3 Radioactive Waste Management in the Jurisprudence of the European Court of Justice

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3.1 Introduction

In the last decades there have not been many cases in which the European Court of Justice (ECJ) or the European General Court (EGC, i.e. the former Court of First Instance) dealt with substantial Euratom Law. According to the most recent analysis, there have been nearly fifty rulings of the ECJ and the EGC on Nuclear Law issues, the first dating back to 1971 (13 years after the entry into force of the EEC and Euratom Treaties).[1] If we consider the distribution of these rulings over the years, we might note a significant tendency for increase of litigation before the European Courts in the period between 1990 and 2011, with only seven judgements and two orders issued until 1990. However, in the last few years, the Euratom seems to have lost its allure among European litigators, the last ruling on nuclear issues being the Order of the ECJ of 12 January 2011 in the *Thule Nuclear Accident* cases.[2] Moreover, most of these cases have been described as 'similar and rather unspectacular actions initiated by the European Commission for declarations of a failure of a Member State to fulfil its obligations under certain EURATOM directives';[3] thus meaning that only few of these rulings tackle EURATOM's substantial issues.

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1 See: Sousa Ferro M., 'Nuclear Law at the European Court in the 21st Century', *Revista de Concorrência e Regulação* (55), 2012, p. 56, Wolf S., 'EURATOM, the European Court of Justice, and the Limits of Nuclear Integration in Europe', *German Law Journal* (12), 2011, p. 1639.

2 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 2011 I-00001. More recently, see the Action brought on 30 January 2014 *European Parliament v. Council* (C-48/14) (OJ 2014/C 102/30), seeking annulment of Council Directive 2013/51/Euratom of 22 October 2013 laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption (OJ L 296/12). In its claim, the European Parliament (EP) argued that 'the choice of legal basis made by the Council is mistaken, on the ground that the measures covered by the contested directive fall within the responsibilities of the European Union in the field of the protection of the environment, referred to in Article 192 TFEU'. Furthermore, the EP claimed that, on the one hand, 'the contested directive undermines legal certainty in so far as it establishes rules of review and analysis which duplicate those already in force under Directive 98/83/EC', and on the other hand, 'that by adopting the contested directive, the Council infringed the principle of loyal cooperation between the institutions, referred to in Article 13(2) TEU'. The case is still in progress.

3 See: Wolf S., above n. 1, p. 1639.

Notwithstanding the low number of judgments, it is, first and foremost, important to draw attention to the fact that the ECJ has a jurisprudence on radioactive waste management and nuclear safety. This is not an obvious fact, if we consider that all the international conventions on nuclear safety and radioactive waste management merely rely on peer review mechanisms (i.e. a system which creates incentives for the contracting Parties to comply).[4]

Thus, on the one hand, the EU Directives on radioactive waste management largely replicate what already exists on the international level, i.e. that the obligations are 'imported' from the international conventions into the EU legal framework.[5] On the other hand, these Directives make the 'international' obligations enforceable, i.e. through the infringement procedure, non-complying States are exposed to sanctions and litigation in the ECJ (Article 258 TFEU).

3.2 THE DEFINITION OF 'WASTE' AND THE UNRESOLVED PROBLEM OF WHAT 'RADIOACTIVE WASTE' MEANS

The concept of 'radioactive waste' has not been dealt with by the ECJ, nor has the ECJ ever tried to clarify the definition of 'radioactive waste' encompassed in Article 3 paragraph 7 of the 2011/70 Council Directive.[6] This silence might seem surprising, especially if we

4 See: Södersten A., 'The EU and Nuclear Safety: Challenges Old and New', Swedish Institute for European Policy Studies (SIPES), European Policy Analysis 2012, no. 10, p. 8, <www.sipes.se>.

5 The reference regards three Directives: the 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, the Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community Framework for the Nuclear Safety of Nuclear Installations, OJ L 172/18, as revised by Council Directive 2014/87/Euratom of 8 July 2014, OJ L 219/41, and the Council Directive 2001/70/Euratom of 19 July 2011 establishing a Community Framework for the Responsible and Safe Management of Spent Fuel and Radioactive Waste, OJ L 199/48. Each of these Directives has been modelled on international conventions, that are, respectively, the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, Basel, 22 March 1989, enforced 5 May 1992, United Nations, *Treaty Series*, vol. 1673, p. 57 (see also <www.basel.int>), the IAEA Convention on Nuclear Safety, Vienna, 17 June 1994, enforced 24 October 1996, 33 I.L.M. 1514 (1994), and, finally, the IAEA Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Vienna, 5 September 1997, enforced 18 June 2011, 36 I.L.M. 1436 (1997) (see also: <www.iaea.org/Publications/Documents/Conventions/jointconv.html>). For more on the three Directives and their relationship with the international conventions mentioned above, see also Chapter 1 by Post in this volume.

6 See: Council Directive 2001/70/Euratom of 19 July 2011, above n. 5, Art. 3 para. 7: '"radioactive waste" means radioactive material in gaseous, liquid or solid form for which *no further use is foreseen or considered* by the Member State or by a legal or natural person whose decision is accepted by the Member State, and which is regulated as radioactive waste by a competent regulatory authority under the legislative and regulatory framework of the Member State' (italics added). For more on this, see also Chapter 1 by Post in this volume.

compare it with the vast and somehow confusing body of ECJ case law about the definition of 'waste' in general.

To better understand the reasons which stand behind this silence, it is important to give a brief overview of the ECJ's jurisprudence on the definition of 'waste' in general, both because it is a significant case law and it gave rise to several (not only juridical) consequences.

At the beginning of the 1990, in *Walloon Waste*, the Court said the following about the nature of waste:

> With respect to the environment, it is important to note that waste is matter of special kind. Accumulation of waste, even before it becomes a health hazard, constitutes a danger to the environment, regard being had in particular to the limited capacity of each region or locality for waste reception.[7]

From this date on, much of the Court's reasoning about 'waste' in general has been informed by this special status of waste as a latent risk to the environment. As it has been noted by some commentators, 'seeing waste as a problem rather than a potential resource has been the predominant approach of the Court'.[8]

In *Euro Tombesi* the Court noted that:

> The concept of 'waste' (...) is not to be understood as excluding substances and objects which are capable of economic reutilization, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists.[9]

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7 Judgement of the Court of 9 July 1992, *Commission v. Belgium (Walloon Waste)* (C-2/90), ECR 1992 I-04431, para. 30. See: Fischer E., Lange B., Scotford E., *Environmental Law*, Oxford U. Press, 2013, p. 671. The earliest of the European Court of Justice key cases on defining waste in general was *Vessoso and Zanetti*, 28 March 1990, where the Court explained another main element: 'The concept of waste... is not to be understood as excluding substances and objects which are capable of economic re-utilization'. Judgement of the Court (First Chamber) of 28 March 1990, *Criminal Proceeding against Vessoso and Zanetti* (Joined Cases C-206/88 and C-207/88), ECR 1990 I-01461. This case concerned the original 1975 incarnation of the Waste Framework Directive, which was less focused on the recycling, recovery as well as prevention of waste, and whose definition was only limited to 'any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force', with no reference to 'intention' to dispose of. The decision in *Vessoso* was upheld even after the change of wording of the definition of waste with the 1991 amendments to the original Waste Framework Directive (dispose became 'discard', and 'intention to discard' was also included).

8 See: Fischer E., Lange B., Scotford E., above n. 7, p. 671.

9 Judgement of the Court (Sixth Chamber) of 25 June 1997, *Criminal Proceedings against Euro Tombesi and Adino Tombesi et al* (Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95), ERC 1997 I-03561, para. 47.

The line of this reasoning was reinforced in a subsequent 1997 case, *Inter-Environnement Wallonie v. Region Wallonne*, in which the Court ruled that 'a substance is not excluded from the definition of waste by the mere fact that it directly or indirectly forms an integral part of an industrial production process'.[10]

With these rulings, it is clear that the ECJ intended to broaden the concept of 'waste' as far as possible. The reason of this interpretative option is not difficult to understand if we consider that according to the preamble to Directive 75/442, the Court noted that:

> the essential objective of all provisions relating to waste disposal must be the protection of human health and environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.[11]

It is therefore clear that in the ECJ's view the concept of 'waste' cannot be interpreted restrictively and that not only substances as well as objects which are capable of economic reutilization, but also substances and objects which are capable of being recovered in an environmentally responsible manner (such as fuel for example) must be included in the concept of 'waste'. This way, the Court finally gave an answer to the unresolved issue of what 'discard' means, the idea being that, contrary to its ordinary, common-sense meaning, this concept did not merely embrace the concept of disposal of the relevant material, but also its recovery and recycling.[12]

The broad approach used by the ECJ regarding the concept of 'waste' continued in the next years,[13] both attracting consternation from most commentators and producing a

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10 Judgement of the Court of 18 December 1997, *Inter-Environnement Wallonie ASBL v. Région Wallone* (C-129/96), ERC 1997 I-07411, para. 23.

11 Judgement of the Court (Fifth Chamber) of 15 June 2000, *Arco Chemie Nederland Ltd v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milierbeher et al* (Joined Cases C-418/97 and C-419/97), ERC 2000 I-04475, para. 38.

12 See: *Arco Chemie*, above n. 11, para. 65. The Court went on, recognizing that whether a substance is 'in fact waste within the meaning of the Directive must be determined in the light of all circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined'. The Court gave also a list of indicators that might constitute evidence of acts of discarding, such as, for example: 'where the substance used is a production residue, that is in itself a product not in itself sought for use as fuel' (para. 84), 'the fact that the substance is a residue for which no use other than disposal can be envisaged' (para. 86), 'where the substance is a residue whose composition is not suitable for the use made of it or where special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition' (para. 87).

13 See: Judgement of the Court (Second Chamber) of 7 September 2004, *Criminal Proceedings against Paul Van de Walle et al* (C-1/03), ECR I-07613, para. 61, where the Court held that: 'hydrocarbons which are unintentionally spilled and cause soil and groundwater contamination are waste (...) The same is true for soil contaminated by hydrocarbons, even if it has not been excavated'. See also: Judgement of the Court (Second Chamber) of 11 November 2004, *Criminal Proceedings against Antonio Niselli* (C-457/02), ECR 2004 I-10853, para. 53: 'the meaning of 'waste' for the purposes of the first subparagraph of Art. 1(a) of Directive 75/442 is not to be interpreted as excluding all production or consumption residues which can be or are reused in a cycle of production or consumption, either without prior treatment and without harm

depressive effect on the European industry, mainly because it was practically impossible to characterize a material that was in any way left over from an industrial manufacturing or extractive process (even though useful as well as of commercial value and purpose) as anything other than 'waste'.[14]

All these rulings formed the basis for what became the simple general definition of 'waste' embraced in the 2008 Waste Framework Directive.[15] This Directive explicitly excludes from its scope radioactive waste (Article 2c), and the Court, probably because of political constraints, decided not to intervene on this subject as well as never tried to clarify the definition of 'radioactive waste' encompassed in Article 3 paragraph 7 of the 2011/70 Council Directive.

3.3 The ECJ's Radioactive Waste Case Law

In this section, we will focus on the analysis of three well-known ECJ cases on radioactive waste and nuclear safety, which, for different reasons, seem relevant, both because they can open interesting lines of reflection about the validity of the Court's role in the specific area of nuclear safety, and because what we can obtain from these decisions is useful

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to the environment, or after undergoing prior treatment without, however, requiring a recovery operation within the meaning of Annex II B to that directive'. In a second line of judgements, which formed the basis for Art. 5 of the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, the ECJ ruled that there are two circumstances in which materials that are not the primary product of an industrial manufacturing or extractive process may nonetheless be non-waste. As an example of the first circumstance, see Order of the Court (Third Chamber) of 15 January 2004, *Criminal Proceedings against Marco Antonio Saetti et al* (C-235/02), ERC 2004 I-01005, where the Court held that a non primary product (petroleum coke, a carbon-based material produced in the refining of crude oil) is nonetheless a secondary product rather than a production residue when it is deliberately produced by technical choice as part of the primary production process. The second instance is where the material is a production residue produced unintentionally or as an inevitable consequence of the main production process, but it has characteristics that render it a by-product and not waste. See Judgement of the Court (Sixth Chamber) of 11 September 2003, *AvestaPolarit Chrome Oy* (C-114/01), ERC 2003 I-08725, and Judgement of the Court (Third Chamber) of 8 September 2005, *Commission of the European Communities v. Kingdom of Spain (The Spanish Pig Manure case)* (C-416/02), ERC 2005 I-07487. For more about this topic, see: Waite A., 'The Definition of Waste: The Riddle in the Sands', Frieden in Freiheit. Peace in Liberty. Paix en liberte. Festschrift für Michael Bothe zum 70. Geburtstag (eds Fischer-Lescano A., Gasser H.-P., Marauhn T., Ronzitti N.), Nomos – Dike, 2008, pp. 787 et seq.

14 See: Brown V., 'The 'End of Waste' under EU Law', Natural Resources and Environment. American Bar Association, (28, No. 3), 2014, p. 41. See also: Court of Appeal, Civil Division, Judgement of 28 June 2007, *R (on the Application of OSS Group Ltd) v. Environment Agency and Others* [2007] EWCA Civ 611, para. 55, in which Carnwath LJ stated that 'a search for logical coherence in the [ECJ] case-law is probably doomed to failure'. According to the judge, the European Law as interpreted by the ECJ made it impossible to provide a definitive ruling. He pointed to the logical incoherence of ECJ case law on the topic, with a fundamental problem identified as the Court's professed adherence to the definition in Directive 2006/12 Art. 1(a), even where it could be of no practical relevance.

15 See: Directive 2008/98/EC, above n. 13, Art. 3 para. 1, '"waste" means any substance or object which the holder discards or intends or is required to discard'.

information about the protection of EU citizens' rights in such a sensitive as well as substantial area.

3.3.1 Commission v. Council (2002): *The Definition of a Proper Legal Basis*

The case *Commission v. Council of the European Union* (so-called *Nuclear Safety Convention* case)[16] concerns the application for annulment in part of the Council Decision of 7 December 1998 approving the accession of the European Atomic Energy Community to the 1994 Nuclear Safety Convention.[17] According to the Commission, the Council sought to establish that the Community's competence in the fields covered by the Convention does not extend to the fields covered by Articles 1 to 5, 7, 14, 16(1) and (3) and 17 to 19 of the Convention. These are fundamental provisions to the Convention, which cover the authorisation system applicable to the construction and operation of nuclear power plants, assessment as well as verification of safety, emergency preparedness, siting, design, construction and operation of power plants respectively.

The Court agreed with the Commission, concluding that Euratom competencies extend to all these provisions (with the only exception of the introductory articles) and therefore ruled that the declaration of the Council must be annulled in so far as some of these provisions (Articles 7, 14, 16(1) and (3) and 17 to 19) are not referred to therein.

What is really important is the reasoning through which the Court delivered its judgement. At the core of the ECJ's ruling stands the conviction that Euratom possesses competencies relating not only to the 'traditionally' recognised *radiation protection aspects*, but also to *different aspects of nuclear safety*.

At first, the Court refers to its judgement in the landmark case *Saarland and Others* of 1988.[18] In this case, the Court held that the provisions of the chapter of the Euratom Treaty entitled 'Health and Safety' form a coherent whole conferring on the Commission powers

16 Judgement of 10 December 2002, *Commission v. Council of the European Union* (C-29/99), ECR 2002 I-11221.

17 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." By the time of this Judgement, the IAEA Nuclear Safety Convention, above n. 6, had been ratified by all the Member States and by the Euratom Community. See: Commission Decision 1998/819/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. The Convention entered into force for the Euratom Community on 30 April 2000.

18 Judgement of the Court of 22 September 1988, *Land de Sarre et al v. Ministre de l'Industrie, des P et T et du Tourism et al* (C-187/87), ECR 1988 05013.

of some considerable scope in order to protect the population and the environment against the risks of nuclear contamination. In the light of the purpose of Article 37 of the Euratom Treaty, which is to forestall any possibility of radioactive contamination, the Court drew attention to the importance of the role played in the matter by the Commission, which has a unique overview of developments in the nuclear power industry throughout the territory of the Community. Based on that consideration, the Court ruled that the Commission must be provided with general data relating to any plan for the disposal of radioactive waste before the competent authorities of the Member State concerned authorize such a disposal.[19]

In the *Nuclear Safety Convention* judgement, the Court went a step further by outlining the middle part of a judicial interpretation of the Euratom competencies in the field of nuclear safety that will be enriched even further by the most recent judgement in the case of the *Temelín Nuclear Power Plant* of 2009 (see Section 3.3.3).

In this decision, the ECJ added that it is inappropriate, in order to define the Community's competencies, 'to draw and artificial distinction between the protection of the health of the general public and the safety of sources of ionizing radiation'.[20] According to the Opinion delivered by the Advocate General Jacobs: 'In the light of current scientific knowledge, it is neither possible nor desirable to maintain artificial barriers between the disciplines of radiation protection and nuclear safety'.[21]

Thus, in a truly broad reading of the Treaty, the ECJ ruled that even though the Euratom Treaty does not grant the Community competence to authorise the construction or operation of nuclear installations, under Articles 30 to 32 of the Euratom the Community:

> possesses legislative competence to establish, for the purpose of health protection, an authorisation system which must be applied by the Member States. Such a legislative act constitutes a measure supplementing the basic standards referred to in article 30 of the EURATOM Treaty.[22]

Based on this landmark ruling, the existing basic safety standards, aiming mainly at the protection of the health of workers and of the general public against the dangers arising from ionizing radiation, can thus be 'supplemented', within the meaning of the EURATOM Treaty, with safety requirements governing the safe management of radioactive waste and spent fuel.

19 *Land de Sarre et al*, above n. 18, paras. 11-20.
20 *Commission v. Council of the European Union*, above n. 16, para. 82.
21 Opinion of AG Jacobs, delivered on 13 December 2001, ECR 2002 I-11225, para. 166.
22 *Commission v. Council of the European Union*, above n. 16, para. 89.

Following this case, there were no longer any *legal* obstacles (political obstacles still remain) for the Commission to start the process of adopting legislation on nuclear safety for installations and on nuclear waste.[23]

3.3.2 Commission v. UK (II) *and* (III): *The 'Military Activity' Cases*

The applicability of the Euratom Treaty to military activities has been the object of discussion since the mid-1990s. In 1995, three individuals, living in French Polynesia, in the vicinity of the place where French authorities announced that they intended to carry out a series of nuclear tests, sought to annul the Commission's Decision of 23 October 1995, by which the Commission concluded that the tests in that area did not present a perceptible risk of significant exposure for workers or the general public and that the basic standards for health protection would be met. In the case before the European Court, both the Commission and Parliament argued that the Euratom Treaty applied both to civil and military experiments.[24] French Government submitted that the provisions of Chapter 3 of the Treaty do not apply to nuclear activities in the military sphere.[25] However, the Court decided not to give answers about the substantial side of the matter, thus leaving the issue unresolved and implicitly admitting that military activities *might fall within* the scope of application of the Euratom Treaty.

Furthermore, in the *Nuclear Convention* case, the Court stated in the broadest terms that Article 37 Euratom gives the Community competences:

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23 See: Sousa Ferro M., 'Nuclear Law at the European Court in the 21st Century', above n. 1, p. 78, and Sousa Ferro M., 'The Future of the Regulation of Nuclear Energy in the EU', International Journal of Nuclear Law (vol. 2, no. 2), 2008, p. 21. The immediate consequence of this judgement was that the Commission decided to amend the Declaration annexed to its Decision ratifying the 1994 Convention on Nuclear Safety in accordance with the ECJ judgement, namely that Euratom has competence in the field of nuclear safety. See: Commission Decision 2004/491/Euratom of 29 April 2004. OJ L 172/7. A far-reaching analysis of the consequences of this judgement was conducted in a document prepared by the Council's legal service in October 2003 (see Council Doc. No. 13909/03). Unfortunately, the version of this document that was made public did not include all the relevant and substantial parts of the original document.

24 Order of the President of the Court of First Instance of 22 December 1995, *Marie-Thérèse Danielsson, Pierre Largenau and Edwin Haoa v. Commission of the European Communities* (T-219/95 R), ECR 1995 II-03051, para. 12. The Commission referred the applicability of the Treaty to Art. 34, which states that 'Any Member State in whose territories particularly dangerous experiments are to take place shall take additional health and safety measures, on which it shall first obtain the opinion of the Commission' and that 'The assent of the Commission shall be required where the effects of such experiments are liable to affect the territories of other Member States.' See: Consolidated Version of the Treaty Establishing the European Atomic Energy Agency, as it results from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007 and which entered into force on 1 December 2009, Luxembourg: Publications Office of the European Union, 2010.

25 See: Order of the President, *Marie-Thérèse Danielsson et al*, above n 24, para. 33.

> 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.[26]

The still open question of the applicability of the Euratom Treaty to military activities was finally resolved by the Court in mid-2005, with a Decision, twice confirmed since, that no provision of the Euratom Treaty applies to military activities. These Judgements (the so-called 'Military Activities' cases) resulted in great surprise and consternation because they showed a clear shift in the ECJ's case law in the legal basis of radiological protection, departing from the background of the *Nuclear Safety Convention* case, that is a ruling which unequivocally demonstrates the will of the ECJ to set itself as a strong supporter of the expansion of the transfer of powers from the Member States to the Community, even in a decisively sensible area such as that of nuclear safety.

The 'Military Activities' cases started with the judgement of 12 April 2005 in the case *Commission v. United Kingdom*[27] concerning the decommissioning of the reactor Jason, a nuclear reactor used for training and research associated to the Royal Navy's nuclear propulsion programme for submarines. By its application, the Commission sought from the Court a declaration that by failing to provide general data relating to the plan for the disposal of radioactive waste associated with the decommissioning of the Jason reactor, the United Kingdom failed to fulfil its obligation under Article 37 of the Euratom Treaty.[28] According to the Commission, Article 37 applies, in fact, to the disposal of radioactive waste from both civil and military installations, as it aims to prevent any risk of radioactive contamination of another Member State and because, since the protection of the general public against the dangers arising from ionizing radiation is an invisible objective, it must extend to all sources of danger, including those resulting from the decommissioning of military installations, such as the Jason reactor. The United Kingdom, supported by the French Republic (the other great nuclear power in the EU), replied that Article 37 cannot

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26 *Commission v. Council of the European Union*, above n. 16, para. 103. See also: Judgement of the Court of 4 October 1991, *European Parliament v. Council of the European Communities* (C-70/88), ECR 1991 I-04529, para. 14, where the Court held that: 'the purpose of the articles referred to [Art. 30 Euratom treaty] is to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionizing radiations, whatever their source and whatever the categories of persons exposed to such radiations'.

27 Judgement of the Court (Grand Chamber) of 12 April 2005, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland (Commission v. UK (III))* (C-61/03), ECR 2005 I-02477.

28 Under this Art.: 'Each Member State shall provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever forms will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State. The Commission shall deliver its opinion within six months, after consulting the group of experts referred to in Article 3'. See: Consolidated Version of the Treaty Establishing the European Atomic Energy Agency, above n. 24.

apply to the disposal of radioactive waste from military installations since, on the one hand, the Treaty itself covers only the civil uses of nuclear energy and, on the other hand, the provisions of Chapter 3 of the Euratom Treaty (regarding health and safety) cannot have a scope wider than that of the provisions in other Chapters of the same Treaty. Finally, the United Kingdom and the French Republic argued that if it was the intention of the signatories of the Treaty to ensure applicability to military activities, they would have included in the Treaty itself some derogating provisions specifically intended to safeguard the national defence interests of the Member States (such as Article 48 para. 4 of the EEC Treaty, now Article 45 of the TFEU; and Article 223 EEC Treaty, now Article 346 of the TFEU).

At the beginning of its judgement, the Court highlighted 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 emphasise the non-military character of that Treaty and the supremacy of the aim of promoting the use of nuclear energy for peaceful purposes.[29]

Furthermore, the Court observed that both Articles 1 and 2 (which define the mission as well as the tasks entrusted to the Euratom Community respectively) confirm the fact that 'the objectives pursued by the Treaty are essentially civil and commercial'. Moreover, the Court stated that in the absence of an express provision excluding activities connected to defence from the scope of the Treaty 'it is necessary to have regard to other factors in order to determine whether the Treaty is intended also to govern, at least in certain spheres, the use of nuclear energy for military purposes'.[30]

Moving on from this legal background, the Court did not consider as a decisive factor that some provisions of the Euratom Treaty deal specifically with the military sector (namely Articles 24 to 28 and 84). Sharing the objections made by the United Kingdom and the French Republic, the Court observed that:

> 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.[31]

29 *Commission v. UK (II)*, above n. 27, para. 26.
30 *Commission v. UK (II)*, above n. 27, para. 28.
31 *Commission v. UK (II)*, above n. 27, para. 32.

The Court didn't seem convinced by the little guidance provided for by the *travaux préparatoires*. According to the (rather simplistic view) of the Court on this matter, it is apparent, from the declarations mentioned in the *travaux préparatoires*, that the representatives of the States who took part in the negotiations 'held differing opinions on that issue and that they decided to leave it unresolved'.[32]

However, this observation is not totally convincing. As the Advocate General Geelhoed emphasized in his opinion, 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 Euratom Treaty to nuclear defence was thus, concluded the AG, 'not at the time strictly necessary (…) [it was] an issue of certain political sensibility'.[33]

Apart from these considerations, the ruling of the Court is based on two juridical observations.

First of all, considering the substantial powers, which the Euratom Treaty gives to the Commission in order to intervene actively by means of legislation or in the form of an Opinion containing individual Decisions in various spheres of activity which are concerned with the use of nuclear energy, the ECJ highlighted that:

> it is 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 authorised 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.[34]

Furthermore, the Court rejected the interpretation of Article 37 that the Commission put forward during the oral procedure, namely that Member States are obliged to communicate only information as well as general data concerning equipment or installations which are no longer assigned to military use and which the Member State concerned for that reason classified as 'waste'. However, an interpretation of Article 37 to the effect that the Member State concerned might decide 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

32 *Commission v. UK (II)*, above n. 27, para. 29.

33 See: Opinion of the AG Geelhoed delivered on 2 December 2004, ECR 2005 I-02510. For more on this topic, see also: Andres-Ordax B., 'Radiological Protection and Military Activities: Recent European Case-Laws', Nuclear Inter Iura 2007 – Proceedings, Brussels, 2008, pp. 546 et seq.

34 *Commission v. UK (II)*, above n. 27, para. 36.

communicated to the Commission, would be in contradiction with the purpose of that provision. According to the Court, first, any late communication of the data would render nugatory the objective of prevention. Second, any partial communication of the relevant data would make it impossible to deliver an opinion with full knowledge of the facts.[35]

Though it showed some sympathy for a better protection of the population against nuclear radiation,[36] the Court did not share the Commission's opinion that Euratom Secondary Law applies to the decommissioning of a military nuclear reactor and ruled that Euratom Law generally does not apply to military installations as well as activities:

> the Commission has not demonstrated that the application of Article 37 EA to the decommissioning of the military installation in question is justified.[37]

Immediately after, the Court restated the same conclusion in general terms,[38] thus creating some confusion about the possibility that it has left the door open for further discussion of the matter or it has intended to definitely resolve the issue against the applicability of the Euratom Treaty to military activities.

In his Opinion, Advocate General Geelhoed, who strongly disagreed with the Court's conclusion, proposed an inclusive solution, based on a case by case approach more in line with the intention of the original drafters of the Treaty.[39]

The question was finally resolved less than one year later, when the Court upheld its view against the applicability of the Euratom Treaty to military activities with even a stronger language.

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35 *Commission v. UK (II)*, above n. 27, para. 40. See also para. 41, where the Court observed that: '(…) an interpretation of Article 37 EA which allowed Member States such discretion as to the time for communicating data and its content would be a source of dispute and would undermine the effective application of that provision'.

36 *Commission v. UK (II)*, above n. 27, para. 44.

37 *Commission v. UK (II)*, above n. 27, para. 43.

38 *Commission v. UK (II)*, above n. 27, para. 44, 'It is necessary, however, to emphasise that the fact that the Treaty is not applicable to uses of nuclear energy for military purposes.'

39 His Opinion, see above n. 33, is mainly based on two considerations. On the one hand, he observed that: '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'. On the other hand, considering that '[T]he health and safety provisions of the EURATOM Treaty are of vital importance and should be interpreted in a manner that ensures effective protection of public health', the AG at first observed that 'the obligation imposed by Article 37 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'. However, he concluded that '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.'

The case *Commission v. UK (III)* concerned the lack of implementation by the United Kingdom 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.[40]

According to the Commission, the information which Member States are required, under Article 5 of the Directive, to give to the public about health protection measures to be adopted in the event of a radiological emergency 'is a civil defence matter and not a military matter'.[41] The Court dismissed this argument, stating that 'it is common ground that in the present case the source of the nuclear energy is of military origin'.[42] Therefore, since the two cases are similar, in that they concern activities within the military sphere, the Court relied on the dictum of *Commission v. UK (II)* and ruled, in the broadest and clearest way, that:

> It is very clear from that 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.

With this judgement, the ECJ confirmed with an even stronger language that military activities are outside the scope of application of both the Euratom Treaty and its secondary legislation (including, inter alia, the implementation of radiological protection provisions concerning emergency response).[43]

These rulings of the ECJ, which were once more confirmed in an Order of 2011 in a case brought before the Court claiming compensation for damages arising from the 1968 Thule nuclear accident,[44] attracted great consternation from most of the commentators. The Court unequivocally asserted its intention to exclude military activities from the scope of application of the Euratom Treaty and any concerns about the safety of persons and the

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40 Judgement of the Court (First Chamber) of 9 March 2006, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland (Commission v. UK (III))* (C-65/04), ECR 2006 I-02239.

41 *Commission v. UK (III)*, above n. 27, para. 21.

42 *Commission v. UK (III)*, above n. 27, para. 23.

43 Even AG Geelhoed, in his Opinion, agreed with the Court, albeit with a lack of enthusiasm. Not only, he observes, 'it is incontrovertible that the source of nuclear energy at issue in the present case, a nuclear submarine forming part of the UK Royal Navy, is military in nature', but it is also clear from the statements in the judgement *Commission v. UK (II)* that '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 categorical and absolute.' 'It follows', he concluded in a resigned spirit, '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 judgement's terms that the Court has accepted this consequence. For these reasons I am compelled to conclude that the Commission's action in the present case must fail.' See: Opinion of AG Geelhoed delivered on 1 December 2005, ECR 2006 I-02251, paras. 28-37.

44 See: Order of the Court (Fifth Chamber) of 12 January 2011, *Eriksen et al v. Commission* (C-205/10 P, C-217/10 P and C-222/10), ECR 2011 I-00001, para. 66.

environment in case of radioactive fallout from a military use of nuclear energy or ionizing radiation clearly was, quite surprisingly, set aside. The question is, therefore, how is it possible to explain such a sudden shift by the Court from its previous assertion (in the *Nuclear Safety Convention* case) that the purpose of the Treaty's rules on radiological protection 'was to ensure consistent an effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source'.[45]

Some commentators observed that, even if from a functional point of view, the Commission's teleological argumentation to apply Euratom's health and safety policy to marginal military nuclear activities, especially when European civilians are endangered, might be considered as a reasonable option. The Court probably wanted to prevent it for (not better explained) political reasons linked to the military sphere.[46] Another commentator, recollecting the passage of the *Commission v. UK (II)*, where the Court suggested that the relevant provisions of the TFEU could be indeed used to adopt the appropriate measures for the protection of the health of the public and the environment against the dangers related to the use of nuclear energy including military purposes, observed that such a view seems to suggest that the ECJ has possibly grown tired of the Euratom Treaty, a Treaty that Member States seem to have given up on.[47]

If we limit our analysis to the *Military Activities* cases, we probably might be inclined to support the latter theory, namely that the Court has grown tired of the Euratom Treaty, therefore not wanting to support a further expansion of the sovereign powers from the Member States to the Euratom Community. If we move on our analysis to other judgments of the Court in the nuclear safety area, we then probably need to re-evaluate the theory of a 'political restraining' that inhibited the Court from carrying on its previous body of case law in favour of a broad interpretation of the Euratom Treaty in so far as military activities are concerned. What makes the difference between these two extremes is the *Temelín* judgement that the Court ruled about in 2009, a historical ruling that, in many ways, 'can be seen as an important step forward in consolidating and developing Euratom law'.[48]

3.3.3 *The* Temelín *Judgement: Who Ultimately Decides the Level of Nuclear Radiation Protection in the EU?*

In 2001, the Province of Upper Austria (acting as a private landowner, and not in its capacity as a public authority), considering that the radioactivity from the Temelín power

45 See: *Commission v. Council of the European Union*, above n. 16, para. 80.

46 See: Wolf S., 'Euratom before the Court: A Political Theory of Legal Non-Integration', European online Papers (EloP), vol. 15.

47 See: Sousa Ferro M., above n. 1, p. 84.

48 See: Müstl M., 'Case C-115/08, *Land Oberösterreich v. CEZ*, Judgement of the Grand Chamber of 27 October 2008, in Common Market Law Review (47), 2010, p. 1230.

plant (located in the Czech Republic, at about 60 kilometres from the Austrian border) and the risks of contamination as well as malfunction were detrimental to the use of its agricultural college, located near the Czech border, brought action against the activities of the power plant before the *Landesgericht* (Regional Court) of Linz. Applicable Austrian Law indeed permits a landowner to have the nuisance emanating from his neighbour's installations prohibited. However, operators granted official authorisation issued by the Austrian authorities may avoid such action and the owner, in that specific case, can merely apply for compensation. What we have in this case is that the Temelin power plant was authorised only by the Czech authorities, and not by the Austrian. The Austrian Supreme Court (*Oberster Gerichtshof*) in a judgement of 4 April 2006 decided that authorisations granted by Austrian authorities had that effect. According to the *Oberster Gerichtshof*, the reason is that the relevant Article (para. 364 of the Austrian Civil Code) is based exclusively on the consideration of diverging national interests and there is no reason why Austrian Law should restrict the property rights of Austrian landowners in the interest of protecting a foreign economy as well as public interests in another country. According to the *Landesgericht* of Linz, however, that interpretation could be contrary to Community Law and thus it asked the ECJ whether the interpretation of the *Oberster Gerichtshof* could be compatible with certain provisions of the EC Treaty, in particular with the fundamental freedoms as guaranteed in Articles 10 (principle of loyal cooperation), 12 (principle of non-discrimination), 28 (prohibition of measures having equivalent effect), and 43 (prohibition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State).[49]

The Grand Chamber of the ECJ ruled against the Province of Upper Austria. First of all, the Court noted that, the present case being a dispute involving an industry activity consisting in the operation of a nuclear power plant, it falls within the scope of application of the Euratom Treaty (*lex specialis* principle).[50] This is important, because both the

49 See: Judgement of the Court (Grand Chamber) of 27 October 2009, *Land Oberösterreich v. CEZ* (C-115/08), ECR 2009 I-10265, paras. 38-54. The construction and operation of the Temelin nuclear power plant were authorised by the Czech authorities in 1985 and it began operating on a trial basis on 9 October 2000. Since 2003, it has operated at full capacity. On 29 November 2001, Austria and the Czech Republic adopted a document, known as 'The Conclusions of the Melk Process and Follow-Up' annexed to the final act of the Treaty concerning the accession of 10 new Member States, including the Czech Republic, signed in Athens on 16 April 2003 (OJ 2003 L 236, p. 17), in which both States declared that they would fulfil the series of bilateral obligations set out in those conclusions. Parallel with the Melk process, the safety of the Temelin nuclear power plant was evaluated by the Commission as well as the Council, and the results of that evaluation showed that the Temelin nuclear power plant, subject to the implementation of the proposed recommendations, showed a satisfactory level of nuclear safety. Since the accession of the Czech Republic to the EU, additional checks have been carried out pursuant to Art. 35 Euratom, in which Temelin has been found compliant with the prevailing legislation and a definitive declaration has been issued to that effect.

50 *Land Oberösterreich v. CEZ*, above n. 49, para. 83. This was done by recalling that, under Arts. 234 EC and 150 Euratom, the Court has 'identical jurisdiction for the purpose of interpreting the relevant provisions of the EC and EAEC Treaties'.

referring court and Advocate General Maduro directly relied on EC Law.[51] In particular, the Court referred to Article 12 of the EC Treaty, which prohibits any discrimination on grounds of nationality:

> is a specific expression of the general principle of equality, which itself is one of the fundamental principles of Community law. It must therefore be recognised that (...) the principle of prohibition of any discrimination on grounds of nationality (...) is a general principle which is also applicable under the EAEC Treaty.[52]

It was then quite simple for the Court to conclude that the difference in treatment introduced by Austrian Law, which worked to the detriment of installations, which received official authorisation in a Member State other than the Republic of Austria, 'in reality leads to the same outcome as a difference in treatment on grounds of nationality'.[53]

At this point, the Court, in order to demonstrate that the difference in treatment did come within the scope of application of the Euratom Treaty, once again elaborated on the competencies of the Community in the nuclear energy field. It stated that although the Euratom Treaty does not contain a Title relating to nuclear installations, Title II of the Treaty has a Chapter 3 entitled 'Health and Safety' which is intended to provide for the protection of public health in the nuclear sector. In particular, Articles 35 to 38 Euratom form, in the words of the ECJ, 'a coherent whole conferring on the Commission powers of some considerable scope on order to protect the population and the environment against the risks of nuclear contamination'.[54]

On the one hand, the ECJ based its conclusion on the fact that both the Euratom Community and its Member States are Parties to the 1994 Convention on Nuclear Safety (whose objective was, inter alia, to establish and maintain effective defences in nuclear installations against potential radiological hazards in order to protect human health as well as the environment). On the other hand, the Court reminded that, in the event of

51 See: Wolf S., above n. 1, p. 1644, who observes that: 'this demonstrates once again that EURATOM is hardly visible and its law is unknown to many legal experts'. See also: Mösll M., above n. 48, p. 1228, arguing that with its Decision to examine the case under the Euratom Treaty the Court avoided 'some weaknesses of the A.G's line of argument: reliance on a new and arguable extended scope of application of the fundamental freedoms; no clear statement on the relationship between EC and Euratom law in the present case'. The Author distinguishes the two approaches chosen by the A. G. and the Court in the following terms: 'The approaches of the Advocate General and of the Court represent two different styles of tackling those difficulties, an ambitious, innovative, but also somewhat uncertain and partly arguable one, as far as the legal basis and its exact consequences are concerned (A.G.), and a much more modest, but in the end also more reliable one (Court).'

52 *Land Oberösterreich v. CEZ*, above n. 49, para. 89.

53 *Land Oberösterreich v. CEZ*, above n. 49, para. 97.

54 *Land Oberösterreich v. CEZ*, above n. 49, para. 118.

malfunction of the protection system introduced by the Euratom Treaty, the Member States had a number of remedies at their disposal for obtaining the corrections necessary in the circumstances.[55] Among others, reference is made to the right to request the revision of the basic safety standards (Article 32 Euratom), the right to initiate infringement proceedings (Articles 142 and 38 Euratom in cases of urgency), and, finally, to the judicial review mechanisms concerning both the lawfulness of the measures taken by the Council or the Commission and cases where one of those institutions may even be brought before the Court immediately (Articles 145 to 149 Euratom).

In these circumstances, concluded the Court, Member States cannot exclude the justifiability of an authorisation granted regarding nuclear installations situated in other Member States by maintaining that such an exclusion is justified on grounds of protecting life, public health or the environment:

> Such an exclusion disregards completely the fact that the Community legislative framework (…) contributes precisely and essentially towards ensuring such protection.[56]

In contrast with the Opinion of Advocate General Maduro, the Court therefore concluded that once nuclear related activities meet the requirements of National Laws for protection against ionizing radiation provided for in Articles 30 to 33 Euratom, and once they passed the Community's scrutiny, they are no longer subject to discriminatory acts in other Member States.

However, by doing that the Court did not take into account that populations in Europe have different attitudes towards nuclear energy,[57] and therefore that it may be crucial for a Member State government to lay down stricter rules in order to meet the needs of its citizens. That is to say, that with its judging the ECJ deemed it necessary to answer the crucial question of who ultimately decides the level of nuclear radiation protection, but not taking into consideration that this is a political, rather than a juridical question.

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55 *Land Oberösterreich v. CEZ*, above n. 49, para. 127-134.

56 *Land Oberösterreich v. CEZ*, above n. 49, para. 136.

57 See: European Commission, 'Attitudes towards Radioactive Waste', Special Eurobarometer 297Report, June 2008, p. 7, about the question 'Are you totally in favour, fairly in favour, fairly opposed or totally opposed to energy production by nuclear power stations?'. Only 14% of the Austrian population (the lowest mark beside Cyprus) answered 'Totally in favour', while 64% of the Czech population (the highest mark in all the EU 27) answered in that manner. See also: European Commission, 'Europeans and Nuclear Safety', Eurobarometer 324 Report, March 2010, p. 41, where 59% of the Czech population considered that the advantages of nuclear energy are greater that the risks it poses, in opposition to only 24% of the Austrian population sharing this view.

3.4 CONCLUSIONS

There are circumstances that seem to introduce some possible, significant elements of critique about the opportunity to assert the effectiveness of the Court's role in the area of nuclear safety.

First, the EU chose mainly to use Directives to legislate on the subject of waste, thus allowing Member States some room to manoeuvre. Moreover, the Directives in the nuclear field set up a very flexible framework for the Member States, stating that 'national circumstances' will be taken into account when Member States develop their national framework.[58] Of course, these Directives are Hard Law, in the sense that they are legally binding. Non-complying States, as we have seen, are exposed to sanctions and litigation in the ECJ, but these Directives also include 'soft' elements, and therefore both the Commission as well as the ECJ need transparency and cooperation from States if they want their actions to be really effective.

Second, Court cases take a long time to conclude. Thirteen years, for example, elapsed between the initial complaint to the Commission in 1987 about uncontrolled waste disposal in the Kouroupitos river in Crete and the historic Court of Justice ruling that Greece must pay a penalty of 20,000 euro a day until it complied fully with the relevant EU Directives.[59] How is it possible to conciliate the role of the Court to effectively enforce the obligations laid down in the EU Directives with such long procedural times ? Which sanctions are the most effective and could tempt Member States to fulfil their obligations? Is a fine an effective, final sanction, or might it simply be a further cost to a country?

Notwithstanding all the difficulties and the relatively low number of decisions, it is unquestionable that the ECJ has played a decisive role in shaping EU Nuclear Law, not hesitating to make decisions that can influence in a strong way the future of the European policies in an area which is of crucial importance for the well-being of national citizens.

In the *Nuclear Safety Convention* case, the ECJ was guided by Euratom. Because of the dramatic renitence of the Commission to legislate in the nuclear sector, the Court adopted

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58 See: Södersten A., above n. 4, p. 8. These Directives have therefore been described as 'a framework for cooperation which includes general and open-ended guidelines rather than rigid rules and straightforward safety standards'.

59 See: Judgement of the Court of 4 July 2000, *Commission of the European Communities v. Hellenic Republic* (C-387/97), ECR 2000 I-05047. This case concerned the operation of an illegal waste dump at a deep gorge at Kouroupitos in the region of Chania. The site was used to illegally dispose of domestic waste, and, for a certain period, quantities of hazardous waste (for example waste oils and batteries) as well as a range of commercial and industrial waste. Since January 1988, the Commission had been investigating the matter. On 7 April 1992, the ECJ ruled against Greece for the first time. See: Judgement of the Court of 7 April 1992, *Commission of the European Communities v. Hellenic Republic* (C-45/91), ERC 1992 I-02509. However, Greece failed to comply with this judgement and the Commission brought the matter before the Court for a second time, using for the first time the power under Art. 228 of the EC Treaty to fine a Member State for non-compliance with a previous Court judgement for breach of EU waste legislation.

a decision whose effect was to remove, by broadly interpreting the powers granted to the Community by Chapter 3 of Title II of the Euratom Treaty, any legal obstacles for the Commission to start the process of adopting legislation on nuclear safety for installations and on nuclear waste.

As to the identification of the real limit of the legislation powers under the Euratom Treaty, the Court was much more uncertain. First, in the very same *Nuclear Safety Convention* case it adopted quite a broad approach, stating that Chapter 3 of Title II of the Euratom Treaty 'form a coherent whole conferring upon the Commission *powers of considerable scope* in order to protect the population and the environment against the risks of nuclear contamination' (italics added).[60] Some years later, however, the Court ruled that Euratom Law generally does not apply to military installations and activities, thus seeming to conclude that ionizing radiation is dangerous if it originates from civil sources, but not if it arises from military installations. It is as if the Court ruled that the protection of national security interests is more relevant than ensuring the protection for the health of populations and the environment. With the 'Military Activities' cases, the Court sided with the Member States, as much as it weakened the unity of the EU legal order. The passage of *Commission v. UK (II)* where the Court made the idealistic suggestion that the relevant provisions of the TFEU could be used to adopt the appropriate measures for the protection of the health of the public and the environment against the dangers related to the use of nuclear energy, doesn't seem satisfactory either given the scarce will of the Member States to lose sovereign powers in this sector.[61]

With the *Temelín* judgement the Court did something different. On the one hand, as we have seen, this judgement reinforced the Euratom competencies in many ways, on the other hand, as many commentators have pointed out, with this judgement the Court strongly weakened the will of the population (which in Austria, as we have seen, is largely opposed to the use of nuclear energy), and discouraged both the population and NGOs in neighbouring States from taking judicial action against those Member States which decide to start the construction as well as operation of nuclear power plants with cross-border effects.[62]

Keeping this perspective in mind, the recent case law of the Court, as established especially in the *Temelín* judgements, would seem to confirm that, at least as far as the ECJ

60 See: *Land de Sarre et al v. Ministre de l'Industrie*, above n. 18, para. 11; later confirmed in *Commission v. Council of the European Union*, above n. 16, para. 89.

61 For more on this, see Chapter 2 by Sousa Ferro in this volume.

62 See: Schärf W.-G., 'The Temelín Judgement of the European Court of Justice', Nuclear Law Bulletin No. 85 (Vol. 1), 2010, p. 85. According to the Author, any claims should take into account not only the relevant provisions of the Euratom Treaty, but also the results of the checks carried out by the Commission in accordance with Chapter 3 EURATOM and National Laws in light of the Euratom Treaty.

is involved, the Aarhus approach[63] is far from having achieved the desired results in matters covered by the Euratom Treaty. On the other hand, this body of case law perfectly reflects the recent trend of the ECJ rulings each time national security interests of Member States are mixed up with the role of the EU executive and legislative actors. In such a sensitive area, as for example is the case with counterterrorism policy (and one can easily remember the *Kadi* case), or more precisely the case of nuclear safety, a delicate balance is required between, on the one hand, the protection of health and the fundamental rights of a democratic society as well as, on the other hand, the interests of the national and EU authorities, namely national security interests. Given the narrow power of intervention reserved to the European Parliament (which, in the case of the Euratom Treaty, is practically equal to nothing at all), the question is therefore: What is the role of the Court in finding this balance, and which decisions should be reserved for the executive?

The fundamental character of this question is much more emphasized in the case of the Euratom Treaty, where Member States still possess a relevant margin of discretion. It is therefore under this specific perspective that we might appreciate the decisive role that the ECJ has played in the last few years in shaping EU Nuclear Law: resisting the pressure of (at least some) very resentful Member States, replacing the inactivity of the EU executive authorities, and advocating (even if sometimes in a confusing manner) for the unity as well as internal coherence of the EU legal order.

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63 See: Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, entered into force 30 October 2011, United Nations, Treaty Series, vol. 2161, p. 447 (see also: <www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>). The EC is part of the Convention since May 2005, see: Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, OJ L 124, pp. 1-3. In 2003, two Directives concerning the first and second 'pillars' of the Aarhus Convention were adopted: Directive 2003/4/EC of the European Parliament and of the Council of January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14 February 2003, pp. 26-32, and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/91/EC, OJ L 156, 25 June 2003, pp. 17-25. Regarding the access to justice, on 24 October 2003 the Commission presented a proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM(2003)624). For more on the Aarhus legislation in the EU, see: <http://ec.europa.eu/environment/aarhus/legislation.htm>. As to the obligations set forth in the Aarhus Convention regarding the access to justice, Art. 9 states that all persons who feel that their rights to access to information have been impaired (request for information ignored, wrongfully refused, inadequately answered) must have access, in the appropriate circumstances, to a review procedure under national legislation. Access to justice is also ensured in the event of the Convention's participation procedure being infringed. Access to justice is also allowed for the settlement of disputes relating to acts or omissions by private persons and public authorities, which contravene provisions of National Law relating to the environment.