OPINION OF ADVOCATE GENERAL JACOBS

delivered on 13 December 2001 [1]

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I — Introduction

1. In this action, brought under Article 146 of the Euratom Treaty, the Commission seeks the partial annulment of the 'Council decision of 7 December 1998 approving the accession of the European Atomic Energy Community to the Nuclear Safety Convention'. [2] The Commission claims that the final paragraph of the 'Declaration by the European Atomic Energy Community according to Article 30(4)(iii) of the Nuclear Safety Convention' which is attached to that decision and which indicates the extent of the Community's competence infringes the Euratom Treaty in essence because it omits to state that the

2 — The contested decision has not been published in the *Official Journal of the European Communities*.

Community possesses competence also in the fields covered by Articles 1 to 5, 7 and 14 to 19 of the Convention.

2. The Nuclear Safety Convention is a 'mixed' agreement to which both the 15 Member States and the Community are parties. In the course of the internal procedure which led to the Community's accession to the Convention the Commission and the Council disagreed about the declaration of competence which the Community had to submit to the depositary. The underlying reason for that disagreement is a more fundamental dissent about the scope of the Community's competence as regards the safety of the Member States' nuclear installations. The present proceedings — in which the parties exchanged sometimes technical and complex arguments on both the admissibility and the substance of the case — are a provisional culmination of that long-running conflict.

3. As will become apparent below I consider that the present case requires the Court to examine

— the procedure for the conclusion of international agreements under the Euratom Treaty, as well as the respective powers of the Commission and the Council within that procedure,

— the nature, interpretation and reviewability of a declaration of competence to be submitted by one of the Communities in the context of a multilateral mixed agreement, and

— the competence which the Community derives from the health and safety provisions of the Euratom Treaty in respect of nuclear installations and in particular of safety assessments, verifications, emergency preparedness, the establishment of safety requirements and the siting, design, construction and operation of such installations.

II — The Convention on Nuclear Safety

4. The Convention on Nuclear Safety ('the Convention')[3] was drawn up between 1992 and 1994 under the auspices of the International Atomic Energy Agency ('IAEA') during a series of meetings at expert level of representatives of Governments, national nuclear safety authorities

3 — The text of the Convention is published in OJ 1999 L 318, p. 21.

and the IAEA Secretariat. It was adopted on 17 June 1994 by a diplomatic conference convened by the IAEA at its headquarters in Vienna and opened for signature on 20 September 1994. All the Member States of the Community have signed and ratified the Convention. It entered into force on 24 October 1996. On 31 January 2000, 53 States or international organisations had ratified the Convention.

5. The two basic elements of the Convention are

— a list of legislative, regulatory, administrative and other measures which the Contracting Parties must adopt in order to achieve and maintain a high level of nuclear safety (Articles 4 and 6 to 19),

— a 'peer review' mechanism which comprises, on the one hand, an obligation for each Party to submit a report on the measures it has taken to implement its obligations (Article 5), and, on the other hand, meetings of the Parties for the purpose of reviewing the reports submitted by other Parties (Articles 20 to 28).

6. Chapter 1 of the Convention is entitled 'Objectives, definitions and scope of application' and contains three provisions.

7. According to Article 1 the objectives of the Convention are:

'(i) to achieve and maintain a high level of nuclear safety worldwide through the enhancement of national measures and international cooperation including, where appropriate, safety-related technical cooperation;

(ii) to establish and maintain effective defences in nuclear installations against potential radiological hazards in order to protect individuals, society and the environment from harmful effects of ionising radiation from such installations;

(iii) to prevent accidents with radiological consequences and to mitigate such consequences should they occur.'

8. Article 2(i) defines 'nuclear installation' as 'any land-based civil nuclear power plant... including such storage, handling and treatment facilities for radioactive materials as are on the same site and are directly related to the operation of the nuclear power plant'.

9. According to Article 3 the Convention applies 'to the safety of nuclear installations'.

10. Chapter 2, entitled 'Obligations', is subdivided into four sections.

11. In Section (a) 'General provisions' (Articles 4 to 6) there are two relevant provisions. Article 4 ('Implementing measures') provides that the contracting parties must take the legislative, regulatory and administrative measures and other steps necessary for implementing their obligations under the Convention. Article 5 ('Reporting') obliges the contracting parties to submit, prior to each review meeting, a report on the measures they have taken to implement the obligations of the Convention;

12. In Section (b) 'Legislation and regulation' (Articles 7 to 9) only Article 7 ('Legislative and regulatory framework') is in issue. Article 7(1) requires the contracting parties to establish a legislative and regulatory framework to govern the safety of nuclear installations. Under Article 7(2) that framework must provide *inter alia* for national safety requirements, a licensing system with regard to nuclear installations, an inspection and assessment system and the enforcement of regulations and the terms of licences.

13. Section (c) 'General safety considerations' (Articles 10 to 16) contains three relevant provisions.

14. Under Article 14 ('Assessment and verification of safety') the contracting parties must ensure that safety assessments and verifications of nuclear installations are carried out.

15. Under Article 15 ('Radiation protection') the contracting parties must ensure that the radiation exposure to the workers and the public caused by a nuclear installation must be kept as low as reasonably achievable and that no individual must be

exposed to radiation doses which exceed prescribed national dose limits.

16. Under Article 16 ('Emergency preparedness') the contracting parties must ensure that there are tested emergency plans for nuclear installations, that information for emergency planning and response is provided and that contracting parties without nuclear installation on their territory, in so far as they are likely to be affected by a radiological emergency, prepare and test emergency plans.

17. Finally, all three provisions of Section (d) 'Safety of installations' (Articles 17 to 19) are of relevance.

18. Under Article 17 ('Siting') the contracting parties must ensure that there are procedures for evaluating all site-related factors likely to affect the safety of a planned nuclear installation, for evaluating its likely safety impact, for re-evaluating all relevant factors so as to ensure its continued safety acceptability, and for consulting contracting parties in the vicinity of a proposed installation.

19. Under Article 18 ('Design and construction') the contracting parties must ensure that the design and construction of a nuclear installation provide for several reliable levels and methods of protection (defence in depth) against the release of radioactive materials, that the technologies used are proven by experience or qualified by testing or analysis and that the design allows for reliable, stable and easily manageable operation.

20. Under Article 19 ('Operation') the contracting parties must ensure that the initial authorisation to operate a nuclear installation is based on an appropriate safety analysis and commissioning programme, that operational limits and conditions are defined and revised, that operation, maintenance, inspection and testing of a nuclear installation are conducted in accordance with approved procedures, that procedures are established for responding to anticipated operational occurrences and to accidents, that necessary engineering and technical support in all safety-related fields is available, that incidents significant to safety are reported, that programmes to collect and analyse operating experience are established and that the generation of radioactive waste is kept to the minimum practicable.

III — Participation of the Community in the Convention

1. *Provisions on international agreements in the Euratom Treaty*

21. According to the first paragraph of Article 101 of the Treaty the Community 'may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements with a third State, an international organisation or a national of a third State'.

22. Under the second paragraph of Article 101 of the Treaty such agreements must in general (see for the exceptions the third paragraph thereof) be

— negotiated by the Commission in accordance with directives of the Council, and

— concluded by the Commission with the approval of the Council, acting by qualified majority.

23. Under Article 102 of the Treaty agreements to which, in addition to the Community, one or more Member States are parties, are not to enter into force until the Commission has been notified by all Member States concerned that those agreements have become applicable in accordance with the provisions of their respective national laws.

2. *Negotiation of the participation of the Community in the Nuclear Safety Convention and the clauses concerning that participation*

24. On 28 September 1993 the Commission submitted to the Council a proposal for a Council decision adopting directives for the negotiation by the Commission of an international Convention on nuclear safety. In that proposal the Commission asked the Council to authorise it to negotiate the Convention on behalf of the Community.

25. The Council did not give its authorisation. Instead it took the position however that the Presidency should request, during the negotiations, that the text of the draft Convention should include a provision which would allow 'regional organisations of an integration or other nature' to become signatories or members. Accordingly the text of the Convention contains in Article 30(4) clauses which permit the

signature or accession of regional organisations.

26. Article 30(4) of the Convention provides:

'(i) This Convention shall be open for signature or accession by regional organisations of an integration or other nature, provided that any such organisation is constituted by sovereign States and has competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention.

(ii) In matters within their competence, such organisations shall, on their own behalf, exercise the rights and fulfil the responsibilities which this Convention attributes to States Parties.

(iii) When becoming party to this Convention, such an organisation shall communicate to the Depositary referred to in Article 34, a declaration indicating which States are members thereof, which articles of this Convention apply to it, and the extent of its competence in the field covered by those articles.

(iv) Such an organisation shall not hold any vote additional to those of its Member States.'

3. *The Commission proposal for the contested Council Decision*

27. On 8 September 1994 the Commission submitted a document entitled 'Proposal for a Council Decision concerning the approval of the conclusion by the European Atomic Energy Community of the Nuclear Safety Convention'.[4] That document contained *inter alia*:

— a draft Council decision approving the conclusion by the Commission of the Convention according to the procedure of Article 101(2) of the Treaty, and

4 — COM(94) 362 final.

— the text of a declaration by the Community according to Article 30(4)(iii) of the Convention.

28. The text of the declaration in question provided as follows:

'The following States are presently members of the European Atomic Energy Community: Belgium, Denmark,...

The Community declares that the following Articles of the Convention apply to it: Articles 1 to 5, Article 7, Articles 14 to 35.

The Community possesses competences in the fields covered by Articles 1 to 5, Article 7, and Articles 14 to 19 as provided for by the Treaty establishing the European Atomic Energy Community and by the Community legislation enumerated hereafter.

In the future the Community may well take further responsibilities by adopting more specific legislation regarding the field covered by the Convention.

LIST OF COMMUNITY LEGISLATION

...'

29. The list of Community legislation referred to in the third paragraph of the declaration and attached to it lists 15 legal acts (directives, regulation and decisions) which had been adopted by either the Council or the Commission and which concern matters related to protection against ionising radiation.

4. *The contested Council decision*

30. On 7 December 1998 — more than four years after the Commission's proposal — the Council unanimously adopted the decision which approves the accession of the Community to the Convention and which the Commission attacks in the present proceedings.

31. In the preamble to the decision the Council states that 'the competence for the design, construction and operation of nuclear installations lies with the Member State in which they are located' and that the accession of the Community to the Convention should be approved 'in view of the relevant tasks assigned to the Community by Title II, Chapter 3 "Health and Safety" of the Treaty'.

32. The sole Article of the operative part of the decision provides:

'1. The accession of the European Atomic Energy Community to the Nuclear Safety Convention is hereby approved.

2. The text of the Declaration by the European Atomic Energy Community according to the provisions of Article 30(4)(iii) of the Nuclear Safety Convention is attached to this Decision.'

33. The attached declaration is worded as follows:

'The following States are presently members of the European Atomic Energy Community: the Kingdom of Belgium, the Kingdom of Denmark,...

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 insofar 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 entitled "Health and Safety".'

5. Developments after the present proceedings were brought

34. The Commission lodged its application on 8 February 1999. By decision of 16 November 1999 published in the *Official Journal of the European Communities* the Commission decided to approve on behalf

of the Community the accession to the Convention [5] and attached to its decision both the text of the Convention and the declaration by the Community according to Article 30(4)(iii) of the Convention as formulated in the attachment to the Council decision of 7 December 1998.

35. On 31 January 2000 the Commission deposited an instrument of acceptance of the Convention with the Director General of the IAEA and at the same time communicated the declaration according to Article 30(4)(iii) of the Convention as formulated in the respective attachments to the Council decision of 7 December 1998 and the Commission decision of 16 November 1999. [6]

36. On 30 April 2000 the Convention entered into force for the Community pursuant to Article 31(2) of the Convention.

IV — 'Health and safety' under the Euratom Treaty

37. According to the preamble to the Euratom Treaty the contracting Member States were on the one hand 'resolved to create the conditions necessary for the development of a powerful nuclear industry', but on the other also 'anxious to create the conditions of safety necessary to eliminate hazards to the life and health of the public'.

38. Under Article 2(b) of the Treaty the Community must 'establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied'.

39. That task is described in more detail in Title II, Chapter 3 (Articles 30 to 39 of the Treaty) which is entitled 'Health and Safety'.

1. *The setting of 'basic standards'*

40. Article 30 of the Treaty provides:

'Basic standards shall be laid down within the Community for the protection of the health of workers and the general public against the dangers arising from ionising radiations.

5 — OJ 1999 L 318, p. 20.

6 — Information on the status of the ratification can be found on the website of the IAEA at www.iaea.org.

The expression "basic standards" means:

(a) maximum permissible doses compatible with adequate safety;

(b) maximum permissible levels of exposure and contamination;

(c) the fundamental principles governing the health surveillance of workers.'

41. Under the procedure of Article 31 of the Treaty the basic standards must be 'worked out' by the Commission after it has obtained the opinion of a group of scientific experts — in particular public health experts — from the Member States. The opinion of the Economic and Social Committee must be obtained and the Parliament must be consulted. The basic standards are 'established' by the Council which acts by qualified majority, after consulting the Parliament.

42. Under Article 32 at the request of the Commission or of a Member State the basic standards may be 'revised' or 'supplemented' in accordance with the procedure laid down in Article 31.

43. Pursuant to Articles 30, 31 and 218 of the Treaty the Community laid down basic standards for the first time in 1959 by means of 'Directives of 2 February 1959 laying down the basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations'. [7] Those directives were revised on the basis of Articles 31 and 32 of the Treaty in 1962 by Directive of 5 March 1962, [8] in 1966 by Council Directive 66/45/Euratom, [9] in 1976 by Council Directive 76/579/Euratom, [10] in 1979 by Council Directive 79/343/Euratom, [11] in 1980 by Council Directive 80/836/Euratom [12] and in 1984 by Council Directive 84/467/Euratom. [13]

7 — OJ English Special Edition 1959-62 (I), p. 7.
8 — OJ English Special Edition 1959-62 (I), p. 229.
9 — OJ English Special Edition 1965-66 (I), p. 265.
10 — OJ 1976 L 187, p. 1.
11 — OJ 1979 L 83, p. 18.
12 — OJ 1980 L 246, p. 1.
13 — OJ 1984 L 265, p. 4.

44. In 1996 the basic standards directives as revised were replaced by Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation ('the Basic Standards Directive') [14] which repealed the previously applicable rules with effect from 13 May 2000. [15]

2. *Compliance, monitoring and the Commission's powers*

45. Under Article 33 of the Treaty the Member States must adopt the appropriate legislative, regulatory or administrative measures to ensure compliance with the basic standards. The Commission must make appropriate recommendations for harmonising the national provisions applicable in this field. To this end the Member States must communicate to the Commission any relevant draft provisions.

46. Under Articles 35 and 36 of the Treaty the Member States must 'establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards'. The results of that monitoring must be communicated to the Commission so that it is kept informed of the level of radioactivity to which the public is exposed. The Commission has a right of access to the national monitoring facilities and may verify their operation and efficiency. [16]

47. Under Article 38(1) of the Treaty the Commission may make recommendation to the Member States with regard to the level of radioactivity in the air, water and soil. Under Article 38(2) and (3) of the Treaty, in cases of urgency, the Commission may issue a directive requiring the Member State concerned to take, within a period laid down by the Commission, all necessary measures to prevent infringement of the basic standards and to ensure compliance with regulations. Should the State concerned fail to comply with the Commission directive, the Commission or any other Member State concerned may immediately bring the matter before the Court.

14 — OJ 1996 L 159, p.1; see also the Communication from the Commission concerning the implementation of Council Directive 96/29/Euratom laying down basic safety standards for the protection of the health of the workers and the general public against the dangers arising from ionising radiation, OJ 1998 C 133, p. 3.

15 — Article 56 of the Basic Standards Directive.

16 — See Commission Recommendation 2000/473/Euratom of 8 June 2000 on the application of Article 36 of the Euratom Treaty concerning the monitoring of the levels of radioactivity in the environment for the purpose of assessing the exposure of the population as a whole, OJ 2000 L 191, p. 37.

3. *Provisions on dangerous experiments and plans for the disposal of radioactive waste*

48. Under Article 34 of the Treaty a Member State in whose territories 'particularly dangerous experiments' are to take place must take additional health and safety measures, on which it must first obtain the opinion of the Commission. The Commission's assent is necessary where the effects of such experiments are liable to affect the territories of other Member States. [17]

49. Under Article 37 of the Treaty Member States must provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as 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 must deliver its opinion within six months. [18]

17 — See, for a case concerning Article 34, Case T-219/95 R *Danielsson and Others* v *Commission* [1995] ECR II-3051.

18 — See, for a case concerning Article 37, Case 187/87 *Saarland* v *Minister for Industry* [1988] ECR 5013; see also Commission Recommendation 1999/829/Euratom of 6 December 1999 on the application of Article 37 of the Euratom Treaty, OJ 1999 L 324, p. 23.

V — Admissibility

50. On 12 October 1999 the Council lodged a preliminary objection as to admissibility. By decision of 8 February 2000 the Court reserved its decision for the final judgment.

51. In support of its claim that the Commission's application is inadmissible the Council raises three pleas in law, namely that:

(1) the application is without purpose;

(2) the application is inadmissible because it is directed against a part of the decision which cannot be considered separately from the rest of the decision and the Commission does not ask for the annulment of the entire decision;

(3) the application is procedurally improper in that the Commission is in fact seeking an opinion on the extent of the Community's competences.

52. Before examining those pleas it will be helpful [19] to consider whether the Commission's application is directed against a reviewable act within the meaning of Article 146 of the Treaty and whether the accession to the Convention after the present proceedings were brought has any bearing on admissibility.

1. *Reviewable act*

53. Under Article 146 of the Treaty the Court may review the legality of 'acts of the Council... other than recommendations and opinions'. Article 146 of the Treaty is in that respect the same as Article 230 EC [20] and must be interpreted by analogy with that provision. [21] It must therefore be established whether the application is directed against a measure which is intended to have legal effects. [22]

54. The Commission asks for the annulment of the final paragraph of the declaration attached to the 'Council decision of 7 December 1998 approving the accession of the European Atomic Energy Community to the Nuclear Safety Convention'. [23] In that decision the approval of the accession to the Convention and the reference to the attached declaration are contained in one 'sole' Article. It will also be noted that the 'sole' Article lists both elements side by side and on an equal footing. The declaration in issue was thus intended to be an integral part of the Council decision of 7 December 1998. That interpretation is in line with normal practice in Community law, namely that annexes or protocols attached to a given legal act form an integral part thereof and are of the same legal nature. [24]

55. Under Article 101(2) of the Treaty international agreements of the Community with third States or international organisations must in general 'be concluded by the Commission with the approval of the Council'. On the international level it is thus for the Commission to express the Community's consent to be bound by an agreement. Internally, however, neither the Council nor the Commission can decide alone to conclude a given international agreement: the Commission needs the approval of the Council and the Council has no possibility to oblige the Commission to conclude an agreement against its will. The decision of 7 December 1998 was therefore a necessary (albeit not sufficient) element of the internal process by which

19 — Under Article 92(2) of the Rules of Procedure the Court may raise issues of admissibility of its own motion.

20 — Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraph 12 of the judgment.

21 — See for such an interpretation by analogy Case T-219/95 R, cited in note 17, paragraphs 64 et seq. of the order.

22 — Case 22/70 *Commission* v *Council* [1971] ECR 263, *ERTA*, paragraph 42 of the judgment.

23 — See paragraph 1 above.

24 — See, for example, Article 311 EC.

the Council and the Commission decided jointly that the Community should become a contracting party to the Convention.

56. Under the Court's case-law, which takes a broad view of the categories of measure which are subject to judicial review,[25] there can be no doubt that the approval of the accession to the Convention taken in isolation (first paragraph of the sole Article of the decision of 7 December 1998) is a reviewable act, since it expresses in definitive terms the Council's consent to the Community's accession and is thus intended to be legally binding in the Council's own operations and its relations with the Commission.

57. As regards the disputed declaration, it will be noted that no provision of the Euratom Treaty determines expressly whether it is for the Commission or for the Council to determine the content of a declaration to be submitted by the Community on the occasion of the ratification of an international agreements. In the present case both institutions appear to claim that right for themselves: in its proposal of 8 September 1994 the Commission states in the Explanatory Memorandum that the Commission 'will' make a declaration, as set out in an Annex; and in the operative part of the decision of 7 December 1998 the Council states that the text of the declaration 'by the... Community' is attached. Since the formulation of such a declaration is an essential part of the process of concluding an international agreement, I consider that the procedure to decide on its content is also governed by Article 101 of the Treaty. It follows that the 'internal' declaration attached to the Council decision of 7 December 1998 was intended to oblige the Commission to communicate to the depositary an 'external' declaration with the content prescribed by the Council and was thus also intended to have legal effects.

58. Even if the 'external' declaration submitted by the Commission to the depositary is not directly at issue it may be useful to add that that external declaration is also intended, and liable, to produce legal effects. Under Article 30(4)(ii) of the Convention the Community must fulfil the obligations under the Convention in all matters within its competence. The external declaration is thus intended to, and indeed does, define for the other contracting parties in a legally binding form the extent of the Community's obligations. I consider that that legal effect of the external declaration in the international sphere reinforces the arguments in favour of the reviewability of the internal declaration in issue, since that internal declaration necessarily determined the content of the external declaration.

25 — See, for example, Case 22/70, cited in note 22, and Case C-25/94 *Commission* v *Council* [1996] ECR I-1469.

59. As a last point I would mention that the internal declaration attached to the decision of 7 December 1998 is not a non-reviewable purely preparatory measure within the meaning of the Court's case-law. [26] That case-law applies in particular to decision-making procedures in which one and the same institution acts in several stages. [27] In that situation an action can be brought against the final act, and the legality of the earlier stages can be challenged then. In the present case several institutions were involved in the procedure under Article 101 of the Treaty and the act under review was the 'last word' of the Council. If that act were not reviewable, the Commission would have no remedy at all.

60. The Commission's application is accordingly directed against a reviewable act within the meaning of Article 146 of the Treaty.

2. The effects of the Community's subsequent accession to the Convention

61. It will be recalled that after it brought the present proceedings the Commission decided to approve the accession by the Community to the Convention and deposited an instrument of acceptance with the depositary of the Convention. On both occasions the Commission attached a declaration identical to the one drafted by the Council which is at issue in the present proceedings.

62. Some might argue that the Commission therefore has no interest in bringing the present proceedings because it has already complied with the act which it attacks.

63. Others might contest the Commission's interest in bringing proceedings on the ground that internationally the Community has in the meantime become a party to the Convention on the basis of a declaration of competence which is identical to the one under review. A ruling by the Court that the last paragraph of the declaration attached to the internal Council decision is void would therefore come 'too late' and not serve any useful purpose.

64. Both arguments must be rejected. The first paragraph of Article 146 of the Treaty gives the Commission the right to bring an action for annulment without making the exercise of that right conditional upon

26 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 12 of the judgment.

27 — See, for example, the administrative procedure in cases concerning Article 81 EC.

proof of an interest in bringing proceedings. [28] It must also be borne in mind that it is one of the Commission's main tasks under Article 124 of the Treaty to ensure that the provisions of the Treaty are applied. In order to enable the Commission to fulfil that duty the Commission must have access to all means provided by the Treaty with a view to ensuring compliance with the law. [29]

65. The Commission has in any event an interest in bringing proceedings since the (partial) annulment of the contested declaration would have real practical consequences. It is true that the annulment would concern only the declaration attached to the internal Council decision of 7 December 1998. The declaration communicated by the Commission to the depositary of the Convention would thus initially remain unaffected. However, as both the Commission and the Council stated at the hearing, nothing in the Convention precludes the Community from submitting at a later stage an alternative or modified declaration. That possibility is inherent in the nature of the requirements imposed by Article 30(4)(iii) of the Convention. Thus for example the list of the Member States might have to be modified in the event of the accession of new Member States to the European Union. The same is true as regards the information about the extent of the Community's competence in the event of an evolution of that competence over time. It follows that in the event of annulment of the declaration the Council and the Commission would have to agree on a new declaration which the Commission would then communicate to the depositary of the Convention.

28 — Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 3 of the judgment.

29 — See Advocate General Lenz in Case 45/86, cited in the previous note, at paragraph 30 of the Opinion.

3. *The Council's first plea: the application is without purpose*

66. The disputed last paragraph of the declaration attached to the Council decision of 7 November 1998 provides:

'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 entitled "Health and Safety".'

67. The Council maintained in its written submissions that that paragraph contains only two statements, namely that:

— the Community shares the competence which it possesses with the Member States, and

— that shared competence stems from Article 2(b) of the Treaty and the relevant Articles of Title II, Chapter 3 of the Treaty.

68. According to the Council the Commission disputes neither the nature of the Community's competence (shared, not exclusive) nor its origin (Title II, Chapter 3 of the Treaty). Since those two pieces of information are the only ones to appear in the disputed paragraph the Commission's application is devoid of purpose.

69. The Commission maintains that the paragraph in issue contains a crucial third piece of information, namely that the Community possesses competence only in the fields covered by Articles 15 and 16(2) and not in fields covered by other Articles of the Convention.

70. It will be recalled that the Commission challenges the final paragraph on the ground that it omits to state that the Community possesses competence also in matters covered by Articles 1 to 5, 7 and 14 to 19 of the Convention. The Council's first plea of inadmissibility is thus bound up with the Commission's main plea and must therefore be examined together with the substance of the case. [30]

30 — See below at paragraph 105.

4. *The Council's second plea: the application for partial annulment is directed against a part of the decision which cannot be dissociated from the decision as a whole*

71. The Council's second plea of inadmissibility is subdivided in two branches. The Council maintains in essence that:

— the declaration as a whole cannot be separated from the Council's decision approving the accession of the Community to the Convention, and

— the final paragraph of the declaration cannot be separated from the second paragraph thereof.

(a) Can the declaration be challenged separately?

72. According to the Council the declaration cannot be dissociated from the decision approving the accession. The Council would not have approved the decision on the accession of the Community without a complete declaration. It would therefore not be possible to maintain the Council's decision to approve the

Community's accession while annulling the declaration or parts thereof. Moreover, the Court cannot annul the decision itself because that would be *ultra petita*.

73. In principle an applicant is free to challenge only a part of a single legal act. [31] The question is therefore only whether the application or the act under review presents particular features which may render the Commission's application for partial annulment inadmissible.

74. It is true that in *Jamet* [32] the Court declared an application for partial annulment inadmissible. In that case however the challenged part was not severable from the decision as a whole: the parts of the decision whose annulment were requested were so essential that in their absence the decision would no longer have been capable of producing legal effects. In the present case a separate annulment of the declaration attached to the Council decision of 7 December 1998 would not have similar consequences. As I have stated above, the decision to approve the accession to the Convention is in itself intended and liable to produce legal effects. [33]

75. The judgment in *Jamet* must be contrasted with the judgments in *Transocean Marine Paint* [34] and in the *Kali and Salz* cases [35] which concerned applications for the separate annulment of conditions attached to decisions favourable to certain undertakings. The difficulty in those cases was that annulment of the conditions might have affected the nature of the decision itself. Nevertheless, the Court did not regard as problematic the admissibility of applications directed against the conditions alone. In the present case therefore there should be even less doubt about the admissibility of the application, since there is no legal link between the declaration and the decision to approve accession to the Convention such that annulment of the declaration would entail annulment of the decision. Even if there might have been a political connection between the two elements, the legality of the decision to approve the Community's accession to the Convention does not depend on the legality of the declaration.

76. The declaration may accordingly be dissociated from the approval decision and challenged separately.

31 — See for example Case C-375/99 *Spain* v *Commission*, judgment of 13 September 2001; Case C-365/99 *Portugal* v *Commission*, judgment of 12 July 2001; Case C-150/95 *Portugal* v *Commission* [1997] ECR I-5863; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973.

32 — Case C-37/71 [1972] ECR 483.

33 — See paragraph 56.

34 — Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063.

35 — Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375.

(b) Can the final paragraph of the declaration be challenged separately?

77. The Council argues that the declaration under review forms a whole and that the last two paragraphs thereof may not be separated from one another or considered individually. That argument is based on the same understanding of the declaration as the Council's first plea. For the reasons given above [36] it must also be examined together with the substance of the case. [37]

5. The Council's third plea: the application constitutes an abuse of the annulment procedure in that it seeks in fact an opinion of the Court on the Community's competence

78. The Council argues that the Commission is not really seeking an annulment of the disputed part of the declaration but wishes to obtain from the Court an opinion on the extent of the Community's competence in the context of the accession of the Community to the Convention. However, unlike the EC Treaty (Article 300(6) EC), the Euratom Treaty does not provide for a general possibility to request the Court for an opinion on the compatibility of an envisaged international agreement with the Treaty, and in particular on the question of the Community's competence to conclude such an agreement. None of the provisions of the Euratom Treaty under which the Court may be asked for an opinion — the Council refers to Articles 103(3), 104(3) and 105(2) of the Treaty — is applicable in the present case. The application must therefore be declared inadmissible for the reason that it constitutes an abuse of the procedure provided by Article 146 of the Treaty.

79. In the first place I can see no concrete indications that the Commission acted in bad faith. Moreover, in *Opinion 1/75* the Court stated that under the EC Treaty the competence to conclude an international agreement may be reviewed under the Opinion procedure, the annulment procedure or the preliminary ruling procedure. [38] In *France* v *Commission* the Court held that the exercise of the powers delegated to the institutions in international matters cannot escape judicial review, under Article [230 EC], of the legality of the acts adopted. [39] In *Greece* v *Council* the Court stressed the 'need for a complete and consistent review of legality'. [40] It follows that the availability of a request for an Opinion and the admissibility of an action for annulment are completely independent questions. If anything, the impossibility of asking the Court for an Opinion on the compatibility of an envisaged agreement with the Treaty does not weaken, but strengthens the arguments in favour of the admissibility of actions under Article 146 of the Treaty.

36 — See paragraph 70.

37 — See below at paragraph 106.

38 — [1975] ECR 1355, at page 1361.

39 — Case C-327/91 [1994] ECR I-3641, paragraph 16 of the judgment.

40 — Case 62/88 [1990] ECR I-1527, paragraph 8.

80. The Council's third plea must accordingly also be rejected.

VI — Substance

81. The Commission seeks the annulment of the third paragraph of the declaration attached to the Council decision of 7 December 1998 in so far as, in relation to Community competence, it omits to state that the Community possesses competence in the fields covered by Articles 1 to 5, 7, 14, 16(1) and (3), and 17 to 19 of the Convention. The Commission's application is based on the ground of infringement of the Treaty, and in particular on the infringement of Article 2(b), the provisions contained in Title II, Chapter 3 (Articles 30 to 39), Article 192 and the Community legislation based on the Treaty.

1. *The requirements under the Convention as regards the contested declaration*

82. It will be recalled that Article 30(4)(iii) of the Convention provides:

'When becoming party to this Convention [a regional organisation] shall communicate to the Depositary... a declaration indicating which States are members thereof, which articles of this Convention apply to it, and the extent of its competence in the field covered by those articles.'

83. That provision must be interpreted according to customary international law on the interpretation of treaties as embodied in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.

84. It should also be mentioned that by virtue of a further principle of customary international law embodied in Article 24(4) of the Vienna Convention on the Law of Treaties[41] the obligations under Article 30(4)(iii) of the Nuclear Safety Convention applied to the Community before the entry into force of the latter Convention.

85. It follows from the wording of Article 30(4)(iii), first, that:

— the Community is obliged to ('shall') submit a declaration of competence if it

41 — 'The provisions of a treaty regulating... matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.'

wishes to become a contracting party, and

— it must communicate the declaration at the same time as it submits its instrument of accession ('when becoming party').

86. Both the wording and the context suggest that the declaration must be both accurate and complete. That may be inferred in particular from Article 30(4)(ii) of the Convention: if the Community is to exercise the rights and fulfil the responsibilities which the Convention attributes to States parties in all 'matters within [its] competence' the Community cannot 'pick and choose' and declare only some of its competences.

87. Moreover, it follows also from the wording of Article 30(4)(iii) that a regional organisation must submit a declaration with three elements, namely:

— a list of the Member States of the organisation,

— a list of the articles of the Convention which 'apply' to the organisation, and

— a statement about 'the extent of its competence in the field covered by those articles'.

88. The first of those three requirements is not contentious.

89. The Council argued in its written submissions that it is the second requirement which obliges the Community to indicate the fields of the Convention in which the Community possesses competence. The third requirement therefore concerns only the question whether that competence is shared or exclusive.

90. That reading conflicts in my view with the ordinary meaning of the terms used. The scope of the second requirement is defined by the word 'apply' which means that a given provision is of legal relevance for a given actor. The relatively indeterminate statement that a provision applies to an actor is to be distinguished from the much more specific statement that the actor in question possesses competence (of a legislative, administrative or other nature) in the fields covered by that provision. For

example the definitions in Article 2 of the Convention are of legal relevance for any contracting party and 'apply' therefore also to the Community. It would however not make sense to state that the Community possesses competence in the field covered by a provision which merely contains definitions.

91. The provisions to be indicated under the second requirement include therefore, first, the substantive obligations under the Convention applicable to a regional organisation which require implementing measures of a legislative, regulatory, administrative or other nature within that organisation's domestic legal order (Articles 4 and 6 to 19). A second group of provisions which 'apply' to a regional organisation are those which establish formal and/or procedural rights and obligations related to the administration and effectiveness of the Convention (e.g. the right to denounce the Convention under Article 33(1) or the obligation to deposit instruments of ratification with the depositary under Article 30(5)). I would also classify within that category the reporting requirements (Article 5) and the other obligations which arise in the context of the peer review mechanism (Articles 20 to 28). Finally, there are the general provisions which do not as such create rights or obligations but have to be taken into account in the interpretation and application of the Convention. An obvious example are the provisions which define the objectives (Article 1 of the Convention), central concepts (Article 2), scope of application of the Convention (Article 3) or the entry into force (Article 31) of the Convention.

92. The meaning of the third requirement is more difficult to determine. The expression 'extent of competence' used in Article 30(4)(iii) must be interpreted in its context and in the light of its object and purpose.

93. Article 30(4)(ii) provides that '[i]n matters within their competence, such organisations shall, on their own behalf, exercise the rights and fulfil the responsibilities which this Convention attributes to State Parties'. 'Competence' in Article 30(4)(iii) must thus be read as referring to the competence of a regional organisation to exercise the rights and fulfil the obligations under the Convention.

94. As to the term 'extent' of competence it must be borne in mind that where a regional organisation and its Member States are parties to an international agreement the other contracting parties wish to know 'to whom they owe their obligations,

and from whom they can claim their rights'.[42] The main purpose of the requirement to indicate the 'extent' of a regional organisation's competence is thus to reveal to the depositary and the other parties those matters governed by the Convention in which an organisation is competent to implement obligations and to exercise rights flowing from the Convention. Under the third requirement of Article 30(4)(iii) a regional organisation must therefore indicate all the articles of the Convention in the field of which it possesses competence to exercise the rights and fulfil the responsibilities which the Convention attributes to State parties.

95. The last point to be dealt with is that under Article 30(4)(iii) the obligation to indicate the extent of the Community's competence applies only 'in the field covered by those articles'. The expression 'those articles' refers clearly to the articles which have to be declared pursuant to the second requirement and therefore to the articles which 'apply' to the Community.

96. At first sight it might seem strange to limit the obligation to reveal the extent of an organisation's competence to a predetermined group of articles of the Convention which 'apply' to that organisation. It follows however from the foregoing analysis of the terms 'apply' and 'competence' that the provisions in respect of which a regional organisation has 'competence' are necessarily a subgroup of the provisions which 'apply' to that organisation. It is therefore possible that the authors of the Convention intended to introduce a safeguard against inconsistencies in a regional organisation's declaration on competence. Another explanation might be that by requiring cumulatively a list of provisions which 'apply' to a regional organisation and an indication of the 'extent of competence' the authors of the Convention wanted to force the Community 'to reveal with particular clarity/evidence its rather limited competence'.[43]

97. At the hearing in response to a question from the Court the Council accepted that the group of provisions of the Convention which apply to a regional organisation (second requirement) is to be distinguished from the narrower group of provisions in the fields of which a regional organisation possesses competences (third requirement).

98. It follows that the third requirement of Article 30(4)(iii) of the Convention obliges a regional organisation to indicate the

42 — See Maurits J.F.M. Dolmans 'Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of Third States', Asser Institute, The Hague 1985, at p. 52.

43 — See C. Lindemann 'Die Nukleare Sicherheitskonvention — Bestätigung deutschen und Fortschreibung internationalen Rechts?' in N. Pelzer (ed.), *Neues Atomenergierecht — Internationale und nationale Entwicklungen*, Nomos, Baden-Baden, 1995, at p. 66. The author seems to have participated in the negotiation of the Convention.

provisions of the Convention in the field of which it possesses competence to exercise the rights or implement the obligations arising under those provisions.

2. *Interpretation of the disputed third paragraph of the declaration*

99. The disputed third paragraph of the declaration provides:

'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 entitled "Health and Safety".'

100. It will be recalled that the parties disagree on the question whether that paragraph contains a statement that the Community possesses competence only in the fields covered by Articles 15 and 16(2) of the Convention.

101. The wording of the third paragraph supports the Commission's assumption that it contains such a statement. It is more natural to read the paragraph as transmitting three pieces of information namely that the 'Community possesses competence... in the fields covered by Articles 15 and 16(2) of the Convention', that the competence which the Community possesses is 'shared with the... Member States' and that that competence stems from 'Article 2(b) and the relevant Articles of Title II, Chapter 3' of the Euratom Treaty. If the Council had wished to make a more limited statement it could have stated for example that 'the Community's competence in the fields covered by Articles 15 and 16(2) is shared with the Member States'.

102. That understanding of the contentious paragraph is confirmed by an interpretation of the Council's declaration in the light of the requirements imposed by Article 30(4)(iii) of the Convention. According to the foregoing analysis of that Article the third requirement imposes on the Community the obligation to indicate the provisions of the Convention in the field of which it possesses competence.

103. It follows that the third paragraph of the contentious declaration must be interpreted as stating *inter alia* that the Community possesses competence only in the

fields covered by Articles 15 and 16(2) of the Convention.

104. That conclusion makes it possible to resolve at this stage the two outstanding issues of admissibility.

105. In the first place, since the third paragraph actually states that the Community possesses competence only in the fields covered by the Articles mentioned therein the Commission's application is not devoid of purpose. The Council's first plea of inadmissibility must accordingly be rejected.

106. Secondly, the information contained in the third paragraph of the declaration (extent of the Community's competence) is legally distinct from the information contained in the second paragraph thereof (provisions of the Convention which apply to the Community) and the legality of both elements may be reviewed independently of one another. The Commission's application is therefore directed against a part of the declaration which can be dissociated from the declaration as a whole. The second branch of the Council's second plea of admissibility must therefore also be rejected.

3. May an incomplete declaration of competences constitute an infringement of Community law within the meaning of Article 146 of the Treaty?

107. In its application the Commission maintained that the declaration in issue infringed Articles 2(b), 30 to 39 and 192 of the Treaty and the Community legislation based on the Treaty. However, in reply to a question from the Court the Commission stated that an obligation to make a complete declaration could not be derived from the Euratom Treaty, but only from the Convention. According to the Council that raises the question whether an incomplete declaration may constitute an infringement of the Treaty within the meaning of Article 146 of the Treaty.

108. Under Article 146 of the Treaty an action for annulment may be brought on the ground of 'infringement of this Treaty or any rule of law relating to its application'. That ground for annulment covers infringements of any binding and superior provision of Community law.

109. The Court has consistently held that a provision of an international agreement concluded by one of the Communities — such as Article 30(4)(iii) of the Conven-

tion — forms, as from its entry into force, an integral part of Community law. [44]

110. The declaration which the Commission challenges, however, is not the 'external' declaration communicated to the depositary, but the declaration attached to the Council's 'internal' approval of the Community's accession to the Convention. Nevertheless, even a declaration made for that purpose must in my view be unlawful if inaccurate or incomplete. It must be borne in mind that the declaration was the Council's final statement of position and was intended to be the basis for the external declaration which would bind the Community under international law. If not correct, it would infringe the Euratom Treaty because it misrepresents the Community's competence under the articles concerned, in a declaration which has legal effects. It would also be liable to lead to an infringement of the Convention because it would oblige the Commission (if it wished to accede to the Convention) to make an inaccurate declaration, which would infringe the international obligations of the Community under Article 30(4)(iii) of the Convention. By acting in that way, the Council would infringe the duty of faithful cooperation between the institutions, in breach of Article 192 of the Treaty which, like Article 10 EC, imposes such a duty not only on Member States but also on the Community institutions.

111. Both parties refer in that connection to *Ruling 1/78* where the Court stated that 'it is not necessary to set out and determine, as regards other parties to the convention, the division of powers... between the Community and its Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene.' [45]

112. That statement must however be placed in its context. *Ruling 1/78* was handed down at a time when the Convention at issue was still being drawn up. At that stage the negotiating parties had not yet agreed on the clauses necessary to enable an international organisation such as the Community to participate in the Convention. [46] Presumably with a view to the forthcoming negotiations of those clauses the Commission had asked the Court to state that the usual practice for mixed agreements should be followed, namely that the internal division of powers between the Community and the Member States was not to be defined as far as third parties were concerned. [47] However, notwithstanding the statement of the Court quoted above, the Convention, which was

44 — Case 181/73 *Haegeman* v *Belgium* [1974] ECR 449, paragraphs 3, 4 and 5 of the judgment; for an application of that principle in an action for annulment see Case 30/88 *Greece* v *Commission* [1989] ECR 3711, paragraphs 12 to 14.

45 — *Ruling 1/78* [1978] ECR 2151, paragraph 35 of the Ruling.

46 — Paragraph 11.

47 — At p. 2162.

signed a year and a half after the Ruling, required the Community to communicate to the depositary a declaration indicating all the Articles of the Convention which did not apply to it.

113. The Court's statement in *Ruling 1/78* must therefore be read as a mere endorsement of the practice of the Communities of avoiding as far as possible at the negotiating stage the indication to third parties of the internal division of powers between the Community and its Member States. In view of the considerable legal and political difficulties of drafting declarations of competence that practice is indeed to be endorsed, since it allows the Communities and their Member States to focus on more important matters such as the substantive provisions of the agreement.

114. In the present case it is however 'too late' and the Community cannot avoid making a declaration on the competence of the Community and the Member States. Contrary to the situation in *Ruling 1/78* the signatories of the Convention (which include the Member States) have already decided to require the Community to reveal the internal division of power.

115. Accordingly, an incomplete 'external' declaration by the Community would infringe Article 30(4)(iii) of the Convention and an incomplete 'internal' declaration by the Council would infringe the Euratom Treaty and — since it is liable to lead to an infringement of the Convention — infringe Article 192 of the Treaty.

4. *Main arguments of the parties as to the completeness of the declaration*

116. The Commission submits, first, that the Community possesses competence in the fields covered by Articles 1 to 5, 7, 14, 16(1) and (3) and 17 to 19 of the Convention. In its view, that competence may be deduced from various Articles of the Euratom Treaty, namely Article 2(b), Articles 30 to 32 (setting of basic standards), Article 33 (recommendations for harmonising national provisions), Article 35 (verification of national monitoring facilities), Article 37 (opinions on plans for the disposal of radioactive waste), Article 38 (recommendations as regards the level of radioactivity and in cases of urgency directives). The competence in question is also evidenced by various provisions of the Basic Standards Directive which was adopted on the basis of Articles 31 and 32 of the Treaty. [48]

48 — Articles 1, 2, 4(1)(a), 6, 7, 9, 13, 38, 43, 44, 46, 47, and 50.

117. Second, in the Commission's view Articles 30 et seq. of the Treaty and the Convention pursue the same basic objective, namely the protection of persons and the environment against ionising radiation.

118. Third, the scope of application of Articles 30 et seq. of the Treaty includes and goes beyond the scope of the Convention, which applies only to the safety of nuclear installations (Article 3 of the Convention). That is because the Treaty applies to the protection against ionising radiation whatever its source[49] and the concept of 'source emitting ionising radiation' as defined in Article 1 of the Basic Standards Directive expressly includes installations.

119. The Council replies, first, that as regards Articles 1 to 5 of the Convention a delimitation of competence is not needed.

120. Second, the other Articles of the Convention which the Commission wishes to have listed in the declaration (Articles 7, 14, 16(1) and (3), and 17 to 19) are essentially concerned with measures relating to the safety of nuclear installations and do not therefore fall under the Community's competence. Articles 30 et seq. of the Treaty provide only for a system of radiation protection which consists essentially in laying down 'maximum permissible doses' and 'maximum permissible levels of exposure and contamination' (Article 30(2) of the Treaty) and in ensuring that those doses or levels are applied (Article 2(b) of the Treaty). The disputed provisions of the Convention, however, concern directly the planning, construction and operation of nuclear installations and therefore fall within the exclusive competence of the Member States.

121. Third, competence of the Community cannot be derived from the Basic Standards Directive since pursuant to Article 30(2) of the Treaty that directive may only lay down the basic standards for radiation protection and thus 'maximum doses compatible with adequate safety' and 'maximum levels of exposure and contamination'. It follows moreover from Article 2(1) of the Basic Standards Directive that its scope of application is limited to 'practices' and that it does not therefore cover 'installations'.

5. General considerations as regards Euratom's competence under Articles 30 to 39 of the Treaty

122. In order to analyse the central issue in this case — the scope of the Community's competence in matters of nuclear safety — it is necessary to examine, on the one hand,

49 — Case C-70/88 *Parliament* v *Council* [1991] ECR 4529, paragraph 14 of the judgment.

the evolution of radiation protection and nuclear safety generally, and on the other hand the meaning and scope of 'health and safety' in the Euratom Treaty.

(a) Radiation protection and nuclear safety

123. As regards the dangers of ionising radiation for the health of human beings, the International Commission on Radiological Protection (ICRP) distinguishes between two types of harmful radiation effects. [50]

124. High doses of radiation will cause inevitable detrimental effects (*deterministic effects*) if the dose exceeds a threshold value. Examples of deterministic effects include erythema and acute radiation syndrome (radiation sickness). The higher the dose, the greater the severity of those effects. The primary protection objective is then to prevent high radiation doses which occur for example on the site of a major nuclear accident.

125. Both low and high doses may also cause randomly occurring effects (*stochastic effects*) such as leukaemia and hereditary disorders. The lower the dose the smaller the probability of those effects. The severity of the effect (if it occurs) is however independent of the dose. The probabilistic nature of those effects makes it impossible to make a clear distinction between 'safe' and 'dangerous' practices. The policy implication here is that radiation doses must be kept 'as low as reasonably achievable' (the ALARA principle).

126. Traditionally there are different approaches to addressing the dangers of ionising radiation.

127. The discipline of radiation protection, on the one hand, is primarily concerned with the protection of the health of people against exposure to ionising radiation or radioactive materials. It is dominated by public health experts and focuses on persons and the radiation doses to which they should be exposed. Radiation protection started as a subdiscipline of medical radiology, because the radiation doses delivered by the first X-ray generators were so high that the medical personnel involved soon suffered from deterministic radiation effects. Later its field was extended to protection against ionising radiation from

50 — See B. Lindell, H. Dunster, J. Valentin 'International Commission on Radiological Protection: History, Policies, Procedures', website of the ICRP, www.icrp.org.

all types of sources (e.g. sources in the nuclear energy sector, in medical institutions or in research facilities). In the 1950s radiation protection experts still assumed that exposure to radiation below certain dose limits would not have any harmful health effects at all. From 1977 onwards, in the light of long-term studies of the stochastic effects of radiation, the ICRP recommended the combination of dose limits with the ALARA principle.

128. The discipline of 'safety' (of nuclear installations, of nuclear transport etc.), on the other hand, is by contrast primarily concerned with the technological safety of radiation sources, and in particular the means for preventing accidents and for mitigating the effects of accidents should they occur. There are many types of sources, and hence safety may be termed nuclear installation safety, radioactive waste safety or transport safety. The 'safety' community is dominated by physicists and engineers. 'Safety' is source-oriented and seeks to maintain full technological control over each source.

129. Clearly radiation protection and safety of sources are closely connected: on the one hand, if radiation protection is to have any practical impact, it must at least try to identify the source which produces the radiation at issue; on the other, safety arrangements concerning a given source must guarantee that in all operational states radiation doses are kept below prescribed limits and as low as reasonably achievable. There is moreover evidence that the borderlines between both disciplines are becoming more blurred.

130. Thus the currently applicable formal system of radiation protection of the ICRP [51] which inspired the latest reform of the Community basic safety standards establishes rules on 'optimisation' as regards 'practices' which increase exposure and 'interventions' which decrease exposure from existing sources. It also contains principles on 'source-related dose constraints', 'potential exposure' and 'accident prevention'. All those principles have in common that they concern control over sources of harmful radiation to a much greater extent than mere dose limits would do.

131. There is a parallel tendency at the International Atomic Energy Agency to adopt an integrated approach to 'Nuclear Safety' which combines technical safety aspects with radiation protection aspects. [52] For example under the current philosophy of the IAEA the 'general nuclear safety objective' to 'protect individuals, society and the environment from harm by estab-

51 — ICRP Publication No 60.

52 — See on the following the website of the IAEA at www.iaea.org.

lishing and maintaining in nuclear installations effective defences against radiological hazards' is 'complemented' by a 'radiation protection objective' and a 'technical safety objective'. The three most important publications of the IAEA Safety Standards programme ('Safety Fundamentals') which in the past dealt separately with 'The Safety of Nuclear Installations', 'Radiation Protection and the Safety of Radiation Sources' and 'The Principles of Radioactive Waste Management' are currently merged into a single publication entitled 'Objectives and Principles of Nuclear, Radiation, Radioactive Waste and Transport Safety'. In organisational terms the Department of Nuclear Safety now coordinates both the Nuclear Installations Safety Division and the Radiation and Waste Safety Division.

132. It follows from the foregoing that in the 1950s the disciplines of 'nuclear safety' and 'radiation protection' were still largely separate: the former focused exclusively on the technological safety of nuclear installations and the latter on maximum exposure and dose limits for workers and the population as a whole. Today there is by contrast a significant overlap between nuclear safety and radiation protection: nuclear safety has not only a technological but also a radiation protection component and radiation protection seeks to limit exposures according to the ALARA principle through increased control over sources of radiation such as nuclear installations.

(b) 'Health and safety' in the Euratom Treaty

133. The priority of the authors of the Euratom Treaty was to create the conditions necessary for the speedy establishment and growth of nuclear industries (Article 1 of the Treaty). They were however also aware that workers and the general public had to be protected against the dangers of ionising radiation.

134. The Spaak Report [53] envisaged in that regard:

— common minimum rules which would regulate nuclear installations as well as the conditions of the storage, transport and treatment of nuclear material;

53 — *Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères*, published by the Comité Intergouvernemental créé par la Conférence de Messine, Brussels, 21 April 1956, p. 109.

— control of the safety of nuclear installations by the institutions of the Community;

— the need to notify planned installations to the Community and the possibility for the Community to object for security reasons to such an installation, with the consequence that the installation would not receive fissile material;

— the day-to-day monitoring of nuclear installations by the authorities of the Member States under the control of the Community.

135. The authors of the Treaty however gave the Community more limited powers: [54]

— the laying down of basic standards for the protection of the health of people, defined as maximum permissible doses, maximum levels of exposure and contamination and the fundamental principles governing the health surveillance of workers (Articles 30 to 32 of the Treaty);

— notification and consultation requirements as regards particularly dangerous experiments and of plans for the disposal of radioactive waste (Articles 34 and 37 of the Treaty);

— monitoring not directly of nuclear installations, but of control facilities (Article 35 of the Treaty),

— recommendations (Articles 33 and 38(1) of the Treaty) and legally binding directives in cases of urgency (Article 38(2) of the Treaty).

136. It follows that the authors of the Treaty did not wish to grant the Community far-reaching powers as regards 'nuclear safety' (as understood in 1957) and that they intended the Community to act mainly

54 — See on Articles 30 to 39 of the Treaty C. Blumann, Euratom, *Répertoire de Droit Communautaire* Éditions Dalloz Paris 1992, paragraphs 100 et seq.; K. Lenaerts, Border Installations, in P. Cameron, L. Hancher, W. Kühn (Ed.) *Nuclear Energy Law after Chernobyl*, Graham & Trotman and International Bar Association, London, 1988, p. 49; M. Schröder, Binnenmarktrelevante Schwerpunkte der Gemeinschaftspolitik zur nuklearen Sicherheit in N. Pelzer (Ed.), *Kernenergierecht zwischen Ausstiegsforderung und europäischem Binnenmarkt*, Nomos Baden-Baden 1991, p. 133; J. Grunwald, 'Tchernobyl et les Communautés Européennes: Aspects Juridiques', *Revue du Marché Commun* 1987, p. 396 (the same author summarises more recent developments in *EuZW* 1990, p. 209 and *ZEuS* 1998, 275).

in the field of 'radiation protection' (also as understood in 1957).

137. What should be today's implications of that historical choice?

138. On the one hand, I consider that despite the subsequent developments of the disciplines of nuclear safety and radiation protection outlined above the basic decision of the authors of the Treaty must be respected. The Member States clearly wished to retain technological control over the installations on their territories. As Community law stands, they therefore possess in my view exclusive (or virtually exclusive) competence over the technological aspects of nuclear safety as it is understood today. In that regard it is significant that the Community has never adopted legislation on the technological aspects of nuclear safety and that the main Community instruments in that field are two non-binding Council resolutions. [55] It should however be borne in mind that externally, notably in Central and Eastern Europe and the New Independent States, the Community undertakes many activities which concern the technological side of nuclear safety and which are based where necessary on Article 203 of the Treaty. [56]

139. On the other hand I consider that the Community shares certain — albeit limited — competences with the Member States as regards the radiation protection aspects of nuclear safety. That follows in my view from an interpretation of Articles 30 to 39 of the Treaty which takes account of:

— the objectives of those provisions;

— the possibility to 'revise' and 'supplement' the basic standards under Article 32 of the Treaty;

— the evolution over time of the scientific and international legal background of those Articles;

55 — See OJ 1975 C 185, p. 1 and OJ 1992 C 172, p. 2; see also the Commission report on the implementation of those Council Resolutions: 'Towards a System of Safety Criteria and Requirements Recognised throughout the Community and a Genuine Safety Culture throughout Europe', COM(93) 649.

56 — See, for example, Council Decision 1999/25/Euratom of 14 December 1998 adopting a multiannual programme (1998 to 2002) of actions in the nuclear sector, relating to safe transport of radioactive materials and to safeguards and industrial cooperation to promote certain aspects of the safety of nuclear installations in the countries currently participating in the Tacis programme, OJ 1999 L 7, p. 31; see in that context also the Resolution of the European Parliament of 11 March 1999, OJ 1999 C 175, p. 288, and the Proposal of 31 August 2001 for a Council Decision approving the signing by the Commission of a Cooperation Agreement between the Euratom Community and Russia in the field of nuclear safety, COM(2001) 474.

— the practice in their application; and

— the Court's case-law.

140. As regards, first, the objectives of the Treaty provisions, the preamble to the Treaty states rather broadly that the Member States are anxious to create the conditions of 'safety' which are 'necessary' to 'eliminate' hazards to the life and health of the public. Under Article 2(b) of the Treaty the Community must not only 'establish uniform safety standards', but also 'ensure that they are applied'. It will be noted that the Treaty refers repeatedly to 'safety' and attaches central importance to the effective implementation, application and enforcement of the corresponding provisions. The protection of the health of the public has thus always been an important preoccupation of the Treaty despite the fact that the dangers of nuclear installations were without doubt less real to the negotiators and to the general public when the Euratom Treaty was drawn up. [57]

141. Second, under Article 32 of the Treaty the basic standards may be not only 'revised', but also 'supplemented'. The authors of the Treaty thus wanted to ensure that the Community would be able not only to modify its health and safety policy but also to extend its scope.

142. On the basis of Articles 31 and 32 of the Treaty the basic standards have been revised on numerous occasions [58] to take account of increasing scientific knowledge of radiation protection. [59] Some of the main features of today's Basic Standards Directive concern the radiation protection aspects of nuclear safety; they include:

— a system of reporting and prior authorisation for certain practices such as the operation of facilities of the nuclear fuel cycle (e.g. nuclear power plants) in order to ensure compliance with the basic standards (Recital 9 of the preamble and Articles 3 to 5);

— justification of exposure: all classes and types of practice (e.g. the operation of a nuclear installation) resulting in exposure to radiation must be justified before being first adopted or first approved by their benefits in relation to the health detriment they may cause

57 — *Ruling 1/78*, cited in note 45, paragraph 20.

58 — See above at paragraph 43.

59 — See for example Recital 3 of the preamble to Council Directive 76/579/Euratom, cited in note 10.

(Recital 10 of the preamble and Article 6(1) and (2));

— optimisation of protection: all exposures must be kept as low as reasonably achievable, economic and social factors being taken into account (Recital 10 of the preamble and Article 6(3)(a));

— dose limitations: the sum of doses from all relevant practices must not exceed certain dose limits (Recital 10 of the preamble and Article 6(3)(b));

— the use of source-related dose constraints in optimisation of protection, i.e. restrictions on the prospective doses to individuals which may result from a defined source, for use at the planning stage of the source (Article 7 and the definition in Article 1);

— principles of operational protection of the population in normal circumstances which require the establishment by the Member States of a system of inspection to keep under review the radiation protection of the population and to check compliance with the basic standards (Recital 13 of the preamble and Articles 43 to 46);

— the concepts of potential exposure and emergency preparedness (Recital 14 of the preamble and Articles 48 to 53).

143. Moreover, after the nuclear accident at the Chernobyl nuclear power station on 26 April 1986 the Council supplemented the basic standards by several measures which are based on either Article 31 alone or Articles 31 and 32 of the Treaty and which cover issues most probably not directly envisaged by the authors of the Treaty. Those measures concern for example:

— the early exchange of information in the event of a radiological emergency; [60]

— information of the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency; [61]

60 — Council Decision 87/600/Euratom of 14 December 1987, OJ 1987 L 371, p. 76.

61 — Council Directive 89/618/Euratom of 27 November 1989, OJ 1989 L 357, p. 31.

— maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident; [62]

— the operational protection of outside workers exposed to the risk of ionising radiation during their activities in controlled areas; [63]

— the supervision and control of shipments of radioactive waste between Member States and into and out of the Community; [64] and

— shipments of radioactive substances between Member States. [65]

144. Third, it follows in my view from the evolution of the scientific and international background that the definition of 'basic standards' in Article 30(2) of the Treaty cannot be relied on for the determination of the current scope of Articles 30 to 32 of the Treaty. As I have already pointed out, when the Treaty was drafted, radiation protection experts still assumed that exposure to radiation below certain dose limits would not have any harmful health effects at all. [66] It was therefore understandable for the authors of the Treaty to define basic standards in Article 30(2) of the Treaty as 'maximum permissible doses' or as 'maximum permissible levels of exposure'.

145. Today, however, it is clear that the stochastic effects of radiation can only be limited if radiation exposure is optimised and kept as low as reasonably achievable. The ICRP therefore focuses mainly on 'optimisation of exposure'. Where the wording of a provision of the Treaty necessarily reflects the state of scientific knowledge at a given time and where that knowledge evolves, it would in my view be wrong to attach too much importance to that wording. The Council and the Commission were therefore wholly justified in following and incorporating the evolution of scientific knowledge in the field of radiation protection when they revised and supplemented the basic standards over the years.

146. Fourth, the concordant and consistent practice of the Member States (mainly *via* the Council) and of the institu-

62 — Council Regulation (Euratom) No 3954/87 of 22 December 1987, OJ 1987 L 371, p. 11.

63 — Council Directive 90/641/Euratom of 4 December 1990, OJ 1990 L 349, p. 21.

64 — Council Directive 92/3/Euratom of 3 February 1992, OJ 1992 L 35, p. 24.

65 — Council Regulation (Euratom) No 1493/93 of 8 June 1993, OJ 1993 L 148, p. 1.

66 — According to the Spaak Report, cited in note 53, the negotiators of the Treaty attached particular importance to a report from the ICRP on the maximum radiation doses which the human body could sustain.

tions of the Community (mainly the Commission and the Council) as reflected in the legislation listed above and in particular in the Basic Standards Directive demonstrates a consensus that the Community has competence as regards the radiation protection aspects of nuclear safety.

147. It is true that in the context of the EC Treaty the Court has held that mere practice cannot override Treaty provisions. [67] What is in issue in the present case is however the *interpretation* of the *Euratom* Treaty and there are in my view good reasons for the Court to interpret Articles 30 to 39 of that Treaty in the light of subsequent practice and in particular of the Basic Standards Directive.

148. Interpretation in the light of subsequent practice is a common feature of the interpretation both of international treaties [68] and of national constitutions. An interpretation in the light of subsequent practice is particularly legitimate and appropriate where the provisions in question were drafted long ago, where they have not been amended since and where there is a common and consistent practice of all actors entitled to interpret, apply or modify the rules in question.

149. It must be recalled that the Euratom Treaty was drafted more than 40 years ago at a time when knowledge about and the economic prospects of nuclear energy were very different from today. It must also be borne in mind that despite that different political, economic and scientific context the substantive rules of the Treaty have not been modified. It is not only the chapter on Health and Safety but also several other parts of the Euratom Treaty such as the chapters concerning 'supplies' (Articles 52 to 76) or 'safeguards' (Articles 77 to 85) which cannot be properly interpreted or understood without an analysis of the practice in their application. [69]

150. Finally, the proposition that Articles 30 et seq. of the Treaty should be interpreted broadly is also confirmed by the Court's case-law. In *Saarland* v *Minister for Industry*, which concerned the nuclear power plant at Cattenom in France, the Court ruled that those provisions formed 'a coherent whole conferring upon the Commission powers of some considerable scope

67 — Case C-327/91 *France* v *Commission* [1994] ECR I-3641, paragraph 36 of the judgment; see for a critique of that reasoning P.J. Kuijper, 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties' 1969, *Legal Issues of European Integration*, 1998, p. 1.

68 — See Article 31(3)(b) of the Vienna Convention; see also I. Sinclair, *The Vienna Convention on the Law of Treaties* 2nd edition, Manchester University Press, Manchester 1984, p. 135.

69 — See on those two chapters and the impact of subsequent practice, W. Manig, *Die Änderung der Versorgungs- und Sicherheitsvorschriften des Euratom-Vertrages durch die nachgfolgende Praxis*, Nomos, Baden-Baden, 1993.

in order to protect the population and the environment against the risks of nuclear contamination.' [70] In *Parliament* v *Council*, which concerned Council Regulation (Euratom) No 3954/87 on maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident, [71] the Court refused to accept the restrictive interpretation suggested by the Parliament and held that the purpose of Articles 30 et seq. of the Treaty was 'to ensure the consistent and effective protection' of the health of the public against the dangers arising from radiations, 'whatever their source and whatever the categories of persons exposed to such radiations'. [72]

151. It is in the light of those general considerations that the Community's competence as regards the contentious Articles of the Convention must be assessed.

6. The extent of the Community's competence in the fields covered by the Convention

152. Under Article 101(1) of the Treaty the Community may conclude international agreements 'within the limits of its powers and jurisdiction'. Euratom's external competence therefore has the same scope as its internal competence or, in other words, it has the power to enter into international agreements on all the matters on which it is entitled to act internally. [73]

153. Article 30(4)(iii) of the Convention requires the Community to indicate the extent of its competence in the field covered by the articles of the Convention which apply to it. That means that the Community must indicate all the articles of the Convention where it possesses powers to exercise the rights and fulfil the obligations which arise under those articles. [74] The main purpose of that obligation is to indicate to the other contracting parties those provisions of the Convention with which the Community has to comply. In that regard it follows from Article 4 of the Convention that the Community has to take into consideration not only its legislative, regulatory and administrative implementing powers but also its powers to take 'other' steps.

154. Both parties agree on the proper method of proceeding, namely to start with the obligations (or rights) arising under the contentious provisions of the Convention and to examine whether the Community has powers to implement those obligations (or to exercise those rights).

70 — Case 187/87, cited in note 18, paragraph 11.

71 — Cited in note 62.

72 — Case 70/88, cited in note 49, paragraph 14 of the judgment.

73 — I. MacLeod, I.D. Hendry, S. Hyett, *The External Relations of the European Communities*, Clarendon Press, Oxford, 1996, p. 392.

74 — See above at paragraph 98.

155. Both parties agree also that the Community must include a provision of the Convention in its declaration independently of whether its competence is exclusive or shared with the Member States. A provision of the Convention must thus be included in the declaration even where the Community shares the implementing power with the Member States and even where the Community's power consists merely in taking certain 'other' steps necessary for implementation within the meaning of Article 4 of the Convention.

156. The parties disagree however on the related, but different question whether the nature of the Community's competence must be disclosed to third parties. The Council maintains that Article 30(4)(iii) requires the Community to indicate in each case not only the article of the Convention where the Community is competent, but also whether the Community shares the competence in question with the Member States. The Commission argues that according to the passage already quoted from *Ruling 1/78*[75] the other contracting parties are only entitled to know whether the Community possesses any competence at all.

157. Since there is nothing which prohibits the Community from informing other contracting parties about the nature of the Community's competence and since the Commission does not formally attack that aspect of the declaration in issue, it is not necessary to pursue that question. Where it is not clear whether a statement on the nature of the Community's competence (exclusive or shared) is required, it may however be appropriate to follow the Court's recommendation in *Ruling 1/78* and to consider the issue as an internal matter.

(a) Articles 1 to 3 of the Convention

158. Article 1 enumerates the objectives of the Convention, Article 2 defines the terms 'nuclear installations', 'regulatory body' and 'licence' and Article 3 defines the scope of application of the Convention.

159. I agree with the Council that those provisions are 'neutral' in that they create neither rights nor obligations. Questions of competence do not arise and a delimitation of competence would not serve any useful purpose.

(b) Articles 4 and 5 of the Convention

160. Article 4 requires each contracting party to take the necessary implementing measures under the Convention. Article 5 requires each contracting party to submit, prior to each review meeting, a report on

75 — See paragraph 111 above.

the measures it has taken to implement the obligations of the Convention.

161. I agree with the Council that the obligations contained in Articles 4 and 5 are general in nature and apply by definition to any contracting party, including the organisations referred to in Article 30(4). Those Articles do not therefore require a delimitation of the respective competence of the Community and its Member States.

(c) Article 7 of the Convention

162. Article 7(1) of the Convention requires the contracting parties to establish and maintain a legislative and regulatory framework to govern the safety of nuclear installations.

163. Under Article 7(2) that legislative and regulatory framework must provide for:

(i) the establishment of national safety requirements and regulations;

(ii) a system of licensing with regard to nuclear installations;

(iii) a system of regulatory inspection and assessment of nuclear installations;

(iv) the enforcement of regulations and of the terms of licences.

164. The Commission maintains that the Community possesses competence in those matters according to Articles 2(b), 30, 31, 32 and 35 of the Treaty and Articles 4(1)(a), 38(1) and 46 and Title VI of the Basic Standards Directive.

165. The Council submits that the Commission's argument is fundamentally flawed. Whereas the overall objective of the Treaty and the Convention, namely protection against the harmful effects of radiation, may be similar, the means of achieving that objective are very different. While the Convention is concerned with the safety of nuclear installations as such, the Community measures are only concerned with laying down minimum requirements for the protection of persons against

the dangers of ionising radiation. The Treaty thus entitles the Community to impose only 'obligations of result' on the Member States, but not to specify how those results are to be achieved and in particular how nuclear installations should be designed or operated.

166. In my view, it must first be borne in mind that whilst not all ionising radiation emanates from nuclear installations, all nuclear installations are a potential source of ionising radiation and thus necessarily also of concern for radiation protection. There is no provision of Community law which immunises nuclear installations from the scope of radiation protection. Second, it is true that both the Treaty and the Convention seek on their own terms to deal with the fact that all nuclear activity involves a potential radiation risk for the population. But even if their respective fields of application do not coincide, they overlap significantly. 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. From a legal perspective it is also evident that modern radiation protection systems such as the Basic Standards Directive are increasingly source-oriented and therefore necessarily also regulate aspects of the safety of installations. Conversely modern systems of safety legislation such as the Convention at issue follow an integrated approach and incorporate radiation protection aspects of safety (e.g. Article 15 of the Convention).

167. I consider therefore that the Community has certain limited regulatory competence in the matters covered by Article 7 of the Convention, which flow from Articles 2(b), 30, 31 and 32 of the Treaty as they must now be understood. That regulatory competence is exercised for example by Articles 3 to 5 (reporting and authorisation) and Articles 43 to 47 (operational protection of the population in normal circumstances) of the Basic Standards Directive. The fact that the Member States retain exclusive competence over the technological aspects of nuclear safety does not prevent the Community from adopting legislation which establishes certain safety requirements, authorisation requirements, inspection and assessment requirements or enforcement mechanisms.

168. The Council argues more specifically that:

— it referred to Article 7(1) in the second paragraph of the declaration;

— subparagraph (i) of Article 7(2) is inapplicable to the Community since it refers to 'national' requirements and

regulations and therefore concerns only States;

— subparagraphs (ii) to (iv) of Article 7(2) are inapplicable to the Community since the Euratom Treaty does not grant the Community the responsibility for licensing nuclear installations;

— the competence of the Community cannot be deduced from a provision of the Basic Standards Directive because, taken as a whole, that directive applies only to 'practices' and not to 'installations';

— in any event the competence of the Community could not be deduced from Article 4(1)(a) of the Basic Standards Directive which is purely incidental and, in addition, subject to the considerable exceptions of Article 4((3) thereof.

169. As to those specific arguments I consider that:

— the second paragraph of the declaration is not at issue in the present case;

— it follows from Article 30(4)(ii) that regional organisations must fulfil all the responsibilities which the Convention attributes to State parties; the Council's assertion that subparagraph (i) of Article 7(2) concerns only States is therefore misconceived;

— in relation to subparagraphs (ii) to (iv) of Article 7(2) the fact that the Community has (allegedly) no powers in connection with the licensing of individual nuclear installations does not mean that it has no legislative powers to establish a system of licensing to be applied by Member States;

— nuclear installations within the meaning of the Convention do not fall outside the scope of the Basic Standards Directive: that directive applies to all practices which involve a risk from radiation emanating from an artificial or natural radiation source and thus *inter alia* to the production, processing, handling, use, holding, storage and disposal of radioactive substances (Article 2(1)); 'source' is moreover expressly defined as an apparatus, a radioactive substance or an *installation* capable of emitting radiation or radioactive substances (Article 1);

— Article 4(1)(a) of the Basic Standards Directive which subjects the operation and decommissioning of any facility of the nuclear fuel cycle to prior authorisation is a central provision of the directive.

170. Article 7 should accordingly have been included in the declaration.

(d) Article 14 of the Convention

171. Under Article 14 the contracting parties must take the appropriate steps to ensure that:

(i) comprehensive and systematic safety assessments are carried out before the construction and commissioning of a nuclear installation and throughout its life,

(ii) verification by analysis, surveillance, testing and inspection of the physical state and the operation of a nuclear installation is carried out.

172. The Commission maintains that the Community possesses competence in those matters according to Articles 35, 36 and 38 of the Treaty and Articles 44, 38 and 46 of the Basic Standards Directive.

173. The Council submits that:

— it referred to Article 14(ii) in the second paragraph of the declaration since the Community possesses powers as regards the monitoring of continued conformity with safety requirement;

— it did not refer to Article 14(i) since no Article of the Treaty gives the Community jurisdiction to carry out evaluations prior to the construction and the putting into service of a nuclear installation;

— Article 35 of the Treaty entitles the Community to control monitoring facilities, but not nuclear installations;

— the rights of initiative and the monitoring powers of the Community under

Articles 30 et seq. of the Treaty do not cover nuclear installations.

174. I consider that under Articles 2(b) and 30 to 32 of the Treaty the Community has regulatory powers, albeit limited, in the matters covered by Article 14 of the Convention which are exercised for example by Articles 44, 38 and 46 of the Basic Standards Directive. Article 44(1)(a) of that directive requires the Member States to examine and approve plans for installations and of the proposed siting of such installations from the point of view of radiation protection, Article 44(1)(b) requires them to accept such new installations into service only if adequate protection is provided and Articles 38(1) and 46(1) require them to establish systems of inspection in respect of the protection of exposed workers and of the health of the population.

175. Under Article 37 of the Treaty (as interpreted by the Court in the *Cattenom* judgment [76]) and Article 38 of the Treaty the Community also has its own powers to monitor nuclear installations which partly overlap with the matters covered by Article 14 of the Convention. [77]

76 — Case 187/87, cited in note 18.

77 — See below at paragraphs 201 to 207.

176. As regards the Council's specific arguments I consider that:

— the second paragraph of the declaration is not at issue in the present case;

— the fact that the Community has (allegedly) no powers to carry out evaluations prior to the construction and the putting into effect of individual nuclear installations does not mean that it has no legislative powers to oblige the Member States to establish such a system of prior assessment; paragraph (i) of Article 14 of the Convention refers moreover not only to assessments before construction but also to assessments throughout the life of a nuclear installation;

— it is true that under Article 35(2) the Commission has only the power to control monitoring facilities, but that has no bearing on its regulatory powers to prescribe assessments or verifications by the Member States or its own monitoring powers under Articles 37 and 38 of the Treaty;

— nothing indicates that nuclear installations as potential sources of ionising radiation are as such outside the scope of Articles 30 et seq. of the Treaty.

177. Article 14 should accordingly have been included in the declaration.

(e) Articles 15 and 16(2) of the Convention

178. Articles 15 and 16(2) are included in the declaration and are not in issue. It is nevertheless useful to recall their content. Under Article 15 the contracting parties must take the appropriate steps to ensure that in all operational states, the radiation exposure of the workers and the public caused by a nuclear installation must be kept as low as reasonably achievable and that no individual must be exposed to radiation doses which exceed prescribed national dose limits.

179. Under Article 16(2) the contracting parties must take the appropriate steps to ensure that, in so far as they are likely to be affected by an emergency, their own population and the authorities of the states in the vicinity of the installation are provided with information for emergency planning and response.

(f) Article 16(1) and (3) of the Convention

180. Under Article 16(1) of the Convention the contracting parties must take the appropriate steps to ensure that there are on-site and off-site emergency plans for nuclear installations which are tested both before and after the installation commences operation.

181. Under Article 16(3) of the Convention contracting parties which do not have a nuclear installation on their territory, in so far as they are likely to be affected in the event of a radiological emergency at a nuclear installation in the vicinity, must take the appropriate steps for the preparation and testing of emergency plans for their territory that cover the activities to be carried out in the event of such an emergency.

182. The Commission maintains that the Community possesses competence in the

matters covered by Article 16(1) and (3) of the Convention according to Articles 2(b) and 30 to 32 of the Treaty and Article 50 of the Basic Standards Directive.

183. The Council submits that Article 16(1) concerns installations and that the Euratom Treaty left the Member States their jurisdiction as regards installations. In the Council's view the development of emergency plans for installations therefore falls within the exclusive competence of the Member States. Article 50 of the Basic Standards Directive is an ancillary provision and calls upon the Member States merely to be prepared for and to cooperate as regards the monitoring of radiation. The Council also submits that Article 16(3) of the Convention does not concern the Community, since the Community is a contracting party which has nuclear installations on the territory of its Member States.

184. I consider that emergency preparedness is one of the areas in which the concerns of installation safety and of radiation protection overlap. Emergency plans for nuclear installations cannot disregard radiation protection aspects. Conversely emergency plans for the protection of the population cannot be planned *in abstracto* without taking into account the technological and physical characteristics of concrete emergencies which might occur. The Community therefore has regulatory powers under Articles 2(b) and 30 to 32 of the Treaty to lay down basic standards concerning the preparation of different types of emergency measures which include the power to require the Member States to draw up plans for emergency measures for nuclear installations. Those powers are exercised for example by Article 50 of the Basic Standards Directive which imposes a legally binding requirement on the Member States *inter alia* to ensure that intervention plans are drawn up at national or local level including within installations.

185. The Council's argument as regards Article 16(3) of the Convention is flawed, since it ignores the fact that the Community is composed of Member States both with and without nuclear installations on their territory. Where the Community lays down basic standards in the field of emergency preparedness it takes account of those Member States which do not have installations on their territory. Article 50(1) of the Basic Standards Directive for example requires the Member States to ensure that account is taken of the fact that emergencies may occur in connection with practices on or *outside* their territory. The Community must therefore comply with Article 16(3) in so far as it adopts measures which concern those Member States which do not have nuclear installations on their territory.

186. Article 16(1) and (3) should accordingly have been included in the declaration.

(iv) consulting contracting parties in the vicinity of a proposed installation, and on request providing the necessary information to such contracting parties, in order to enable them to evaluate and make their own assessment of the likely safety impact on their own territory of the nuclear installation.

(g) Articles 17, 18 and 19 of the Convention

187. Under Article 17 the contracting parties must take the appropriate steps to ensure that procedures are established and implemented for:

188. In respect of Article 17 of the Convention the Commission submits that the Community possesses competence according to Articles 2(b), 30 to 32 and 37 of the Treaty and Article 44(1)(a) and (b) of the Basic Standards Directive. The Commission refers also to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [78] as amended by Council Directive 97/11/EC, [79] which requires 'nuclear power stations and other nuclear reactors' to be made subject to an environmental impact assessment.

(i) evaluating all site-related factors likely to affect the safety of a nuclear installation for its projected lifetime;

189. Under Article 18 the contracting parties must take the appropriate steps to ensure that:

(ii) evaluating the likely safety impact of a proposed installation on individuals, society and the environment;

(i) the design and construction of a nuclear installation provide for several reliable levels and methods of protec-

(iii) re-evaluating as necessary all relevant factors so as to ensure the continued safety acceptability of the installation;

78 — OJ 1985 L 175, p. 40.
79 — OJ 1997 L 73, p. 5.

tion (defence in depth) against the release of radioactive materials;

(ii) the technologies incorporated in the design and construction of a nuclear installation are proven by experience or qualified by testing or analysis;

(iii) the design of a nuclear installation allows for reliable, stable and easily manageable operation.

190. In respect of Article 18 of the Convention the Commission submits that the design and the construction of a nuclear installation must guarantee that it can be operated in compliance with the Basic Standards. In that regard for example Article 18 (establishment of supervised and controlled areas), Articles 9 and 13 (dose limits for workers), Article 43 (operational protection of the public) and Article 6(3)(b) of the Basic Standards Directive must be complied with.

191. Under Article 19 the contracting parties must take the appropriate steps to ensure that:

(i) the initial authorisation to operate a nuclear installation is based on an appropriate safety analysis and commissioning programme;

(ii) operational limits and conditions are defined and revised as necessary for identifying safe boundaries for operation;

(iii) operation, maintenance, inspection and testing of a nuclear installation are conducted in accordance with approved procedures;

(iv) procedures are established for responding to anticipated operational occurrences and to accidents;

(v) necessary engineering and technical support in all safety-related fields is available throughout the lifetime of a nuclear installation;

(vi) incidents significant to safety are reported in a timely manner by the holder of the relevant licence to the regulatory body;

(vii) programmes to collect and analyse operating experience are established, the results obtained and the conclusions drawn are acted on and experience is shared with international bodies and with other operating organisations and regulatory bodies;

(viii) the generation of radioactive waste is kept to the minimum practicable.

192. In respect of Article 19 of the Convention the Commission argues that the Community's powers are evidenced by Article 4(1)(a) (authorisation requirement for any facility of the nuclear fuel cycle), Title IV (justification, optimisation and dose limitation for practices), Articles 43, 44 and 47 (radiation protection for the population in normal circumstances) and Article 50 (intervention preparation) of the Basic Standards Directive. Under Article 37 of the Treaty as interpreted by the Court in the *Cattenom* judgment [80] the Commission is moreover involved in the licensing process of nuclear installations, in so far as they are covered by the Treaty.

193. In my view, either the Community has no competence in the matters covered by Articles 18 and 19 of the Convention or any such competence is so insignificant that it should not be declared to the other contracting parties.

194. It will be recalled that Articles 18 to 19 are part of Section (d) of Chapter 2 of the Convention which is entitled 'Safety of installations'. It will also be recalled that the Convention pursues the overall objective of a high level of 'nuclear safety' and that it distinguishes in that regard between 'General safety considerations' (Section (c) of Chapter 2) and 'Safety of installations' (Section (d)). The obligations in Section (c) and in particular in Articles 14, 15 and 16 are thus the expression of a comprehensive and integrated approach to safety which incorporates both technological safety and radiation safety aspects. The obligations in Articles 18 ('Design and construction') and 19 ('Operation') concern by contrast almost exclusively the technological aspects of safety. Their main purpose is to establish and maintain effective technical defences against potential accidents (Article 1(ii)). That relationship between Sections (c) and (d) is particularly evident as regards the relationship between the general obligation of a 'comprehensive and systematic' prior assessment under Article 14(i) and the more specific assessment obligations under Article 19(i).

195. However, as Community law stands, the Member States retain, as I have already stated, exclusive competence for the technological side of nuclear safety. Even if

80 — See above at note 18.

radiation protection must be understood broadly and the wording of Article 30(2) of the Treaty is to a certain extent outdated, it is nevertheless clear that the authors of the Treaty did not intend the Community to interfere with safety of nuclear installations *stricto sensu*.

196. The Council was accordingly right not to include Articles 18 and 19 of the Convention in the declaration.

197. As regards Article 17 ('Siting'), the system of the Convention may seem to suggest that the siting of a nuclear installation is also part of the technological side of nuclear safety and thus part of the exclusive competence of the Member States. It is also clear that the Commission's reliance on Directive 85/377/EEC is misplaced: since that Directive was adopted under the EC Treaty, it cannot be taken into account for the analysis of the competence of the Euratom Community.

198. I consider none the less that the siting of nuclear installations is a further area where radiation protection and technological safety aspects considerably overlap and where the Community therefore has a certain (limited) competence. The site for a nuclear installation must be chosen on the basis of an assessment of both technological 'safety' aspects (for example seismological, meteorological and hydrological features of the site) and 'radiation protection' aspects (for example demographical features of the site or the foodstuffs growing in the region). Those radiation protection aspects seem to be envisaged by Article 17(ii) of the Convention which mentions the 'likely safety impact of a proposed nuclear installation on individuals, society and the environment'.

199. As regards the Community's competence in that field it must first be recalled that under Articles 43 and 44 of the Basic Standards Directive the Member States must create the conditions necessary to apply the fundamental principles governing operational protection of the population which includes *inter alia*:

— the examination and approval of the *proposed siting* of installations involving an exposure risk from the point of view of radiation protection, and

— acceptance into service of new installations subject to adequate protection being provided against any exposure or radioactive contamination liable to

extend beyond the perimeter, taking into account, if relevant, *demographic, meteorological, geographical, hydrological and ecological conditions.*

200. It follows that the Community has a regulatory competence based on Articles 31 and 32 of the Treaty and exercised by the Basic Standards Directive to require the Member States to examine and approve the proposed site of an installation from a radiation protection point of view and to take the siting into account when they accept new installations into service

201. Second, Article 37 of the Treaty requires each Member State to provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as 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.

202. Both the Commission and the Member States interpret 'disposal of radioactive waste' (in French 'rejet d'effluents radioactifs', in German 'Ableitung radioaktive Stoffe') and 'general data' broadly.

203. According to Commission Recommendation 1999/829/Euratom of 6 December 1999 on the application of Article 37 of the Euratom Treaty [81] the term 'disposal of radioactive waste' covers any planned disposal or accidental release of radioactive substances associated with operations such as the operation of nuclear reactors, the reprocessing of irradiated fuel or the storage of irradiated nuclear fuel in gaseous, liquid or solid form in or to the environment. It thus encompasses both planned liquid and gaseous effluent discharges of nuclear installations under normal operating conditions and unplanned effluent discharges which could result from an accident.

204. According to the same recommendation 'general data' within the meaning of Article 37 should be understood, in the context of the operation of a nuclear reactor, as including data on the site and the surroundings of the planned installation and in particular data on the geographical, topographical, geological, seismological, hydrological, meteorological features of the site and region, on the natural resources and foodstuffs of the region and on other activities in the vicinity of the site.

205. It must also be recalled that in the *Cattenom* judgment, [82] which concerned an authorisation procedure for a nuclear

81 — OJ 1999 L 324, p. 23.
82 — Cited in note 18.

power plant, the Court interpreted Article 37 as meaning that the Commission must be provided with such 'general data' before a 'disposal of radioactive waste' is authorised by the competent Member State and that the Commission's opinion must, in order to be rendered fully effective, be brought to the notice of that State before the issue of any such authorisation.

206. It is thus constant practice under Article 37 of the Treaty that the Member States provide 'general data' to the Commission *inter alia* on the site and the surroundings of a planned facility in the course of the national authorisation procedures for the operation of nuclear power plants, [83] reprocessing facilities, [84] and storage facilities. [85] On the basis of those notifications and following consultation with the group of national experts referred to in Article 31 of the Treaty the Commission has already drawn up a considerable number of Opinions. [86] In those Opinions the Commission examines in particular the features of the site of the planned installations (e.g. distance to the nearest other Member State, natural features of the site). It assesses primarily whether the planned installations are liable to lead to an exposure, significant from the point of view of health, of members of the population of another Member State or to significant radioactive contamination of the water, soil or airspace of another Member State.

207. It follows that under Article 37 of the Treaty the Commission possesses competence to draw up Opinions on the siting of nuclear installations from a radiation protection point of view. That type of non-binding measure might be meant by Article 4 of the Convention which refers in addition to legislative, regulatory and administrative measures also to 'other steps necessary for implementing' the obligations of the Convention.

208. It should perhaps also be noted that the Council did not mention the siting of nuclear installations when it stated in the preamble to the contested decision of 7 December 1998 that the competence for the 'design, construction and operation' of nuclear installations lay with the Member States in which they were located. Aspects of siting are in my view within the Community's competence, so that the declaration should have referred to Article 17 of the Convention.

209. The Council was accordingly right not to include Articles 18 and 19 of the Convention in the declaration but should have included Article 17 of the Convention.

83 — See for example OJ 1992 L 344, p. 40 or OJ 1997 C 51, p. 5.

84 — See for example OJ 1992 L 138, p. 36.

85 — See, for example, OJ 1994 L 297, p. 39.

86 — See for a list of recent Opinions Grunwald, *ZEuS* 1998, p. 275.

VII — Conclusion

210. The main results of the foregoing analysis may be summarised as follows. The contested declaration is a reviewable internal act intended to oblige the Commission to submit to the depositary a declaration as prescribed by the Council. The legality both of the declaration and of the last paragraph of the declaration may be reviewed separately. The Convention required the Community to submit a declaration indicating those Articles of the Convention where the Community has competence to fulfil the obligations under the Convention. That declaration had to be both complete and accurate. According to the current understanding of the health and safety provisions of the Euratom Treaty there is a significant overlap between radiation protection and the safety of nuclear installations. The Community therefore possesses a certain limited competence in the field of Articles 7 (Legislative and regulatory framework), 14 (Assessment and verification of safety), 16(1) and (3) (Emergency preparedness) and 17 (Siting).

211. It follows that the third paragraph of the declaration attached to the Council decision of 7 December 1998 wrongly omits to state that the Community is competent in the fields covered by Articles 7, 14, 16(1) and (3) and 17 of the Convention on Nuclear Safety and that it must consequently be annulled to that extent.

212. Since the Commission has failed in its arguments as regards Articles 1 to 5, 18 and 19 of the Convention each party should bear its own costs.

213. Accordingly the Court should in my opinion:

(1) annul the third paragraph of the Declaration by the European Atomic Energy Community according to Article 30(4)(iii) of the Nuclear Safety Convention, attached to the Council decision of 7 December 1998 approving the accession of the European Atomic Energy Community to the Nuclear Safety Convention, in so far as it fails to state that the Community is competent in the fields covered by Articles 7, 14, 16(1) and (3) and 17 of the Convention;

(2) order each party to bear its own costs.