

“The exercise of giving way to ‘giving in’- some aspects of the Member States’ EURATOM obligations revisited”

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The European Atomic Energy Community (EAEC, commonly referred to as EURATOM) ever since its inception in 1957 was considered as a bold political and legal enterprise of the then six Member States of the Community in the sense that as much as it was seen as ‘futuristic’ and ‘forward-looking’ at the time, it is still today believed to “by the very nature of its subject (...) bite deeper into the crust of national sovereignty than the Common Market Treaty”¹. Referred to as a *dirigiste* and *promotional* treaty as opposed to the market-oriented European Economic Community (EEC) Treaty², the EURATOM’s futuristic aspect is seen in the fact that it promotes the development of the (then) nascent civil nuclear energy production, the world having already been familiarized with the military nuclear industry and its devastating consequences in the developments throughout The Second World War. Although slightly aside from the spotlight of academic research focus, the EURATOM framework provides for a very particular division of competence between the EURATOM Community and the Member States that merits greater attention especially since this division sometimes proves to be a problematic one due to the general wording of certain Treaty provisions which lend themselves to an unwarranted extensive interpretation.

Notwithstanding the notion of constitutional pluralism³ and the way it is applied in the examination of the relationship between the (EURATOM) Community and the Member States, this paper will focus on the ‘sovereignty battle’ between the Community and the Member States with regard to certain aspects pertaining to nuclear energy production, that is: safety of nuclear installations, disposal of radioactive waste and nuclear safeguards. Further on, the latter two will be linked and areas of possible interference will be examined.

If indeed we are in the presence of a sovereignty battle when it comes to certain aspects of nuclear energy production, this is certainly because these issues are closely related to Member States sovereignty concerns and the scope of national prerogatives they are (not) willing to delegate, but can these sovereignty concerns be believed, even remotely, to stem from national defence concerns? Bearing in mind the political and highly sensitive character of these questions, a legal approach will be applied to answer this question.

¹ Quoted in P. Koutrakos, Case note on Case C-29/99 *Commission v Council (re: Nuclear Safety Convention)*, Judgment of the Court of Justice (Full Court) of 10 December 2002, (2004) 41 *Common Market Law Review*, p.191.

² T. F. Cusack, “A Tale of Two Treaties: An Assessment of the Euratom Treaty in relation to the EC Treaty” (2003) 40 *Common Market Law Review*, p.125.

³ For a discussion on the concept of constitutional pluralism see N. Walker, “Late Sovereignty in the European Union”, in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing, 2003); N. Walker, “The Idea of Constitutional Pluralism” (2002) 65-3 *The Modern Law Review*.

1. Safety of nuclear installations v. safety of nuclear materials

The safety of nuclear installations was in the past considered as inherent Member State competence as opposed to the safety of nuclear materials (radiation protection) which belongs to one of the objectives set out in Art.2 of the EAEC Treaty and clearly falls within the purview of EURATOM competence. In the *Nuclear Safety Convention Case*⁴ the Court was asked to determine the scope of the EURATOM competence as a signatory party to the Convention on nuclear safety in the areas covered by the Convention. Concurring to Advocate General Jacobs' Opinion, the Court observed that according to the present interpretation of the health and safety provisions of the EAEC Treaty there is a significant overlap between radiation protection as a health protection objective of the Treaty on one hand and the safety of nuclear installations on the other. It thereby took an extensive approach to establishing the EURATOM competence not only by reiterating the Advocate General's stance that it is not appropriate to draw an artificial distinction between protection of the health of the general public and the safety of sources of ionizing radiation⁵, but went even further to conclude that the declaration of competence should have additionally included, *inter alia*, not only Art.17 of the Convention that concerns the siting of nuclear installations, but also Art.18 and 19 which concern the design, construction and operation of installations. The Court clearly surpassed what was suggested by AG Jacobs and awarded the Community the competence to legislate in matters concerning the technological aspects of nuclear safety, which Jacobs considered should predominantly fall under the competence of the Member States.

Pursuant to the judgment given on 10 December 2002, in 2004 the Council drew up a proposal for Directive laying down basic obligations and general principles on the safety of nuclear installations⁶, now replaced by a proposal for Directive setting up a Community framework for nuclear safety⁷. What is worth mentioning is that these two proposals, *inter alia*, differ in the definition they offer for 'nuclear installation'. The 2004 proposal defines it as "*any civilian⁸ facility(...) where radioactive materials are produced, processed, used, handled, stored or disposed of temporarily or permanently*" whereas the present proposal refers to a "*nuclear fuel fabrication plant, research reactor, nuclear power plant, spent fuel storage facility, enrichment plant or reprocessing facility*"; One could read into the absence of the word 'civilian' in the new definition an implied attempt to safeguard any possible diversion of nuclear materials to non-peaceful uses by way of prescribing in detail the kind of installations the Directive will apply to.

The two directives already in the pipeline, it can be argued that Member States have indeed conceded to the safety of nuclear installations being a competence shared with the Community, rather than an exclusive Member State competence. Effectively, what still seems to stir unease and reluctance among the Member States is the issue of radioactive waste management and the possible application of nuclear safeguards standards in the matter of disposal of radioactive waste. This is an area which clearly touches upon national defence concerns and therefore raises sovereignty-related objections.

⁴ Case C-29/99, *Commission v Council* [2002] ECR I-1122.

⁵ Para 82 of the judgment.

⁶ Proposal for a Council Directive (Euratom) laying down basic obligations and general principles on the safety of nuclear installations, COM(2004) 526 final.

⁷ Proposal for a Council Directive setting up a Community framework for nuclear safety, COM(2008) 790/3.

⁸ Emphasis added.

2. Nuclear safeguards and radioactive waste – the space in between

In a Union that ventures to keep up with the priorities of the global security agenda (among other, by envisaging a progressive framing of a common defence policy that might lead to a common defence⁹) and in a world going through a possible revival of a nuclear arms race (with a view to recent developments in Iran and North Korea), the EURATOM provisions relative to nuclear safeguards once considered by the Member States as ‘legal espionage’¹⁰ become all the more topical. Closely connected with these defence concerns is also the issue of nuclear terrorism¹¹.

The ‘Spaak Report’ (considered as the prelude to the EURATOM treaty), solely focuses on the peaceful uses of nuclear energy, its drafters having considered that the eventuality of an utilization of nuclear energy for *military purposes*¹² by certain states is a question of a political character that exceeds the limits of their competence¹³. This kind of evasiveness adds on to the non-military spirit of the Report aiming for an atmosphere of mutual trust to be established between the Member States as something fundamental in a Europe ‘torn apart by its history’¹⁴. Even though at the time of the conclusion of the Treaty none of the then six Member States was a nuclear weapon state¹⁵, the drafters, while assuring the peaceful character of the Treaty, by the insertion of the nuclear safeguards provisions conceived a preventive approach towards a future ‘nuclear militarization’ of any of the Member States (as was the case with France and later on, Great Britain¹⁶).

Concerning the application of nuclear safeguard standards, what proves to be problematic in terms of finding the applicable legal regime is the persistent controversy of precisely delimitating the *civil* from the *military* uses of nuclear energy in that nuclear

⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C 306/1, Art. 11 of the Chapter on Common Foreign and security policy.

¹⁰ D.A. Howlett, *EURATOM and Nuclear Safeguards* (MacMillan Press, 1990), p.9.

¹¹ Communication from the Commission to the Council and the European Parliament: Communication on nuclear non-proliferation, COM(2009) 143, p.3; The short definition for nuclear terrorism is ‘attacks on nuclear facilities that use or process nuclear material’ (See C.D. Ferguson and W.C. Potter, *The Four Faces of Nuclear Terrorism* (Center for non-proliferation studies-Monterey, 2004), foreword). For a discussion on this issue see also B. Patel and P. Chare, ‘Fifty Years of Safeguards under the EURATOM Treaty - A Regulatory Review’ (2007) 36 *ESARDA Bulletin* (also available at esarda2.jrc.it/db_proceeding/mfile/B_2007_036_02.pdf), p.9.)

The possibility of a nuclear counter-attack is a seriously considered option in France, as the former French president Jacques Chirac stated referring to leaders of states who would “*use terrorist means against us, just like anyone who would envisage using, in one way or another, arms of mass destruction, must understand that they would expose themselves to a firm and adapted response from us.*”(press statement available at <http://news.bbc.co.uk/2/hi/europe/4627862.stm>).

¹² Emphasis added.

¹³ Report of the Intergovernmental Committee created by the Messina Conference to the Ministers of Foreign Affairs, Brussels, 21 April 1956, p.122.

¹⁴ *Idem*, p.100.

¹⁵ France only started developing its nuclear arsenal in the early 1960s.

¹⁶ At the moment the only Member States of the EU that have developed their own nuclear arsenals are France and United Kingdom with the mention of countries such as Belgium, Germany, Italy and The Netherlands that, under the NATO nuclear weapons sharing mechanism, the US provides with its nuclear weapons to be deployed and stored (H.M. Kristensen, *US Nuclear Weapons in Europe: A Review of Post-Cold War Policy, Force Levels and War Planning* (Natural Resources Defense Council, Washington D.C.,2005), p.8,9).

technology is such that it makes the exercise of differentiating the two quite difficult.¹⁷ Moreover, uranium enrichment and reprocessing of spent nuclear fuel are both civil nuclear activities that are most commonly associated with nuclear weapons proliferation concerns.¹⁸

In the same vein, the topic of safe disposal of radioactive waste is another controversial one and hence, it is crucial to precisely define the notion of radioactive waste and apply stringent standards to the process of its disposal since it is scientifically proven that plutonium which is the content of radioactive waste can easily be diverted to military purposes i.e for the construction of nuclear bombs or other nuclear weapons¹⁹ Therefore the issue of applying nuclear safeguards to the area of disposal of radioactive waste needs to be thoroughly examined in the sense that regardless of the Art.84 EAEC exclusion of military uses of nuclear energy from the scope of the safeguards provisions, the fact remains that the end products of military nuclear industry are thereby, legally speaking, left unaccounted for. This argument goes *a fortiori*, to the possible health concerns that the unsafe disposal of radioactive waste from military installations poses to the general public. The Court has already addressed this issue in cases C-61/03 *Commission v United Kingdom*²⁰ and C-65/04 *Commission v United Kingdom*²¹, discussed *infra*.

3. The issue of safeguarding radioactive waste – The ECJ view

There are two cases where the European Court of Justice pronounced itself on the controversial issue of application of EURATOM provisions to military nuclear installations in the event when their functioning might have an impact on the health of the general public. The first case relates to the application of the Art. 37 EAEC obligation to provide general data on a plan for the disposal of radioactive waste in the case of the decommissioning of the Jason reactor in Greenwich, UK, while the second refers to the obligation to provide the public likely to be affected in the event of a radiological emergency prior information pursuant to Directive 89/618/Euratom²², concerning a local emergency plan for the nuclear powered UK military submarine of the Tireless. What these two cases have in common is the fact that they both raise the same point in law²³ and in both of the proceedings the UK Government put forward the same defence argument before the Court i.e. that the EAEC Treaty does not apply to the use of nuclear energy for military purposes²⁴.

In the first case, the Court based its reasoning mainly on two arguments. First, in the absence of an express derogation contained in Art.37 EAEC, or rather a treaty provision generally excluding the military activities from the scope of the Treaty, the Court looked into the intention of the drafters of the Treaty by referring to the *travaux préparatoires* and found them to be inconclusive²⁵. Secondly, the Court found that there was no provision in the EAEC

¹⁷ D.A. Howlett, *supra* note 10, p.8.

¹⁸ Communication on nuclear non-proliferation, *supra* note 11, p.3.

¹⁹ D. Bodansky, *Nuclear Energy: Principles, Practices and Prospects* (Springer, 2004), p. 242, 284.

²⁰ Case C-61/03 *Commission v United Kingdom* [2005] ECR I-2477.

²¹ Case C-65/04 *Commission v United Kingdom* [2006] ECR I-2239.

²² Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency, OJ 1989 L357.

²³ *Supra*, note 21, Case C-65/04 *Commission v United Kingdom*, para.20.

²⁴ *Idem*, para.7 and *supra* note 20, Case C-61/03 *Commission v United Kingdom*, para.16.

²⁵ *Supra* note 20, Case C-61/03 *Commission v United Kingdom*, para.29.

Treaty equivalent to Art.296 of the EC Treaty providing for security exceptions and safeguarding the national defence interests of the Member States²⁶. It therefore concluded that the use of nuclear energy for military purposes falls outside of the scope of the provisions of the EAEC Treaty.

During the hearing, in my opinion, the Commission made a very curious suggestion that in the matter of radioactive waste coming from military nuclear facilities the Member States will solely be obliged to provide the Commission with data on equipment or installations that are no longer assigned to military uses and that the Member States have therefore classified as waste, proposing that it would be for each Member State to decide the point in time from which a military source of radioactive waste must be regarded as waste²⁷. The Court quite rightly from a legal standpoint i.e. for reasons of consistency and uniformity in applying Art.37 EAEC, overturned this argument leaving no room for any kind of Member State discretionary power.²⁸ The Court's final conclusion was that its restrictive interpretation of Art.37 "*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***"²⁹. 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"³⁰

Although the Court rejected the solution offered by the Advocate General Geelhoed for a case by case, dialogue-based approach between the Commission and the Member States³¹ and rejected the proposed use of proportionality test on whether the protection of national defence interests can be achieved through less extreme means than withholding of the waste disposal data³², AG Geelhoed's Opinion offers several valuable arguments. First, he opined that there can be no blanket disapplication of EURATOM rules to the Member State defence sector since neither the EC treaty provides for such a general solution.³³ This stems from the presumption that the EC treaty does indeed apply to defence-related issues, except in cases where the Member States consider that their security interests will be put into question and raise Art. 296 EC as an objection³⁴. Admitting there is no article equivalent to Art. 296 EC in the EURATOM Treaty, he examines the relationship between the two treaties and suggests that for matters not regulated by the EURATOM, the EC Treaty provisions should apply³⁵, as a sort of a *lex generalis*. Therefore, in his opinion, the security exceptions of Art.296 EC should apply to products covered by the EAEC Treaty³⁶.

In Case C-65/04 *Commission v United Kingdom*, which dealt with the issue of provision of information to the general public the Court did not go into a deeper analysis and by concluding that the two cases raise the same point in law it simply reiterated its judgment in

²⁶ Para 30.

²⁷ Para 37.

²⁸ Paras 40, 41.

²⁹ Emphasis added.

³⁰ Para 44.

³¹ Opinion of AG Geelhoed, para.117.

³² *Idem*, para.120.

³³ Para.85.

³⁴ Para.102.

³⁵ Para.105.

³⁶ Para.107.

the previous case.³⁷ Even though AG Geelhoed would have been inclined to give a different Opinion in this case, his hands were tied because of the categorical and unequivocal terminology used by the Court in its previous judgment³⁸ which left no leeway or latitude of interpretation. For what is worth, his opinion does leave an important *caveat*: “*It follows that the inevitable consequence of the Court’s judgment in Case C-61/03 is that, 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.*”³⁹

What is striking is that none of the parties in the first case mentioned the (then, proposal for) Regulation (Euratom) No 302/2005 of 8 Feb 2005⁴⁰ on the application of Euratom safeguards, more particularly, Art. 34 of this Regulation which, while exempting installations and materials which have been assigned to meet defence requirements from its scope, offers a different treatment in the case of materials and installations ‘*liable to meet defence requirements*’⁴¹. It provides that in this respect the extent of the Regulation shall be defined by the Commission in consultation with the Member States concerned. This argument would apply *a fortiori* because its wording bears strong resemblance with the case by base approach suggested by the Advocate General, especially since in order to examine the scope of the term ‘liable to meet defence requirements’ one has to look into the particularities of each case. Putting forward this argument might have been a valid attempt to convince the Court to apply a similar analogy, this time with relation to the Treaty provisions on radioactive waste rather than the safeguards provisions dealt with in the Regulation.

4. A possible way out?

In my opinion, for the reasons expressed *supra* in part 2, there is a pressing need to resolve the existent *terra nullius* suggested by AG Geelhoed in matters that concern the functioning of military installations and its effect on the health and safety of the general public. The Court in its judgment of 9 March 2006 proposed the adoption of measures under the EC Treaty as a possible alternative to rectify this *lacuna*. Hence, it would be instructive to test the Court’s reasoning in the event that a similar case arises in the present and see whether Community law as it stands today or indeed the international legal framework would offer a satisfactory solution (provided it has been established beforehand that no protection under the EURATOM auspices can be afforded) and whether the outcome altogether would be generally different.

From the outset it has to be noted that, unfortunately, the only EC measure that comprehensively deals with waste matters- Directive 2008/98/EC⁴², excluded the safe management of radioactive waste from its scope of application⁴³. However, certain provisions of Directive 2008/99/EC on the protection of the environment through criminal law⁴⁴ seem to

³⁷ *Supra* note 21, Case C-65/04 *Commission v United Kingdom*, para.26.

³⁸ Opinion of AG Geelhoed, paras.28, 35.

³⁹ *Idem*, para.37.

⁴⁰ Regulation (Euratom) No 302/2005 of 8 February 2005 on the application of Euratom safeguards, OJ 2005 L54.

⁴¹ Emphasis added.

⁴² Directive 2008/98/EC of 19 November 2008 on waste and repealing certain directives, OJ 2008 L312.

⁴³ *Idem*, Article 2.

⁴⁴ Directive 2008/99/EC on the protection of the environment through criminal law, OJ 2008 L328.

be pertinent to shed some light on the issue. Art.3 of the Directive, under the activities regarded as offences, includes the “*the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*”⁴⁵. This Directive does not offer a stipulation concerning national defence interests and contains no derogations in this respect, which begs the question on its possible application to military issues with regard to radioactive waste. Hence, relying on these provisions in future cases could serve as a feasible solution.

The international law instruments (to which the EURATOM is a signatory party) that one might refer to are rather general in their wording and offer no concrete protection mechanisms. For example, the Preamble of the *Joint Convention on the safety of spent fuel management and on the safety of radioactive waste management*⁴⁶ (to which the EURATOM acceded on 2 January 2006⁴⁷), stipulates that spent fuel and radioactive waste are excluded from the Convention because they belong to national military or defence programmes and simply gives the contracting parties a general direction to manage these matters in accordance with the objectives stated in the Convention. In the same vein, the *Convention on the physical protection of nuclear material and nuclear facilities*⁴⁸ in its Preamble acknowledges that effective physical protection of nuclear material and nuclear facilities used for military purposes is a responsibility of the state in whose possession they are and leaves it to the states themselves to make sure that such material and facilities are and will continue to be accorded stringent physical protection. It is highly questionable whether the states will have a uniform understanding of what should be understood as affording ‘stringent protection’.

5. Conclusion

It is understandable that for issues that pertain to the activities in the military sphere there can be no uniform and quick fix solutions since these issues are highly political, sensitive and often kept under the radar. Nevertheless, there have to exist minimum standards that states will be under an obligation to respect. The absence of a Community devised protection in instances of adverse consequences to human health resulting from the operation of military nuclear installations or indeed an international legal instrument that would impose concrete and stringent obligations on states in this respect is indeed a *lacuna* and the direct result of its existence is that the population potentially affected is left to turn solely to the national protection mechanisms i.e. rely on the good will of their national governments to afford them satisfactory standards of protection.

It is quite symptomatic that this crucial issue revealing an important deficiency in the EAEC Treaty framework has risen before the Court of Justice as late as in the beginning of the

⁴⁵ *Idem*, Art.3.

⁴⁶ Downloadable at the official website of the International Atomic Energy Agency website <http://www.iaea.org/Publications/Documents/Infocircs/1997/infocirc546.pdf>.

⁴⁷ http://www.iaea.org/Publications/Documents/Conventions/jointconv_status.pdf.

⁴⁸ Convention on the physical protection of nuclear material and nuclear facilities, published in OJ 2008 L 034, p.0005-0018 (this is the comprehensive text containing the 2005 amendments to the Convention).

21st century and not before. Moreover, the fact that the EURATOM health protection and safeguards mechanisms have not since 1957 undergone any substantial changes offers an additional impetus for a future revision of the Treaty in this direction. Such an amendment is to be expected only in the distant future since the present Lisbon Treaty does not foresee any amendment to the EAEC Treaty in terms of prescribing a comprehensive exclusion of military uses of nuclear energy from its scope.

For the time being, it seems that the sovereignty battle in matters relative to military uses of nuclear energy and their effect on the general public is a zero sum game. It is advisable that an amendment of the EURATOM be introduced in this field, regardless whether for the benefit of the Community or the Member States, with the shortcoming that if the final equation would result in a gain for the Community, the exercise of 'giving in' will arguably prove to be burdensome for certain Member States⁴⁹.

An American author as far as in 1958 used a rather federalist terminology to pose the following question: "Can supranational regulation of atomic energy contribute, by way of example, to the realization of the vision of a united region of the old continent, an entire and perfect union in itself"?⁵⁰ As things presently stand, there are still certain important borderline issues that continue to escape the supranational 'magic wand'.

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⁴⁹ For an insight into the relationship of unease between the Commission and the United Kingdom in this respect., see the latest Commission press releases on UK's nuclear processing site Sellafield (Commission Press release, IP/04/419 of 30 march 2004 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/419&format=HTML&aged=0&language=EN;&guiLanguage=en> and Commission Press release, IP/04/1063 of 3 September 2004 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1063&format=HTML&aged=0&language=EN&guiLanguage=en>). The latter press release refers to UK's failure to provide the Commission with a satisfactory action plan to assure the proper accounting of the nuclear materials stored in one of the installations on the site as well as to provide physical access by EURATOM safety inspectors to the facilities concerned.

More recently, the Commission issued Decision 2006/626/Euratom of 15 February 2006 (Commission Decision 2006/626/Euratom pursuant to Article 83 of the EAEC Treaty, OJ 2006 L255/5) relating to the adequacy of the accounting and reporting procedures at the Sellafield site. While stating that it does not find that nuclear material has actually been lost or diverted from its intended purpose, the Commission finds infringement of provisions of the Regulation (Euratom) No 302/2005 on the application of EURATOM safeguards regarding accounting and reporting. As a response to this decision, British Nuclear Group Sellafield started proceedings against the Commission contesting, *inter alia*, its competence to adopt the decision claiming that this case exceeds the scope of existing safeguards legislation and that by imposing measures that encroach on the competence of the relevant national authorities the Commission infringed the principle of subsidiarity (Pending case T-121/06 *British Nuclear Group Sellafield v Commission*, OJ 2006 L255, p.5).

⁵⁰ H.J. Hahn, "EURATOM - The Conception of An International Personality" (1958) 71-6 *Harvard Law Review*, p.1056.

