appears from the complaint that the plaintiff does not seek to safeguard its procedural rights, but only calls into question the merits of the decision, it must satisfy the conditions of individual concern laid down in* Cofaz. *This approach has now been confirmed in subsequent judgments. Plaintiffs should therefore always allege an infringement of their procedural rights under Article 88(2) EC in order to file an admissible action."* – SOLTÉSZ, 2010. In any case, this case's clarification of the issue of admissibility has been invoked several times in subsequent cases.

238 The Court's conclusion that the plaintiffs had failed to even put forward arguments showing how their position on the market was affected by the alleged State aid is not entirely unchallengeable – see, e.g., EGC Judgment in *Stadtwerke Schwäbisch Hall*, §106. AG Poiares Maduro did not issue an Opinion in this case – see recital of ECJ Judgment in *Stadtwerke Schwäbisch Hall*.

239 One author noted that this case clarified, on a general point of EU State aid law, that *"a general tax exemption constitutes an economic advantage granted through State resources in so far as the State renounces the right to levy the tax otherwise chargeable, even though it does not fall within Article 87(1) EC where it is available to all undertakings and is, accordingly, not selective"* (QUIGLEY, 2009: 8).

240 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §53.

radioactive waste management and decommissioning[241], and that the special provisions concerning the reserves they had to establish were not such as to provide them any special (selective) advantages[242].

The plaintiffs had argued that the established reserves were less than objectively required to meet their goals, and that this was made possible by auditor reports (whose independence was questioned)[243]. While not excluding that such an argument could lead to a finding of State aid, the EGC noted that, in this case, it had not been shown that the reserves were actually disproportional to the costs of waste management and decommissioning. In so doing, it added, referring to the degree of uncertainty in the calculation of such costs, that *"l'évolution rapide des normes technologiques relatives à l'élimination des déchets et au déclassement des installations appelait une appréciation souple et un certain dégrée d'incertitude en matière de coûts et que les dépenses techniques et, par conséquent, le montant à couvrir par les provisions, même s'il ne peut encore être déterminé avec certitude, est certainement conséquent"*[244].

Finally, it was also argued that the tax exemptions and freedom to dispose of the reserves was contrary to general principles of prudence and meant that the reserves might not actually be available when they were required for decommissioning[245]. The Court agreed with the Commission that, while this was certainly an advantage, it was not specific to the nuclear industry: *"*[1] *a circonstance que les centrales nucléaires sont susceptibles de bénéficier dans une mesure plus importante que d'autres entreprises de l'exonération fiscale en raison du montant potentiellement plus élevé de leurs provisions ne permet donc pas au Tribunal de qualifier cette exonération d'avantage sélectif constitutif d'une aide d'État"*[246].

---

241 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §§70-74. The Court also took the opportunity to note that German law does provide for a definitive closing date for nuclear power plants, even if determined by reference to amounts of electricity generated (§§76-78).

242 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §§88-93.

243 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §94.

244 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §101. As explained by one author, *"the mere fact that certain aspects of an individual tax assessment may require the tax authorities to exercise a discretion in determining liability does not necessarily lead to the conclusion that State aid is granted. For example, in Stadtwerke Schwäbisch Hall* (...) *the CFI accepted that the rapid development of technical standards entailed a degree of uncertainty as regards future costs"* (QUIGLEY, 2009: 70).

245 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §§103-105.

246 EGC Judgment in *Stadtwerke Schwäbisch Hall*, §109.

This case may come to be quoted as a precedent for the idea that State measures by which nuclear power plants are relieved from bearing the full cost of radioactive waste management and decommissioning should be considered State aid[247]. This, of course, does not mean that they may not be authorized[248].

3.4.3. Altair Chimica[249]

In *Altair Chimica*, a chemical company refused to pay a "surcharge for nuclear charges" introduced by the Italian legislator to finance compensation to nuclear power plant operators for costs incurred by the decision to definitively abandon construction of nuclear power stations, following the 1987 referendum to that effect[250]. Under the law, the surcharge was collected by the power company. Altair invoked, *inter alia*, that the levy of the surcharge was in violation of Articles 101, 102 and 105 TFEU.

The issue was quickly set aside by the ECJ on the basis of the State action defence[251]: the surcharge constituted a tax measure[252] and the power company had to be considered as a mere tax collector (not acting as an economic operator), with no margin of discretion[253]. The Court added that Arts. 101 and 102 TFEU *"are not intended to eliminate differences which may exist between the tax regimes of the different Member States"*[254]. It should be stressed that this case did not invoke the obligations of the Member State itself under the Treaty's provisions on competition.

---

247 In the appeal to the ECJ, the plaintiffs had argued for a broader interpretation of the condition of selectivity, stating that: *"even if no selectivity as regards the aid is ascertainable* de jure*, a measure can contravene the law relating to State aid if it is liable* [de facto] *to favour certain undertakings. The directive liberalising the internal market in electricity requires that Member States actively reduce discrimination and distortion of competition"* (OJ C 131/35, 03/06/2006).

248 See Sousa Ferro, 2010(2): 18-20 and 27.

249 Judgment of the ECJ of 11 September 2003, *Altair Chimica SpA* (C-207/01), ECR (2003) I-8875; Opinion of AG Jacobs delivered on 13 March 2003, in *Altair Chimica SpA* (C-207/01), ECR (2003) I-8875.

250 EGC Judgment in *Altair Chimica*, §§11-17.

251 EGC Judgment in *Altair Chimica*, §§30-31.

252 EGC Judgment in *Altair Chimica*, §32.

253 EGC Judgment in *Altair Chimica*, §§34-35.

254 EGC Judgment in *Altair Chimica*, §36. See Judgment of the EGC of 30 September 2003, *Atlantic Container Line* (T-191/98 etc.), ECR (2003) II-3275, §1130.

3.4.4. Outokumpu Oyj[255]

In *Outokumpu Oyj*, a Finnish company contested a Commission Decision finding it guilty of an infringement of Art. 101 TFEU (price fixing and market sharing in the industrial tubes sector)[256]. One of the arguments it raised was that it could not be considered a repeat offender, because its previous infringement of EU Competition Law had been found under the ECSC Treaty.

In providing its answer, the Court took the opportunity to extend part of it to the Euratom Treaty (even though the specific issue could not arise under this Treaty, which contains no provisions on competition law, and so the reference should be read in its very limited context of relevance): "*it should be noted that the founding treaties established a single legal order in which the* [Euratom] *Treaty constitutes, and the CS Treaty constituted until 23 July 2002, a* lex specialis *in derogation from the* lex generalis *represented by the EC Treaty*"[257].

3.4.5. EREF[258]

Finally, in *EREF*, the European Renewable Energies Federation asked the Court to annul two Commission Decisions relating to some aspects of the financing of the construction by Framatome ANP of a nuclear power plant in Finland, for Teollisuuden Voima Oy[259]. EREF had filed a complaint with the Commission in 2004, claiming that the export guarantee provided by the French export credit agency ("COFACE"), as a syndicated credit facility (of EUR 570.000), and the loans granted by five banks (including some "public banks") amounted to illegal (non-notified) state aid. The challenged Decisions found that there was no state aid.

---

255 Judgment of the EGC of 6 May 2009, *Outokumpu Oyj et al v Commission* (T-122/04), ECR (2009) II-1135. For more on this case, see: Debroux, 2009.

256 Commission Decision C(2003) 4820 final, relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 – Industrial tubes).

257 EGC Judgment in *Outokumpu Oyj*, §55.

258 Order of the ECJ of 29 September 2010, *EREF v Commission* (C-74/10 P and C-75/10 P), ECR not yet reported; Order of the EGC of 19 November 2009, *EREF v Commission* (T-40/08), ECR (2009) II-222; Order of the EGC of 19 November 2009, *EREF v Commission* (T-94/07), ECR (2009) II-220.

259 Commission Decision C(2006) 4963 final, of 24 October 2006 (state aid case NN 62/A/2006); and Commission Decision C(2007)4323 final, of 25 September 2007 (state aid case NN 62/B/2006, and then C 45/2006, available at http://ec.europa.eu/competition/state_aid/register/ii/doc/C-45-2006-WLAL-fr-25.09.2007.pdf).

Before the Court, EREF argued, in essence, that the French State's guarantee gave TVO an unlawful advantage, that the banks' loans were subject to a below market interest rate, and that the Commission had been wrong to split the file into two cases, as their joint assessment would have made the identification of state aid more obvious – the guarantee being allegedly one of the reasons why lower interest rates had been obtained.

The General Court and, on appeal, the Court of Justice, declared the action manifestly inadmissible, as the submission had been signed, not by a lawyer who could be considered a third party in relation to the applicant (as is required by the Statutes of the Court), but by a lawyer who was the director of EREF.

3.5. Non-contractual liability cases

3.5.1. EnBW Kernkraft[260]

In *EnBW Kernkraft*, a German company argued that the Commission had failed to pay for services provided, under the TACIS programme, specifically on-site assistance at the Zaporozhe nuclear power station in Ukraine. It should be noted that, even though the TACIS Programme was adopted under both the EC and Euratom Treaties, this case was brought only under Art. 288(2) EC. The issue of the single EU legal order was not discussed, but may be said to be implicitly confirmed herein.

Since the last contract between the parties did not confer jurisdiction on the Court to adjudicate in matters relating to its execution, the EGC could not interpret that contract to assess if the dispute fell within its scope, the dispute before it being, therefore, limited to an issue of non-contractual liability, based on an alleged infringement of the principles of the protection of legitimate expectations and of sound administration[261]. This dispute did not discuss issues relevant to Nuclear Law, but merely to general EU Law on contractual liability[262]. Finding no infringement by the Commission of the two invoked principles, the Court dismissed the application.

---

260 Judgment of the EGC of 16 March 2005, *EnBW Kernkraft GmbH v Commission* (T-283/02), ECR (2005) II-913.

261 EGC Judgment in *EnBW Kernkraft*, §§81-83. General liability principles affirmed in this judgment were subsequently quoted, e.g., in: EGC Judgment of 26 January 2006, *Medici Grimm* (T-364/03), ECR (2006) II-79, §§59-60 and 79; and EGC Judgment of the EGC of 30 March 2006, *Yedas Tarim* (T-367/03), ECR (2006) II-873, §§34-35, 55 and 62.

262 See EGC Judgment in *EnBW Kernkraft*, §§90, 92 and 100.

3.5.2. Autosalone Ispra[263]

Like the first case of Euratom non-contractual liability[264], *Autosalone Ispra* concerned the Joint Nuclear Research Centre. An Italian company sought compensation for damages resulting from the Community's failure to carry out work and/or maintenance on a drain running through the Ispra Centre, which overflew following heavy rains and flooded its establishment.

The Court found that, even if that section of the drain was *"at the sole disposal of the Centre"*, it did not *"follow from the JRC Agreement that the* (…) *drain falls within the responsibility of the Community"*[265]. In particular in light of Article 3 of Annex F of the JRC Agreement, responsibility for the inspection, repair and maintenance of the drain – being a public utility service – fell to the municipal administration of Ispra[266]. This was not changed by the fact that the Centre had freely taken upon itself to carry out regular supervision and maintenance of the drain[267]. Thus, no compensation was granted.

The company still lodged an appeal, which the ECJ found inadmissible due to its grounds[268].

3.5.3. Thule nuclear accident cases[269]

More recently, three separate cases were brought before the Court claiming compensation for damages arising from an old famous incident: *Eriksen v Commission*, *Lind v Commission* and *Hansen v Commission*, here collectively referred to as the Thule nuclear accident cases.

In January 1968, an American B-52 bomber, carrying nuclear weapons, crashed near the Thule Air Base, in Greenland. The weapons' high explosives

263 Order of the ECJ of 12 December 2006, *Autosalone Ispra* (C-129/06 P), ECR (2006) I-131; Judgment of the EGC of 30 November 2005, *Autosalone Ispra Snc v. Euratom Community* (T-250/02), ECR (T-250/02) II-5227.

264 Judgment of the ECJ of 3 February 1994, *Alfredo Grifoni v Commission* (C-308/87), ECR (1994) I-341; Judgment of the ECJ of 27 March 1990, *Alfredo Grifoni v Commission* (C-308/87), ECR (1990) I-1203.

265 EGC Judgment in *Autosalone Ispra*, §§69, 73 and 74.

266 EGC Judgment in *Autosalone Ispra*, §§71-72.

267 EGC Judgment in *Autosalone Ispra*, §83.

268 ECJ Order in *Autosalone Ispra*.

269 Order of the ECJ of 12 January 2011, *Eriksen et al v Commission* (C-205/10 P, C-217/10 P and C-222/10), ECR not yet reported; Order of the ECJ of 18 October 2010, *Eriksen et al v Commission* (C-205/10 P, C-217/10 P and C-222/10), ECR not yet reported; Order of the EGC of 24 March 2010, *Eriksen v Commission* (T-516/08), ECR not yet reported; Order of the EGC of 24 March 2010, *Hansen v Commission* (T-6/09), ECR not yet reported; Order of the EGC of 24 March 2010, *Lind v Commission* (T-5/09), ECR not yet reported.

detonated, and while no thermonuclear reaction occurred, thanks to fail safes, approximately six kilograms of weapons grade plutonium were released. The search and rescue operation that followed, as well as the subsequent management of removed radioactive ice, snow and debris (which lasted months), involved over *"700 Danish civilians and U.S. military personnel"*, working *"under hazardous conditions without protective gear*[270]*. In 1987, nearly 200 of the Danish workers unsuccessfully attempted to sue the United States"*[271].

In 2002, an association of Thule workers affected by radiation, believing that the Danish government was not meeting its obligations towards them, under the Basic Safety Standards Directive, presented a petition to the European Parliament[272], leading the latter to adopt a Resolution urging the Commission *"to pursue vigorously any failure* [of the Member States] *to fulfil their obligations"* under Directive 96/29/Euratom[273]. The applicants did not submit a complaint to the Commission[274].

At the end of 2008, beginning of 2009, three of the Danish workers who had taken part in those events (one as a fireman, two as lorry drivers) asked the Court to order the European Commission to pay them compensation for damages suffered[275] *"by reason of the alleged failure by the Commission to enforce implementation of the provisions of Directive 96/29 on the medical monitoring of workers"* (Arts. 52(2) and 53(b))[276]. The argument was, in essence, that the Commission had failed to take enforcement measures, despite the EP's Resolution urging it to, in breach of the principles of the duty of care and

270 See EGC Order in *Eriksen v Commission*, §3.

271 See: ECJ Order of 2011 in *Eriksen et al v Commission*, §§6-7 and http://en.wikipedia.org/wiki/Thule_Air_Base.

272 EP Petition 720/2002.

273 European Parliament resolution of 10 May 2007 on the public health consequences of the 1968 Thule crash (Petition 720/2002) (OJ C 76E/122, 27/03/2008).

274 EGC Order in *Eriksen v Commission*, §26; EGC Order in *Lind v Commission*, §26; EGC Order in *Hansen v Commission*, §24.

275 Mr. Eriksen and Mr. Hansen had been with kidney cancer. Mr. Nochen had died of lung cancer, and Ms. Lind, his sister, was acting in her own name and on behalf of his estate (see ECJ Order of 2011 in *Eriksen et al v Commission*, §§ 10-13).

276 EGC Order in *Eriksen v Commission*, §17; EGC Order in *Lind v Commission*, §17; EGC Order in *Hansen v Commission*, §16.

good administration, and that a prompt intervention would have reduced the gravity of the harm they suffered[277].

Naturally, the EGC declared the application manifestly unfounded. Of the several grounds it could have used to do so, it chose the most straightforward: the Commission's only option for enforcement was to initiate infringement proceedings against Denmark[278], and *"since* (…) *the Commission is under no obligation to bring infringement proceedings under Article 226 EC* [now Art. 258 TFEU] *or Article 141 EA, its decision not to bring such proceedings is not unlawful, so that it cannot give rise to non-contractual liability on the part of the Community"*[279].

On appeal, after having joined the cases[280], the ECJ confirmed the EGC's ruling, in the process reaffirming a general point concerning infringement proceedings under the Euratom Treaty (that the Commission *"is not under a duty to bring proceedings pursuant to those provisions"*), in furtherance of the well established single EU legal order approach in the case-law[281].

While the EGC avoided tackling the issue, the ECJ confirmed its previous case-law according to which the Euratom Treaty does not apply to military activities[282].

Finally, the Commission's arguments in these cases included a clarification of the geographical scope of the Euratom Treaty, stating that it *"does not apply to Greenland now, nor did it in 1968 at the time of the accident, or in 2000 when Directive 96/29 entered into force"*[283].

In April 2011, the ***Siemens v Commission*** case was brought before the Court, asking compensation from the Commission of the Euratom Community, apparently under the terms of a contract with Siemens. Thus, this does not

277 EGC Order in *Eriksen v Commission*, §§18 and 28; EGC Order in *Lind v Commission*, §§18 and 28; EGC Order in *Hansen v Commission*, §§17 and 26.

278 Confirmed by the ECJ – see ECJ Order of 2011 in *Eriksen et al v Commission*, §54.

279 EGC Order in *Eriksen v Commission*, §§27 and 29; EGC Order in *Lind v Commission*, §§27 and 29; EGC Order in *Hansen v Commission*, §§25 and 27.

280 ECJ Order of 2010 in *Eriksen et al v Commission*.

281 ECJ Order of 2011 in *Eriksen et al v Commission*, §42.

282 ECJ Order of 2011 in *Eriksen et al v Commission*, §66.

283 EGC Order in *Eriksen v Commission*, §20; EGC Order in *Lind v Commission*, §20; EGC Order in *Hansen v Commission*, §19.

seem to be a non-contractual liability case, but the details behind it are not yet known, including the reason for the jurisdiction of the EGC.

3.6. Nuclear proliferation cases

In the framework of the EU's commitment to combating the proliferation of nuclear weapons (an effort that has been carried out primarily under the TFEU, rather than under the Euratom Treaty), and to comply with mandatory Resolutions adopted by the United Nations Security Council under Chapter VII of the UN Charter, the EU adopted restrictive measures against Iran[284] and the Democratic People's Republic of Korea[285]. These measures include sanctions for specific (natural and legal) persons, identified in lists annexed to the regulations in question, including the freezing of funds and resources.

Such measures have predictably been challenged before the Court, who has been asked – so far, only in cases relating to Iran – to control the Council's determination of which persons should be subject to sanctions within the context of pressuring a third State to halt its actions towards nuclear proliferation. Aside from politically very sensitive issues, these cases also require the Court to control EU implementation of mandatory UNSC Resolutions.

Although specifically associated to efforts to prevent nuclear proliferation, and therefore worthy of attention within the scope of this paper, it should be

---

284 See: Council Decision 2010/413/CFSP, of 26 July 2010, concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ L 195/39, 27/07/2010), as amended by Council Decision 2011/299/CFSP (OJ L 136/65, 24/05/2011), which repealed Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran (OJ L 61/49, 28/02/2007), last amended by Council Decision 2009/840/CFSP, of 17 November 2009 (OJ L 303/64, 18/11/2009); Council Regulation (EU) 961/2010, of 25 October 2010, on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 (OJ L 281/1, 27/10/2010), which replaced: Council Regulation (EC) 423/2007 of 19 April 2007 concerning restrictive measures against Iran (OJ L 103/1, 20/04/2007), last amended by Council implementing Regulation (EU) 668/2010, of 26 July 2010 (OJ L 195/25, 27/07/2010), which followed the previous Regulations and Decisions implementing Art. 7(2) of Council Regulation (EC) 423/2007: Council Regulation (EC) 1100/2009, Council Decision 2008/475/EC, and Council Decision 2007/242/EC.

285 See: Council Decision 2010/800/CFSP, of 22 December 2010, concerning restrictive measures against the Democratic People's Republic of Korea and repealing Common Position 2006/795/CFSP (OJ L 341/32, 23/12/2010); Council Regulation (EC) 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea (OJ L 88/1, 29/03/2007), last amended by Commission Regulation (EU) 1283/2009, of 22 December 2009 (OJ L 341/15, 23/12/2010); and Council Decision 2009/599/CFSP of 4 August 2009 implementing Common Position 2006/795/CFSP concerning restrictive measures against the Democratic People's Republic of Korea (OJ L 203/81, 05/08/2009). See also (no longer in force) Council Joint Action 2007/753/CFSP of 19 November 2007 on support for IAEA monitoring and verification activities in the Democratic People's Republic of Korea in the framework of the implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (OJ L 304/38, 22/11/2007).

noted that this case-law falls into a broader category, of which the leading case is clearly *Kadi and Al Barakaat International Foundation v Council and Comission*[286], which is reaffirmed in the judgments mentioned below.

3.6.1. Bank Melli cases[287]

As stated by the Court, Regulation (EC) 423/2007 (now Regulation (EU) 961/2010) pursues *"the intention of preventing nuclear proliferation and, more generally, to maintain international peace and security, given the seriousness of the risk posed by nuclear proliferation"*[288], which is a legitimate objective[289].

Art. 7(2) of Regulation (EC) 423/2007 (now included, with revised content, in Art. 16 of Regulation (EU) 961/2010) states that:

> *"*[a]*ll funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex V shall be frozen. Annex V shall include natural and legal persons, entities and bodies, not covered by Annex IV, who, in accordance with Article 5(1)(b) of Common Position 2007/140/CFSP, have been identified as:*
> *a) being engaged in, directly associated with, or providing support for, Iran's proliferation-sensitive nuclear activities, or*
> *b) being engaged in, directly associated with, or providing support for, Iran's development of nuclear weapon delivery systems, or*
> *c) acting on behalf of or at the direction of a person, entity or body referred to under (a) or (b), or*

---

286 Judgment of the ECJ of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Comission* (C-402/05 P and C-415/05 P), ECR (2008) I-6351. Another important case, reaffirmed in these cases, is EGC Judgment of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran v Council* (T-228/02), ECR (2006) II-4665.

287 *Bank Melli (I)*: Appeal brought on 25 September 2009, *Melli Bank v Council* (C-380/09 P) (OJ C 282/30, 21/11/2009); Opinion of AG Mengozzi delivered on 28 June 2011 in *Melli Bank v Council* (C-380/09 P), ECR not yet reported; Judgment of the EGC of 9 July 2009, *Melli Bank v Council* (T-246/08 and T-332/08), ECR (2009) II-2629; Order of the President of the EGC of 17 September 2008, *Melli Bank v Council* (T-332/08 R), ECR (2008) II-185; Order of the President of the EGC of 27 August 2008, *Melli Bank v Council* (T-246/08 R), ECR (2008) II-146.
Bank Melli (II): Appeal brought on 23 December 2009, *Bank Melli Iran v Council* (C-548/09 P) (OJ C 80/10, 27/03/2010; Opinion of AG Mengozzi delivered on 28 June 2011 in *Bank Melli Iran v Council* (C-548/09 P), ECR not yet reported; Judgment of the EGC of 14 October 2009, *Bank Melli Iran v Council* (T-390/08), ECR (2009) II-3967; Order of the President of the EGC of 15 October 2008, *Bank Melli Iran v Council* (T-390/08 R), ECR (2008) II-224.
For more on these cases, see: Paciullo, 2009.

288 EGC Judgment in *Bank Melli (I)*, §66. EGC Judgment in *Bank Melli (II)*, §67.

289 EGC Judgment in *Bank Melli (I)*, §102. EGC Judgment in *Bank Melli (II)*, §67.

d) being a legal person, entity or body owned or controlled by a person, entity or body referred to under (a) or (b), including through illicit means".

Bank Melli Iran (*Bank Melli (II)*), a bank controlled by the Iranian State, and Melli Bank plc (*Bank Melli (I)*), its UK-based subsidiary, were included in the list in Annex V to Regulation (EC) 423/2007, implemented (in what concerned these cases) by Council Decision 2008/475/EC, on the grounds that this bank served *"as a facilitator for Iran's sensitive activities. It has facilitated numerous purchases of sensitive materials for iran's nuclear and missile programs. It has provided a range of financial services on behalf of entities linked to Iran's nuclear and missile industries"*, some of which designated in the relevant UNSC Resolutions.

The judgments in these cases were preceded by the refusal of the applicants' requests for provisional measures (suspension of the effects of inclusion in the list of entities subject to the restrictive measures).

The scope of both disputes was substantially limited by a formal lapse on behalf of the appellants, who, although arguing against this finding, did not raise the plea that Bank Melli Iran was not engaged in the funding of nuclear proliferation[290].

The Court began by clarifying the limited extent of judicial review it exercises over Regulation (EC) 423/2007 and, therefore, the extent of the Council's broad discretionary margin in applying sanctions to persons in the context of preventing nuclear proliferation. Judicial review is different for the provisions laying down general rules on method of implementation of restrictive measures (e.g. Article 7(2)), and for the specific implementation of that method (e.g. inclusion of persons in the list of Annex V):

"With regard to the first kind of matter, it is to be borne in mind that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC and 301 EC [now Arts. 75 and 215 TFEU], *consistent with a common position adopted on the basis of the common foreign and security policy ('the CFSP'). Because the Community judicature may not, in particular, substitute its assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court must, therefore, be restricted to checking that the*

290 EGC Judgment in *Bank Melli (I)*, §§27-30; EGC Judgment in *Bank Melli (II)*, §30.

rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such measures are based.
With regard to [the second kind of matter,] *it is for the Court to determine, having regard to the pleas for annulment raised by the entity concerned or raised of the Court's own motion, inter alia, that the instant case corresponds to one of the four hypotheses referred to in Article 7(2)(a) to (d) of Regulation No 423/2007. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded*"[291].

The Court considered that measures implementing Regulation (EC) 423/2007 *"must be regarded as being compatible with the interpretation of Articles 60 EC and 301 EC given in Kadi and Al Barakaat International Foundation v Council and Comission"*[292]. It also noted that Art. 7(2) *"does not give effect to* [UNSC] *Resolution 1803(2008), which means that the content of that resolution does not constitute a criterion having regard to which*" the legitimacy of that provision should be assessed[293], and that *"nothing in Article 60 EC or 301 EC permits the inference that the powers conferred on the Community by those provisions are limited to the implementing measures decided by the Security Council"* (meaning that the Council can go beyond the scope of measures ordered by the UNSC)[294]. It has been stated that Regulation (EC) 423/2007 was adopted with the adequate legal basis and correct voting rule[295], that the fund-freezing measures are precautionary measures (not criminal sanctions or

291 EGC Judgment in *Bank Melli (I)*, §§45-46. EGC Judgment in *Bank Melli (II)*, §§36-37.

292 EGC Judgment in *Bank Melli (I)*, §69. The Court also noted, rather succinctly, that *"Regulation No 423/2007 was adopted"* on the basis of Arts. 60 and 301 EC, *"which implies that the restrictions entailed by that act form part of the rules circumscribing the free movement of capital and payments guaranteed by the Treaty and cannot, therefore, be incompatible with it"* (EGC Judgment in *Bank Melli (I)*, §113).

293 EGC Judgment in *Bank Melli (I)*, §99. See also EGC Judgment in *Bank Melli (II)*, §§64-65.

294 EGC Judgment in *Bank Melli (II)*, §51.

295 EGC Judgment in *Bank Melli (II)*, §§44-49.

related to accusations of a criminal nature)[296], and that there was no evidence of misuse of powers by the Council in its adoption[297].

One argument raised by the appellant in *Bank Melli (I)* was a breach of the principle of equal treatment, as the Council had allegedly not applied these provisions to all subsidiaries of entities identified as being engaged in nuclear proliferation. The Court first noted the mandatory consequence of including a person within the scope of Art. 7(2): *"extension of the fund-freezing measure to entities owned or controlled is obligatory, the Council enjoying no leeway in this respect"*[298]. It then excluded the existence of discrimination on the basis of several arguments:

(i) the *"Council may legitimately* (…) *not apply Article 7(2)(d) of the regulation to entities which, in its opinion, do not fulfil the conditions for the application of that provision, despite the fact that they are subsidiaries"* of those entities[299];
(ii) *"it is impossible to identify, in every case, all the entities owner or controlled"* by those entities[300];
(iii) even if the Council had breached its obligation under the Regulation, this would not derogate from the Regulation or create legitimate expectations (principle of legality) – *"any unlawful conduct by the Council in other cases* (…), *cannot* (…) *be relied on to advantage in support of the applicant's position"*[301].

As for the alleged breach of the principle of proportionality by Art. 7(2), the Court dismissed the United Kingdom's argument *"that the freezing of funds of entities owner or controlled also pursues the objective of putting economic pressure on* [Iran]", saying that while they may indeed have the aim of pressuring Iran, *"they are, nevertheless, precautionary measures designed to prevent nuclear proliferation and its funding"*, nothing allowing *"the inference that those measures are intended to affect the economic situation of the entities concerned, beyond what*

296 EGC Judgment in *Bank Melli (II),* §111.

297 EGC Judgment in *Bank Melli (II),* §50.

298 EGC Judgment in *Bank Melli (I),* §63.

299 EGC Judgment in *Bank Melli (I),* §73.

300 EGC Judgment in *Bank Melli (I),* §74.

301 EGC Judgment in *Bank Melli (I),* §§75 and 137. See also EGC Judgment in *Bank Melli (II),* §59.

is essential in order to prevent nuclear proliferation and its funding"[302] – thus, the test of proportionality must guide itself by this objective. The Court concluded that the measures ordered in Art. 7(2), pursuing a legitimate objective, did not breach the principle of proportionality:

(i) necessity: *"the mere existence of rules prohibiting the carrying-out of transactions with entities identified as engaged in nuclear proliferation and providing for obligations entailing sanctions does not guarantee that such transactions will not be performed"* by these controlled entities[303];

(ii) adequacy: since entities engaged in nuclear proliferation efforts may try to circumvent the freezing of their funds through other entities they control, *"the freezing of funds of entities owned or controlled by an entity identified as being engaged in nuclear proliferation is necessary and appropriate in order to ensure the effectiveness of the measures adopted vis-à-vis that entity and to ensure that those measures are not circumvented"*[304];

(iii) proportionality *stricto sensu*: it was not proven that there were less restrictive measures that could equally ensure the achievement of the objective (namely, *"ex post measures concerning transactions already performed* (…) *are not* (…) *capable of preventing possible future transactions incompatible with the restrictive measures"*)[305];

(iv) appellant's arguments on disproportionality dismissed as irrelevant: *"that the entity owned or controlled has not been the subject of disciplinary or regulatory measures in the past and that it has complied with the sanctions regime and the restrictive measures in force"*; that it issues *"a declaration* (…) *to the effect that it would abide by the consequences of the freezing of its parent entity's funds"*[306];

In an extension of the test of proportionality, the Court also found that Art. 7(2) of the Regulation does not breach fundamental rights (right to property and right to carry on economic activities): "[t]*he importance of the aims pursued* (…) *is such as to justify negative consequences, even of a substantial*

302 EGC Judgment in *Bank Melli (I)*, §106.

303 EGC Judgment in *Bank Melli (I)*, §71.

304 EGC Judgment in *Bank Melli (I)*, §103. See also EGC Judgment in *Bank Melli (II)*, §68.

305 EGC Judgment in *Bank Melli (I)*, §§107-108. EGC Judgment in *Bank Melli (II)*, §69.

306 EGC Judgment in *Bank Melli (I)*, §105.

nature, for some operators", and *"given the prime importance of the preservation of international peace and security, the Court considers that the difficulties caused are not disproportionate to the ends sought"*[307].

The extent of the Council's obligations to state reasons for its decision to include a certain person in the list provided for in Art. 7(2) was clarified by the Court, in general terms, as follows:

(i) *"the Council is required to indicate the reasons that prompted it to consider that an entity is 'owned or controlled' by an entity identified as engaged in nuclear proliferation"*[308];

(ii) *"unless overriding considerations involving the security of the Community and its Member States or the conduct of their international relations militate against it, the Council is required, by virtue of Article 15(3) of Regulation No 423/2007, to advise the entity concerned of the actual specific reasons when it adopts a fund-freezing decision such as the contested decision. It must thus mention the matters of fact and law on which the legal justification for the measure depends and the considerations which led it to adopt that measure. So far as is possible, those reasons must be communicated either when the measure at issue is adopted or as soon as may be after it has been adopted"*[309];

(iii) *"However, the statement of reasons must be appropriate to the measure at issue and the context in which it was adopted. The requirement of a statement of reasons must be assessed in the light of the circumstances of the case, in particular of the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to specify all the relevant matters of fact and law, inasmuch as the adequacy or otherwise of the reasoning is to be evaluated with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In*

307 EGC Judgment in *Bank Melli (I)*, §§111-112. See also EGC Judgment in *Bank Melli (II)*, §§70-71.

308 EGC Judgment in *Bank Melli (I)*, §70.

309 EGC Judgment in *Bank Melli (I)*, §144. See also EGC Judgment in *Bank Melli (II)*, §81. The Court further added: *"*[t]*he principle of observance of the rights of the defence requires the evidence adduced against the entity concerned to be communicated to it, in so far as possible, either concomitantly with or as soon as may be after the adoption of an initial decision to freeze its funds. However, overriding considerations to do with the safety of, or the conduct of the international relations of, the Community and of its Member States may militate against the communication of certain matters to the person concerned"* (§92).

particular, the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him"[310];

(iv) Contrary to what was argued by France, the Council must expressly identify by name the entities to which fund-freezing is to apply, under Art. 72(d)[311];

(v) But the statement of reasons may be *"exceptionally concise"*, and does not even have to explicitly mention clause (d), as long as the addressee can identify it as the legal basis; in practice, it is sufficient to merely list the name of the company as a subsidiary of a company targeted under Art. 7(2)(a) or (b), even without additional considerations on ownership or control[312]; differently, the targeting of a company under clauses (a) or (b) requires a significant level of justification, including evidence: "[w]*hen a decision is adopted pursuant to Article 7(2)(a) or (b) of Regulation No. 423/2007, the communication of the inculpatory evidence must include the specific information or material in the file which shows that in the case of the entity concerned the conditions for implementing that provision have been satisfied*"[313];

(vi) Contrary to what was argued by the Council, the Commission and France, the obligation to apprise the company of the reasons for its inclusion in the list, as derives from Art. 15(3) of the Regulation, is not sufficiently met by the publication of the decision in the Official Journal (which is relevant for the *erga omnes* effects): *"in the circumstances* [including the knowledge of the address of the applicant's headquarters] (…), *the Council is bound, in so far as may be possible, to apprise the entities concerned of the fund-freezing measures by making*

310 EGC Judgment in *Bank Melli (I)*, §145. EGC Judgment in *Bank Melli (II)*, §82.

311 EGC Judgment in *Bank Melli (I)*, §146.

312 EGC Judgment in *Bank Melli (I)*, §§147-150. The finding concerning the tacit understanding on "ownership" is somewhat surprising, given the Court's position on the interpretation to be given to that concept under Art. 7(2)(d) of the Regulation.

313 EGC Judgment in *Bank Melli (II)*, §§84-85 and 95. However, the Council is not required to automatically offer to the company access to the material in its file – *"When sufficiently precise information has been communicated, enabling the entity concerned to make its point of view on the evidence adduced against it by the Council known to advantage, the principle of respect for the rights of the defence does not mean that the institution is obliged spontaneously to grant access to the documents in its file. It is only on the request of the party concerned that the Council is required to provide access to all non-confidential official documents concerning the measure at issue"* (EGC Judgment in *Bank Melli (II)*, §97).

individual notification"[314]. However, in this specific case, the measure was notified *"timeously and officially"* to the applicant by a letter from the French banking commission, and there was evidence it consulted the content of the decision, and in these *"exceptional circumstances"*, *"the Council's omission does not justify annulment of the contested decision"*[315];

On the right to a prior hearing, the Court confirmed the need for a restrictive approach: *"inasmuch as an initial decision to freeze an entity's funds* (…) *must be able to take advantage of a surprise effect, it is not a requirement that, before the decision* (…) *was adopted, the evidence adduced against the entity concerned should have been communicated to it or that that entity should be heard"*[316]. The right to a hearing exists, upon request, after the adoption of an initial decision to freeze funds: the Council is not *"required automatically to conduct a hearing, having regard to the opportunity the entities concerned also have of immediately bringing an action before the Court of First Instance"*[317].

Specifically, in what concerns the interpretation of Art. 7(2)(d) of Regulation (EC) 423/2007, the EGC provided the following interpretations:

(i) case-by-case assessment: the implementation of this provision requires a case-by-case *"evaluation of the facts of the case in order to ascertain which entities are entities owned or controlled"*[318];
(ii) elements to be assessed: the Council must *"take into account all the relevant aspects of the specific case, such as the degree of operational independence of the entity in question or the possible effect of the supervision to which it is subjected by public authorities"*[319];
(iii) irrelevance of involvement in nuclear proliferation efforts: *"the nature of that entity's activities and the possible lack of any link between those activities and nuclear proliferation are not, in this context, a relevant*

314 EGC Judgment in *Bank Melli (II)*, §§86-88.

315 EGC Judgment in *Bank Melli (II)*, §§89-90.

316 EGC Judgment in *Bank Melli (II)*, §93 (see also §94).

317 EGC Judgment in *Bank Melli (II)*, §§98-99.

318 EGC Judgment in *Bank Melli (I)*, §§64-65 and 67.

319 EGC Judgment in *Bank Melli (I)*, §69.

criterion"[320] (it is only the parent company, under clause (a) or (b) whose involvement must be shown);

(iv) Meaning of "owned": the interpretation of this concept cannot be literal, it must consider the objective pursued by the Regulation[321] – what matters is if the parent company is in a position to prompt the company in question to *"circumvent the measures adopted against it"*. The Court considered it useful to apply a test of exercise of decisive influence, analogous to the one developed in Competition Law, but with an adjustment: *"aspects relating to the appointment of staff* [directors and employees] *must be given greater force"*[322].

While full ownership usually allows the appointment of the company's directors and, therefore, *"actual control"*, the Court found it possible that, *"in extraordinary circumstances, the application of* [Art. 7(2)(d)] (…) *may not be justified in the light of other factors counterbalancing"* the parent company's influence[323]. The relevance of several circumstances invoked by the applicant was dismissed by the Court: (i) that the application possesses legal personality; (ii) that the parent does not intervene in its day-to-day activities; (iii) that the company and its staff have complied with the restrictive measures and sanctions regime; (iv) that neither company nor staff has been the subject of disciplinary or regulatory measures in the past; (v) that general company law imposes certain obligations on directors; and (vi) that the company is subject to general banking supervision[324].

However, the Court may consider the subjection of the appointment of all directors to approval by national authorities (when possible) as excluding control by the parent company in the sense of Art. 7(2)(d)[325].

320 EGC Judgment in *Bank Melli (I)*, §69.

321 EGC Judgment in *Bank Melli (I)*, §120.

322 EGC Judgment in *Bank Melli (I)*, §§121-122.

323 EGC Judgment in *Bank Melli (I)*, §123.

324 EGC Judgment in *Bank Melli (I)*, §§125-128.

325 EGC Judgment in *Bank Melli (I)*, §§127: *"In so far as the applicant proposes in this connection to submit the appointment of its future directors to the consent of the competent authorities, it is to be observed on the one hand that it has not been established that such a procedure would be feasible and in keeping with the law of England and Wales, and on the other hand that it would in any case not resolve the situation of the applicant's present directors, who have been appointed by"* the parent company.

Both cases have been appealed to the ECJ. AG Mengozzi has recommended that both appeals be dismissed.

3.6.2. Pending cases

Several other cases are, in the meantime, pending before the Court, wherein parties have challenged their inclusion in the list of persons whose funds have been frozen under the Regulation on restrictive measures relating to the Iranian suspected nuclear weapons programme[326].

4. CONCLUSION

The main overall conclusion to be drawn from the case-law of the European Court in the 21st century is that there has been a shift in paradigm. The Court has moved away from positions promoting the furtherance of European integration, whenever the Euratom Treaty is concerned, and closer to a position which seems to spur from discomfort in handling a Treaty about whose present and future the Member States are unable to agree on.

While a restrictive approach to the interpretation of the Euratom Treaty may be understandable in what concerns the long outdated common supply policy, the same cannot be said about the position taken concerning applicability of Euratom provisions to military activities.

The Court may well be justified in showing fatigue with the Euratom Treaty, and it is clear that the ideal solution would be a political one, implying a full scope revision of the Treaty and, possibly, its incorporation into the TFEU. However, until that happens, it should be recognized that the TFEU does not allow for the pursuance of Euratom's main goals – and particularly those relating to health protection – in the same broad and effective manner as its sibling Treaty. Thus, there is still much to be done under the Euratom Treaty, and the Court has a decisive role to play in making such efforts viable.

In the future, one may expect the attention of the Court to continue to be drawn to nuclear issues, in particular, in the context of the enforcement

326 Action brought on 29 January 2010, *Bank Melli Iran v Council* (T-35/10) (OJ C 100/47, 17/04/2010; Action brought on 7 January 2011, *Bank Melli Iran v Council* (T-7/11) (OJ C 63/30, 26/02/2011; Action brought on 24 September 2010, *Mahmoudian v Council* (T-440/10) (OJ C 328/34, 04/12/2010); Action brought on 24 September 2010, *Fulmen v Council* (T-439/10) (OJ C 328/34, 04/12/2010); Action brought on 20 October 2010, *Manufacturing Support & Procurement Kala Naft v Council* (T-509/10) (OJ C 346/57, 18/12/2010); Action brought on 16 December 2010, *HTTS Hanseatic Trade Trust & Shipping v Council* (T-562/10) (OJ C 46/14, 12/02/2011); Action brought on 7 January 2011, *Iran Insurance v Council* (T-12/11) (OJ C 63/31, 26/02/2011); Action brought on 7 January 2011, *Post Bank v Council* (T-13/11) (OJ C 63/32, 26/02/2011).

of competition law (*maxime* state aid rules) and, of course, infringement proceedings. In this regard, the ECJ may come to play a crucial role in the enforcement of international law provisions adopted also at EU level (nuclear safety and, soon, management of radioactive waste and irradiated fuel). Another issue where the EGC and the ECJ will probably be called on to play an important role is in the fight against the proliferation of nuclear weapons.

BIBLIOGRAFIA

Alehno, I.
2008 "The Euratom Supply Agency: past, present and future", in *Nuclear Inter Jura 2007 – Proceedings*, Bruxelas: Bruylant, p. 108.

Allen, D.
1983 "The Euratom Treaty, Chapter VI: new hope or false dawn?", (1983) *Common Market Law Review* 473.

Allibert, B. & Jones, C.
2008 "Energy (including nuclear and coal)", in Mederer, W., Pesaresi, N., Van Hoof, M. (eds.), *EU Competition Law*, Clayes & Casteels, Vol. IV (State Aid), Book Two.

Andres-Ordax, B.
2008 "Radiological protection and military activities: recent European case-law", in *Nuclear Inter Jura 2007 – Proceedings*, Bruxelas: Bruylant, p. 537.

Barsi, T.
2008 "Enrichment contracts in the European Union after the INB Judgment", in *Nuclear Inter Jura 2007 – Proceedings*, Bruxelas: Bruylant, p. 1095.

Breda, E.
2005 "Alla ricerca del delicato equilibrio tra protezione della salute e difesa della sicurezza nazionale nell'ambito del Trattato Euratom", (2005) *Diritto pubblico comparato ed europeo* 1126.

Cardwell, P. J., French, D.
2007 "Who decides? The ECJ's judgment on jurisdiction in the MOX Plant dispute", (2007) 19 *Journal of Environmental Law* 121.

Carreño Gualde, V.
2007 "TJCE – Sentencia de 30.05.2006, Comisión/Irlanda, C-459/03, MOX – La Competencia exclusiva del TJCE y la Parte XII de la Convención de las Naciones Unidas sobre el Derecho del Mar", (2007) *Revista de Derecho Comunitario Europeo* 185.

Casolari, F.
2007 "La sentenza MOX: la Corte di giustizia delle Comunità europee torna ad occuparsi dei rapporti tra ordinamento comunitario ed ordinamento internazionale", (2007) *Il diritto dell'Unione Europea* 327.

Debroux, M.
2009 "Chroniques. Ententes", (2009) *Concurrences: revue des droits de la concurrence* 80.

Della Molle, E. & Galvan, S.
2008 "Past and present issues relating to the transfer of nuclear material for nuclear research", in *Nuclear Inter Jura 2007 – Proceedings*, Bruxelas: Bruylant, p. 199.
Delzangles, H.
2007 «Provisions pour démantèlement des centrales nucléaires et droit communautaire des aides d'État», (2007) *Revue européenne de droit de l'environnement* 71.
Donnat, F.
2006 "Une opération d'enrichissement d'uranium ne peut être assimilée à une «production» de matière nucléaire et ne relève donc pas du régime de «propriété» du traité Euratom", (2006) *Cahiers juridiques de l'électricité et du gaz* 479.
Galante, R.
2010 "La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt «Land Oberösterreich c. CEZ»", (2010) 1 *Revue du droit de l'Union européenne* 140.
Gervasoni, S.
2005 "Le traité Euratom ne s'applique pas aux activités nucléaires militaires", (2005) *Revue française de droit administratif* 828.
Grunwald, J.
2008 "Euratom Treaty history and the way forward", in *Nuclear Inter Jura 2007 – Proceedings*, Bruxelas: Bruylant, p. 1075, at p. 1084.
Kerbrat, Y. & Maddalon, P.
2007 "Affaire de l'Usine MOX: la CJCE rejette l'arbitrage pour le règlement des différends entre Etats membres", (2007) *Revue trimestrielle de droit européen* 165.
Lavranos, N.
2006(1) "Protecting its exclusive Jurisdiction: the Mox Plant-Judgment of the ECJ", (2006) *The Law and Practice of International Courts and Tribunals* 479.
2006(2) "Freedom of member states to bring disputes before another court or tribunal: Ireland condemned for bringing the MOX plant dispute before an arbitral tribunal. Grand Chamber decision of 30 May 2006, Case C-459/03, Commission v. Ireland", (2006) 2 *European Constitutional Law Review* 456.
2007 "The scope of the exclusive jurisdiction of the Court of Justice", (2007) *European Law Review* 83.

Maitrepierre, A.
2008 «La Cour de justice, gardienne des limites de l'objet du litige, soulève d'office un moyen tiré de l'irrecevabilité du recours formé contre une décision de la Commission en matière d'aides d'Etat», (2008) 1 *Concurrences: revue des droits de la concurrence* 164.

Möstl, M.
2010 "Case C-115/08, Land Oberösterreich v. ČEZ, Judgment of the Court of Justice (Grand Chamber) of 27 October 2008", (2010) 47(4) *Common Market Law Review* 1221.

Neframi, E.
2007 "La mixité éclairée dans l'arrêt MOX du 30 mai 2006: une double interaction, un triple apport", (2007) 3 *Revue du droit de l'Union européenne* 687.

Nocera, F.
2005 *The legal regime of nuclear energy – a comprehensive guide to international and European Union law*, Antwerp-Oxford: Intersentia.

Paciullo, G.
2009 "Misure restrittive della Comunità europea in materia di proliferazione nucleare", (2009) *Diritto pubblico comparato ed europeo* 1957.

Quigley, C.
2009 *European State Aid Law and Policy*, 2nd ed., Hart Publishing.

Reich, D. O.
2006 "No level playing field for nuclear power reserves? Comment on the Judgment in Case T-92/02 of 26 January 2006", (2006) *European State Aid Law Quarterly* 445.

Savy, D.
2003 "Tendenze evolutive della Corte in tema di competenze della Comunità europea dell'energia atomica in materia di sicurezza nucleare", (2003) *Diritto pubblico comparato ed europeo* 1037.

Schrijver, N.
2006 "Case C-459/03, Commission of the European Communities v. Ireland, Judgment of the Court of Justice (Grand Chamber) of 30 May 2006, [2006] ECR I-4635", (2010) 47(3) *Common Market Law Review* 863.

Semmelmann, C.
2006 "Forum shopping between UNCLOS arbitration and EC adjudication – And the winner ... should be ... the ECJ!", (2006) *European Law Reporter* 234.

Soltész, U.

2010 Commentary in Heidenhain, M. (ed.), *European State Aid Law: Handbook*, Municque: Beck, 2010, pp. 732-733.

Sousa Ferro, M.

2008 "The Future of the Regulation of Nuclear Safety in the EU", 2(2) (2008) *International Journal of Nuclear Law* 149.

2010(1) "Directive 2009/71/Euratom: the long lost battle against discrimination and protection of sovereignty", 2(4) (2010) *International Journal of Nuclear Law* 295.

2010(2) "Competition Law and the nuclear sector: an EU outlook", 85 (2010/2) *Nuclear Law Bulletin* 13

Wainwright, R. & Cusak, B.

1997 "Case-law of the European Court of Justice in the nuclear field from 1971 to the present day", in *Nuclear Inter Jura 1997 – Proceedings (14-18 September 1997, Tours).*