OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 2 December 2004 [1]

I — Introduction

1. In this action brought under Article 141 of the Treaty establishing the European Atomic Energy Community (the 'EAEC Treaty'), the Commission claims that, by failing to provide it with general data relating to a plan for the disposal of radioactive waste resulting from the decommissioning operations of the 'Jason' reactor, situated at the Royal Naval College Greenwich, the United Kingdom is in breach of Article 37 EA. This article requires Member States to provide to the Commission general data concerning any plan to dispose of radioactive waste in whatever form.

2. This case raises an important question of interpretation of Article 37 EA, namely, whether the obligation imposed by this article applies to radioactive waste emanating from nuclear facilities used for military purposes. While the Commission maintains that this is indeed the case, the United Kingdom, supported by the French Republic, argues that the article applies only to waste emanating from nuclear facilities used for civil and commercial purposes.

3. No factual matters relating to the decommissioning are in dispute in the present proceedings.

II — Factual and procedural background

4. The Jason reactor was operated by the United Kingdom Ministry of Defence at the Royal Naval College Greenwich from 1962 to 1996. During this time, it was used to train naval and dockyard personnel in reactor physics and as a research tool in support of the Naval Nuclear Propulsion Programme of the Ministry of Defence. At the end of this period, Jason was dismantled upon successful application for authorisation to the United Kingdom's Environment Agency for England and Wales.

1 — Original language: English.

5. In 1998, the Commission was informed by the United Kingdom that the Jason reactor was to be decommissioned. By letter dated 8 January 1999, the Commission asked the United Kingdom for detailed information concerning this decommission, in order to determine when the 'general data' required under Article 37 should be provided. By letter of 5 March 1999, the United Kingdom replied that it considered that facilities used for military purposes did not fall within the scope of the EAEC Treaty and that, as a result, it did not intend to provide the Commission with any general data within the meaning of Article 37. The United Kingdom offered, however, to communicate to the Commission the authorisation for the decommission obtained from the Environment Agency for England and Wales, as well as the request for authorisation lodged with this body.

6. By formal notice notified on 30 January 2001, the Commission informed the United Kingdom that it considered Title II, Chapter 3, of the EAEC Treaty to apply to ionising radiation, whatever the source. The Commission invited the United Kingdom to submit its observations on this notice within two months following its notification.

7. In its response of 30 March 2001, the United Kingdom stated that, in its view, the mission of the European Atomic Energy Community, as defined by the EAEC Treaty, was to promote the civil and commercial use of nuclear energy, to the exclusion of nuclear energy used for military purposes. In the United Kingdom's contention, only certain chapters of the Treaty could be considered to apply to defence activities.

8. On 21 December 2001, the Commission addressed a reasoned opinion to the United Kingdom in respect of the alleged breach of Article 37 EA. The Commission invited the United Kingdom to comply with the reasoned opinion within two months of receipt.

9. In its response of 20 February 2002, the United Kingdom confirmed its position that, as military facilities did not fall within the scope of the EAEC Treaty, it was not obliged to provide any information to the Commission under Article 37 EA.

10. As a result, the Commission instituted the present proceedings, which were registered with the Court on 4 February 2003.

11. On 8 December 2003, the statement in intervention of the French Republic was registered with the Court.

III — Legal framework

12. The following provisions of the EAEC Treaty are of relevance to assessing whether Article 37 applies to waste emanating from nuclear facilities used for military purposes.

A — *Chapter 3 of the EAEC Treaty*

13. Article 37 forms part of Chapter 3 of Title II of the EAEC Treaty. This chapter is entitled 'Health and Safety' and was adopted to give effect to the fourth recital to the Treaty that the Member States, whilst resolved to create the conditions 'necessary for the development of a powerful nuclear industry', are 'anxious to create the conditions of safety necessary to eliminate hazards to the life and health of the public'. It is instructive, for present purposes, to examine briefly the provisions of Chapter 3 as a whole, in order to get an idea of the type of powers given to the EAEC in the health and safety field.

14. Article 30 EA provides that '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'.

15. These standards have been laid down most recently in Council Directive 96/29.[2] Under Article 33 EA, Member States are required to ensure compliance with these basic standards.

16. Under Article 34 EA, Member States are required to obtain the opinion of the Commission as to additional health and safety measures to be taken where they intend to carry out particularly dangerous experiments. If the effects of such experiments are liable to affect the territories of other Member States, the assent of the Commission must be obtained prior to carrying out the experiment.

17. Under Articles 35 and 36 EA, Member States are required to ensure compliance with the basic standards by establishing the facilities necessary to carry out continuous monitoring of the radioactivity levels and

2 — 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 ionizing radiation, OJ 1996 L 159, p. 1.

must keep the Commission informed of these levels periodically. The Commission must have a right of access to such facilities and a right to verify their operation and efficiency.

18. Article 37 EA provides:

'Each Member State shall 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 shall deliver its opinion within six months, after consulting the group of experts referred to in Article 31.' [3]

19. Article 38 EA requires the Commission to make recommendations to the Member States with regard to the level of radioactivity in the air, water and soil. In case of urgency, it may issue a directive requiring the relevant Member State to take, within a specified period, all necessary measures to prevent infringement of the basic standards and to ensure compliance with regulations. [4] In case of non-compliance with the Commission directive within the specified period, the Commission or any Member State concerned may 'forthwith' bring the matter before the Court of Justice.

20. Finally, Article 39 EA provides for the creation of a health and safety documentation and study section within the framework of the Joint Nuclear Research Centre (established under Article 8 EA), which has the task of collecting the documentation and information referred to in Articles 33, 36 and 37 EA [5] and of assisting the Commission in carrying out its tasks under Chapter 3 of the EAEC Treaty.

3 — Various Commission recommendations since the entry into force of the EAEC Treaty have clarified the scope of application of Article 37, and in particular the meaning of the phrases 'disposal of radioactive waste' and 'general data'. These include 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, and Commission Recommendation 91/4/Euratom of 7 December 1990 on the application of Article 37 of the Euratom Treaty, OJ 1991 L 6, p. 16.

4 — See, for example, Commission Recommendation 2001/928/Euratom of 20 December 2001 on the protection of the public against exposure to radon in drinking water supplies, OJ 2001 L 344, p. 85.

5 — Note that, while the text of the English language version of the EAEC Treaty refers to Articles 33, 36 and 37 EA in this regard, the text of certain other language versions refers to Articles 33, 37 and 38 EA.

21. A large amount of secondary legislation has been enacted in the furtherance of the health and safety objectives of the EAEC Treaty since its entry into force, including, for example: [6]

— Council Directive 2003/122/Euratom of 22 December 2003 on the control of high activity sealed radioactive sources and orphan sources; [7]

— Council Regulation (Euratom) No 1493/93 of 8 June 1993 on shipments of radioactive substances between Member States; [8]

— Council Directive 92/3/Euratom of 3 February 1992 on the supervision and control of shipments of radioactive waste between Member States and into and out of the Community; [9]

— Council Directive 90/641/Euratom of 4 December 1990 on the operational protection of outside workers exposed to the risk of ionizing radiation during their activities in controlled areas; [10] and

— Council Regulation (Euratom) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency. [11]

B — *Articles 24 to 28 EA*

22. Also relevant to the present assessment are Articles 24 to 28 EA, which fall under Sections 3 and 4 (entitled 'Security Provisions' and 'Special Provisions' respectively) of Chapter 2 of the EAEC Treaty concerning Dissemination of Information. Essentially, these articles provide for a special security

6 — Other examples include: Council Decision 87/600/Euratom on Community arrangements for the early exchange of information in the event of a radiological emergency (OJ 1987 L 371, p. 76); Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency (OJ 1989 L 357, p. 31); Council Directive 97/43/Euratom on health protection of individuals against the dangers of ionising radiation in relation to medical exposure (OJ 1997 L 180, p. 22).

7 — OJ 2003 L 346, p. 57.

8 — OJ 1993 L 148, p. 1.

9 — OJ 1992 L 35, p. 24.

10 — OJ 1990 L 349, p. 21.

11 — OJ 1987 L 371, p. 11, as amended.

system applicable to information acquired by the Community as a result of carrying out its nuclear research programme if the disclosure of such information 'is liable to harm the defence interests of one or more Member States'.

23. This system takes the form of security gradings, established by the Council, which are provisionally applied by the Commission where it considers that the disclosure of certain information is liable to harm the defence interests of one or more Member States (Article 24(2)). This information is then communicated by the Commission to the Member States, which must 'provisionally ensure its security in the same manner'. Member States have three months in which to inform the Commission whether they wish to maintain the grading provisionally applied, substitute another grading, or declassify the information. Upon the expiry of this three month period, the highest grading of those requested is applied and the Commission notifies the Member States accordingly.

24. At the request of the Commission or of a Member State, the Council may, acting unanimously, at any time apply another grading or declassify the information. Prior to taking any action on a request from a Member State, however, the Council must obtain the opinion of the Commission.

25. Article 24(3) provides that the provisions of Articles 12 and 13 EA, concerning information over which the Community has power of disposal, apply to information subject to a security grading only in limited circumstances and provided that the 'appropriate security measures' are observed.

26. Under Article 25(1) EA, Member States notifying the existence or communicating to the Commission the contents of an application for a patent or utility model relating to a nuclear subject (as is required under Article 16 EA) shall, where necessary, draw attention to the need to apply a given security grading for defence reasons, and state the probable duration of such a grading. The Commission and Member States are obliged to take measures corresponding to the security grading required by the State of origin. Although the Commission may pass on these communications to 'Joint Undertakings' within the meaning of Chapter 5 of the EAEC Treaty or, through a Member State, to other persons or undertakings operating in the territory of that State, Article 25(2) EA provides that the communications shall 'in all cases be subject to the consent of the State of origin', and that such consent may be withheld for defence reasons.

27. Article 26 EA provides that, where information covered by patents, patent applications, provisionally protected patent rights, utility models or applications for utility models has been classified in accordance with Articles 24 and 25 EA, the States which have applied for such classification may not refuse to allow corresponding applications to be filed in the other Member States. However, 'Each Member State shall take the necessary measures to maintain the security of such rights and applications in accordance with the procedure laid down in its own laws and regulations'.

28. Further, under Article 26(2), no applications relating to information classified in accordance with Article 24 may be filed outside the Member States except with the unanimous consent of the latter.

29. Finally, Article 28 provides, inter alia, that the Community shall make good any damage suffered when patents or utility models classified for defence reasons are improperly used or come to the knowledge of an unauthorised person as a result of their communication to the Commission.

30. The security system outlined in Section 3, Chapter 2 is implemented by Council Regulation (Euratom) No 3 implementing Article 24 of the Treaty establishing the European Atomic Energy Community. [12] The aim and scheme of this regulation are explained in its preamble, 'Whereas security measures must be put into effect for each of the security gradings to be applied to information the disclosure of which is liable to harm the defence interests of one or more Member States, and whereas such measures must be exercised under the supervision of the Commission in respect of both the subject matter of such information and the persons and undertakings to which such information must be communicated in the territory of Member States.'

31. The regulation goes on to provide that information under Articles 24 and 25 EA, which is termed 'Euratom Classified Information', must be classified under one of four security gradings:

— 'Eura-Top Secret', where unauthorised disclosure of the information would have extremely serious consequences for the defence interests of one or more Member States;

12 — OJ, English Special Edition 1952-58, P. 63.

— 'Eura-Secret', where unauthorised disclosure of the information would have serious consequences for the defence interests of one or more Member States;

— 'Eura-Confidential', where unauthorised disclosure of the information would be harmful to the defence interests of one or more Member States; and

— 'Eura-Restricted', where unauthorised disclosure of the information would affect the defence interests of one or more Member States but where a lesser degree of security is required than in the case of documents classified as Eura-Confidential. [13]

32. Under Article 9 of the regulation, these security gradings are to be applied 'only to the extent strictly necessary'.

33. Each Member State is obliged to appoint an official body to be responsible for applying the security measures laid down in the regulation within its jurisdiction. [14] Access to Euratom Classified Information may be granted only to persons who are authorised following a screening procedure laid down in the regulation. [15]

34. In sum, the system eliminates the risk of classification of sensitive defence-related information at a security level considered too low by any Member State. This safeguard is, however, subject to the principle that security gradings should be granted to information only to the extent 'strictly necessary'.

C — *Article 13 EA*

35. Article 13 EA forms part of Chapter 2 of the EAEC Treaty, which sets out the system for dissemination of information over which the Commission has power of disposal under the EAEC Treaty. It provides that the Commission shall communicate to Member States, persons and undertakings informa-

13 — Article 10, Council Regulation No 3.

14 — Article 7, ibid.

15 — Articles 14 to 16, ibid.

tion acquired by the Community that is not covered by Article 12 EA — i.e., information other than patents, provisionally protected patent rights, utility models or patent applications owned by the Community.

36. Of interest for present purposes is the provision in this article dealing with procedures for the treatment of confidential information. The article specifies,

'The Commission may, however, make the disclosure of such information conditional on its being treated as confidential and not passed on to third parties.

The Commission may not disclose information which has been acquired subject to restrictions on its use or dissemination such as information known as classified information unless it ensures compliance with these restrictions.'

D — *Article 84 EA*

37. Article 84 EA falls within Chapter 7, which provides for a system of 'safeguards' within the EAEC Treaty for ores, source materials and special fissile materials. This system requires the Commission to 'police' certain nuclear activities within Member States to ensure that these materials are not diverted from their intended uses as declared by the users, and that the provisions relating to supply and any particular safeguarding obligations assumed by the Community under an agreement concluded with a third State or an international organisation are complied with (Article 77 EA). To this end, for example, the Commission must require operating records to be kept and produced (Article 79 EA) and may send inspectors into Member States (Article 81 EA).

38. Article 84(3) EA comprises an exception from these safeguards for materials that are, 'intended to meet defence requirements which are in the course of being specially processed for this purpose or which, after being so processed, are, in accordance with an operational plan, placed or stored in a military establishment'.

E — *Article 192 EA*

39. Article 192 EA provides for a general duty of loyal cooperation for Member States, analogous to that contained in Article 10 EC:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty.'

F — *Article 194 EA*

40. A further provision of relevance is Article 194 EA, which falls within Title V ('General Provisions') of the EAEC Treaty. This article places a strict duty of secrecy upon any person who, by reason of their duties or their public or private relations with the institutions or facilities of the Community or with Joint Undertakings, obtains knowledge of 'any facts, information, knowledge, documents or objects which are subject to a security system' of a Member State or Community institution. [16] In addition, under Article 194(2) EA, Member States are required to take 'all appropriate measures' to facilitate the gradual establishment of 'as uniform and comprehensive a security system as possible'. As I have already noted, the framework for such a security system for information acquired by the Community pursuant to its research programme was set out in Regulation No 3. [17]

G — *Article 296 EC*

41. A final element of the legal framework in these proceedings is Article 296(1) of the EC Treaty, which provides,

'The provisions of this Treaty shall not preclude the application of the following rules:

(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with

16 — Breaches of this duty must be treated as an infringement of Member State's laws relating to acts 'prejudicial to the security of the State or to disclosure of professional secrets' and those within a Member State's jurisdiction who infringe this provision must, at the request of any Member State concerned or of the Commission, be prosecuted.

17 — Cited at paragraph 30 above.

the production of or trade in arms, munitions and war materials; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.'

IV — Observations of the parties

A — *Observations of the Commission*

42. The Commission makes the following principal observations in support of its position that Article 37 EA applies equally to radioactive waste emanating from a military facility.

43. First, the Commission argues that the French Republic, who at the time of the signature of the EAEC Treaty was the only Member State that had decided to develop military nuclear capabilities, has in the past recognised that Chapter 3 of the EAEC Treaty also applies to radiological risks of military origin. In support of this argument, the Commission cites a 1957 declaration of the French foreign minister to the French Assemblée Nationale that, 'the provisions of Article 34 apply to all particularly dangerous experiments, civil or military'. It was in conformity with this declaration, the Commission contends, that the French Government notified to it its nuclear tests in the Sahara desert, which took place in the 1960s.

44. Second, the Commission points to two resolutions adopted by the European Parliament at the time of the French Polynesian nuclear tests in 1995. In the first of these resolutions, the Parliament states that it, [18]

'10. Considers that nuclear weapons tests should be regarded as "particularly dangerous experiments" within the meaning of Article 34 of the EAEC Treaty; calls on the Commission, the guardian of the Treaties, to define clearly which experiments, pursuant to the provisions of this article, should be classified as "particularly dangerous experiments";

11. Deplores the fact that the French authorities did not, before the first test, forward all the necessary documents to the Commission to enable it to examine the matter or to

18 — Resolution on the resumption of nuclear tests by France, OJ 1995 C 269, p. 61.

independent international experts to enable them to list all the health consequences of the tests;

12. Deplores the fact that, as a result, neither the potential effects of the tests on the environment nor the adoption of complementary measures or actions relating to health and safety, with due regard for the maximum permissible radiation doses referred to in the EAEC Treaty, have been submitted to an in-depth and thorough examination;

13. Calls on the Commission to implement fully and immediately Articles 34 and 35 of the EAEC Treaty and to examine the information on the French nuclear tests in this context together with independent and critical experts ...'.

45. In the second resolution relied upon by the Commission, the Parliament states that it, [19]

'8. Shares the Commission's view that the Euratom Treaty, and in particular Articles 34, and 35 and 36, is in principle applicable to nuclear tests carried out by Member States of the Union, that Article 34 applies to military experiments and that nuclear tests can be viewed as "particularly dangerous experiments" within the meaning of this article ...'.

46. Third, the Commission relies on dicta of the Court in Case C-70/88 *Parliament* v *Council* [20] and Case C-29/99 *Commission* v *Council*. [21] In the first of these cases, the Commission points to the Court's statement that Articles 30 to 39 of the EAEC Treaty are aimed at ensuring 'the consistent and effective protection of the health of the general public against the dangers arising from ionizing radiations, whatever their source and whatever the categories of persons exposed to such radiations'. [22]

47. In the second of these cases, the Commission cites in support of its case the Court's dictum that,

'Title II, Chapter 3, of the Euratom Treaty implements Article 2(b) of that Treaty, which instructs the Community to "establish

19 — Resolution on the statement of the Commission on nuclear tests, OJ 1995 C 308, p. 106.

20 — [1991] ECR I-4529.

21 — [2002] ECR I-11221.

22 — Paragraph 14.

uniform safety standards to protect the health of workers and of the general public and [to] ensure that they are applied". On the one hand, it is apparent that such protection cannot be achieved without controlling the sources of harmful radiation. On the other, the Community's activities in the field of health protection must observe the competences of the Member States defined, inter alia, in Title II, Chapter 3, of the Euratom Treaty itself.' [23]

B — *Observations of the United Kingdom and the French Republic*

48. In support of its argument that the EAEC Treaty is concerned solely with the development of nuclear energy for peaceful purposes, the United Kingdom, supported by the French Republic, makes the following principal arguments.

49. First, it seeks to rely on the definition of the Community's task found in Article 1 EA. This article provides that the task of the EAEC is to, 'contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries'. The United Kingdom notes that the duties listed in Article 2, which includes the establishment of 'uniform safety standards to protect the health of workers and of the general public and ensure that they are applied', are, in the words of Article 2, imposed 'in order to perform its task'. In the United Kingdom's contention, it follows that, 'the health and safety responsibilities of the Community are part and parcel of its responsibilities in the development of the civil and commercial uses of nuclear energy'. As a result, it is argued, the EAEC Treaty has 'no application whatsoever to the defence use of nuclear energy'.

50. Second, the United Kingdom argues that, if the EAEC Treaty had been intended to cover defence activities, 'detailed exceptions as regards access to defence installations, and the receipt of defence-sensitive information would surely have been necessary'. The United Kingdom contends that no such exceptions are found in the Treaty save for Article 84(3). [24] Further, in the United Kingdom's view, this article does not imply that the EAEC Treaty applies to defence activities unless excluded, but functions merely to 'demarcate' between the civil and defence sectors for cases where defence authorities receive nuclear materials for defence use from a civil/commercial nuclear facility. In other words, the aim of Article 84 EA is, in the United Kingdom's submission,

23 — Paragraph 76.

24 — See paragraph 38 above.

to indicate that safeguards do not extend to materials from the point at which they are processed for defence purposes.

51. The United Kingdom's third argument is based on the absence of a provision analogous to Article 296 EC in the EAEC Treaty, i.e., providing that no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. In the United Kingdom's contention, 'the absence of such a provision can only confirm that the Euratom Treaty was never intended to apply to the defence uses of nuclear power'. As Article 296 EC forms a vital safeguard for Member State's security interests, its absence from the EAEC Treaty constitutes, in the United Kingdom's contention, an irremediable 'lacuna' militating against the application of this Treaty to the defence sector. Similarly, the United Kingdom argues that the absence in Article 96 EA [25] of a provision parallel to Article 39(4) EC exempting employment in the public service from the principle of free movement of workers in the field of nuclear energy is 'worthy of remark and is consistent with the proposition that the Euratom Treaty has no application to defence activities'. The United Kingdom also challenges the Commission's interpretations of Case 187/87 *Land de Sarre,* [26] *Parliament* v *Council,* [27] and *Commission* v *Council.* [28]

52. Finally, the United Kingdom points to a number of consequences that, in its contention, would follow if Article 37 EA were held to apply to defence activities. [29] For example, it argues that the disclosure of data on radioactive waste streams could provide the basis for 'reverse engineering', that is, deducing the design of nuclear propulsion and weapons systems from the composition of waste streams generated by the operation or decommissioning of propulsion systems and the decommissioning of weapons systems. Similarly, it argues that, as reactors being decommissioned may be identical to reactors that remain in service, the disclosure of data about the decommissioning of a reactor might reveal the capabilities of reactors that are still in service.

53. The United Kingdom refers by analogy in this regard to its Radioactive Substances Act 1993, which provides for the creation and maintenance of a public register of

25 — Article 96 EA provides that, 'Member States shall abolish all restrictions based on nationality affecting the right of nationals of any Member State to take skilled employment in the field of nuclear energy, subject to the limitations resulting from the basic requirements of public policy, public security or public health' (i.e., broadly equivalent to Article 39 (2) and (3) EC).

26 — [1988] ECR 5013.

27 — Cited at paragraph 20 above.

28 — Cited at paragraph 21 above.

29 — See the observations of the United Kingdom on the intervention of the French Republic.

radioactive substances. The United Kingdom notes that its Secretary of State may give directions as to categories of information that should not appear in the register for national security reasons. Further, data collected as a result of monitoring defence sites may be inspected only by members of the Environment Agency or the Scottish Environmental Protection Agency who have security clearance to undertake this task. In the United Kingdom's contention, equivalent special provisions would have been included in the EAEC Treaty had it been intended to apply to defence activities.

54. In addition to supporting the above arguments, the French Republic relies on the Court's judgment in Ruling 1/78 which, in its contention, should be interpreted as holding that 'materials and facilities intended for military purposes were excluded from the scope of application of the EAEC Treaty'. [30]

55. The French Republic also points to a number of occasions since the creation of the EAEC in which it has argued against the application of the EAEC Treaty to defence activities, including in its submissions before the Court of First Instance in Case T-219/95 R *Danielsson* v *Commission*. [31] The French Republic denies the relevance of the fact that it provided the Commission with information on its military nuclear tests in Polynesia in 1995, arguing that this was 'part of a political dialogue between the French Government and the Commission and was a response to a basic need for transparency'.

V — Assessment

56. As is evident, this case turns on the interpretation of Article 37 EA: does the obligation imposed therein on Member States extend to the disposal of radioactive waste from military facilities?

57. It is in my view instructive to approach this question bearing the following preliminary observations in mind.

30 — Ruling 1/78, [1978] ECR 2151.

31 — [1995] ECR II-3051.

58. First, the positions taken by the parties in their submissions are mutually exclusive. The Commission argues that Article 37 EA applies to military activities, while the United Kingdom, supported by the French Republic, argues that this article has no application whatsoever to military activities. It is notable that neither party has, in its submissions, countenanced the possibility of a 'middle way' or 'compromise' solution.

59. Second, the interests at stake in the present proceedings, as defined by the parties, are of the highest order: on the one hand, Member State's imperative interests of national security; on the other, vital interests of public health and safety, as well as those of cross-border environmental protection.

60. It follows that substantial negative repercussions for an important interest would inevitably be entailed by an unqualified finding in favour of either party.

61. It is, in my estimation, crucial to take this into consideration when interpreting Article 37 EA in its systematic and historical context.

A — *Textual interpretation*

62. On a purely textual interpretation of this article, it is plain that, on the face of its wording, it applies not only to radioactive waste from civil and commercial nuclear facilities, but also from military sites. Thus Member State's obligation is to provide the Commission with 'general data relating to *any*[32] plan for the disposal of radioactive waste in whatever form', in order to enable the Commission to determine whether such a plan may result in the radioactive contamination of another Member State's territory. No express exception is provided for military facilities. This is in contrast to other chapters of the Treaty where express provision is made on grounds of protection of Member State's military interests, such as Articles 24 and 84.

63. This purely textual argument, although of some persuasion, is not, however, conclusive for present purposes. In order properly to interpret Article 37 EA, it must be examined in the light of not only its express wording, but also the overall context of the provisions of the EAEC Treaty as a whole, 'regard being had to the objectives

32 — Emphasis added.

thereof and to its state of evolution at the date on which the provision in question is to be applied'. [33]

66. The perceived importance of the nuclear sector, therefore, along with the fact that it was a clearly demarcated sector, provided the impetus for creation of the EAEC and, with it, a common nuclear authority.

B — *Scheme and objectives of Chapter 3 in the context of the EAEC Treaty*

64. The EAEC Treaty was conceived, as explained in its preamble, '... to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples'.

67. It is clear, however, that the objective of the EAEC Treaty was not limited purely to the purpose of the development of the nuclear industry. The Treaty authors viewed the assurance of the health and safety of the public as a sine qua non of the development of the nuclear sector. [35]

65. As stated in the so-called 'Spaak Report' which contained the basic plan for the Treaty, [34] [Atomic power] appears to be the essential resource that may be used, eventually, for the development and the renewal of production and for the progress of peace.

68. To this end, as outlined above, Chapter 3 of the EAEC Treaty was aimed at creating 'the conditions of safety necessary to eliminate hazards to the life and health of the public' (recital 4, preamble). This was to be achieved by establishing 'uniform safety standards to protect the health of workers and of the general public and ensure that they are applied' (Article 2 EA).

33 — See in this regard, the Court's judgment in Case 283/81 CILFIT [1982] ECR 3415, paragraph 20: 'Every provision of Community Law must be placed in its context and interpreted in the light of the provisions of Community Law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'

34 — Report of the Intergovernmental Committee created by the Messina Conference to the Ministers of Foreign Affairs, Brussels, 21 April 1956, p. 99.

35 — The Spaak Report, published in 1956, refers explicitly to the events of 10 years previous as revealing 'the power of the atom in a terrifying form' (cited at paragraph 65 above, p. 99). It states: Insurance against the risk of imprudent use [of nuclear power] is essential. The nuclear industry will not develop unless conditions of safety are established that will remove dangers to the life and health of workers and populations (p. 100).

69. The means by which this aim was to be accomplished were, as described above:

— the establishment of basic minimum safety standards for protection against ionizing radiations, that Member States are bound to comply with (Articles 30 to 33 EA);

— the requirement for the Commission to monitor and approve in advance Member State's plans for 'particularly dangerous experiments' or the disposal of radioactive waste (Articles 34 and 37 EA); and

— the monitoring and communication to the Commission of radioactivity levels and the power for the Commission to issue recommendations to the Member States in this regard (Articles 35, 38 and 39 EA).

70. As described above, since the institution of the EUROPEAN Atomic Energy Community, a large amount of secondary legislation has been adopted in the interest of public health and safety in the nuclear sphere. These texts invariably emphasise the importance of the health and safety objective in nuclear matters. Examples include Council Resolution 92/C 172/02 of 18 June 1992 on the technological problems of nuclear safety, in which the Council emphasised 'the particular importance it attaches to nuclear safety in Europe and therefore request[ed] the Member States and the Commission to adopt as a fundamental and priority objective of the Community cooperation in the nuclear field ...'. [36]

71. A further illustration is Council Decision 94/179/Euratom of 21 March 1994, in which the Council noted that 'the European Atomic Energy Community was created to establish conditions of safety necessary to eliminate hazards to the life and health of the public'. [37]

36 — OJ 1992 C 172, p. 2. The Council also noted that, 'the issue of nuclear safety is an important one, particularly with regard to the protection of the health of the population and of workers as well as the protection of the environment from the dangers resulting from ionizing radiation, particularly in view of the developments which have taken place throughout Europe', and encouraged 'the Commission, national safety authorities, institutions specialised in nuclear safety evaluation, research and development institutions, nuclear utilities and manufacturers in the Community to continue to participate actively in the well-established and continuing process of consultation and cooperation'.

37 — Council Decision 94/179/Euratom of 21 March 1994, amending Decision 77/270/Euratom to authorise the Commission to contract Euratom borrowing in order to contribute to the financing required for improving the degree of safety and efficiency of nuclear power stations in certain non-member countries, OJ 1994 L 84, p. 41. See also, Commission Recommendation 1999/829/Euratom laying down requirements for information to be transmitted to the Commission under Article 37, cited at footnote 3 above, which states the objective of Article 37 to be forestalling 'any possibility of radioactive contamination of another Member State'; and the Amended Proposals for Council Directives (Euratom) laying down basic obligations and general principles on the safety of nuclear installations and on the safe management of spent nuclear fuel and radioactive waste, COM (2004) 526 final.

72. In addition, the importance of the health and safety objectives of the EAEC Treaty has on numerous occasions been emphasised by the Court.

73. For example, in *Parliament* v *Council,* [38] the question before the Court was whether Article 31 EA had correctly been chosen as the legal basis for Regulation No 3954/87. [39] In contending that the correct legal basis was in fact Article 100a of the EEC Treaty, the Parliament argued, inter alia, that Article 30 et seq. of the EAEC Treaty applied only to 'primary' radiation, that is, radiation produced directly in a nuclear power station or when nuclear fuel is being handled, and not to 'secondary' radiation, that is, radiation which comes indirectly to the public from contaminated foodstuffs or feedingstuffs.

74. In rejecting this argument, the Court gave a broad view of the purpose of Chapter 3 of the EAEC Treaty. The aim of the Chapter was '...to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionizing radiations, whatever their source and whatever the categories of persons exposed to such radiations'. [40]

75. Similarly, Advocate General Van Gerven was, in his opinion in that case, explicit about the vital role played by the health and safety provisions in the EAEC Treaty. In his view, the purpose of Chapter 3 of the EAEC Treaty was to ensure 'a consistent and effective protection of the health and safety of the public against the dangers arising from ionizing radiations'. [41] Underlining the importance of ensuring the 'effectiveness of the provisions of the EAEC Treaty', he stated:

'As has already been seen, the Parliament's three arguments are based on the idea that the EAEC Treaty, more particularly the health protection policy laid down by Article 30 et seq. of that Treaty, must be regarded as having a limited scope. I cannot accept such a restrictive view. In fact, in view of the serious risks to health arising from ionizing radiations, I think that Article 30 et seq. of the EAEC Treaty must be interpreted as meaning that they authorise the Community to protect the health of the public consistently and effectively. [42]

It therefore seems to me essential to regard Article 30 et seq. of the EAEC Treaty as being fully effective.' [43]

38 — Cited at paragraph 20 above.
39 — Cited at paragraph 14 above.
40 — Paragraph 20.
41 — Paragraph 23.
42 — Paragraph 24.
43 — Paragraph 26.

76. In its judgment in *Land de Sarre*, the Court emphasised that Article 37 must be interpreted 'in the light of its context and its purpose within the system of the EAEC Treaty'.[44] In order to 'ensure that the provision retains its effectiveness',[45] the Court held that Article 37 must be interpreted as meaning that the Commission must be provided with general data relating to any plan for the disposal of radioactive waste before such disposal is authorised by the competent authorities of the Member States.

77. In sum, the objectives underpinning Chapter 3 of the EAEC Treaty – public health and safety and environmental protection — have, since the entry into force of the Treaty, consistently been viewed as being of the utmost importance.[46]

C — *Treatment of the defence sector in the EAEC Treaty*

78. The next step in considering whether, on a proper interpretation, Article 37 EA extends to radioactive waste from military facilities is to examine the treatment of the defence sector in the EAEC Treaty.

79. The first point to bear in mind here is that, at the time of conclusion of the Treaty, none of its members had nuclear military activities. Indeed, there were only three nuclear powers at that time: the United States, the United Kingdom, and the Soviet Union. It was, therefore, not at the time strictly necessary to decide whether the EAEC Treaty applied to the nuclear defence sector.

80. This is not to say that the issue was not discussed by the founders of the Community in preparing the Treaty. It should be remembered that the discussions took place in the context of international disarmament negotiations, as well as general speculation that the French Republic was considering

44 — See paragraph 51 above, paragraph 10.

45 — Ibid., paragraph 19.

46 — A further illustration of this can be also be seen within the scheme of the EAEC Treaty, Article 87 of which provides: 'Member States, persons or undertakings shall have the unlimited right of use and consumption of special fissile materials which have properly come into their possession, subject to the obligations imposed on them by this Treaty, in particular those relating to safeguards, the right of option conferred on the Agency and health and safety.' It is notable, as discussed below, that the Treaty provisions on safeguards have an explicit exception for defence, whereas the provisions on health and safety do not. On an international level, the importance of nuclear safety has been emphasised in numerous instruments including, for example, the Convention on Nuclear Safety drawn up under the auspices of the International Atomic Energy Agency, OJ 1999 L 318, p. 21.

joining the ranks of the nuclear military powers.[47] The potential application of the future EAEC Treaty to nuclear defence was thus, at the time, an issue of certain political sensitivity.[48]

81. However, the *travaux préparatoires* of the Treaty record that,

'The general view of the Ministers was that it was more important to find a solution that did not definitely exclude military uses, while at the same time ensuring that such a solution could not endanger the safeguards that were recognised as being of primordial importance.'[49]

82. The United Kingdom's contention that the EAEC Treaty was not intended to apply to the defence sector at all would therefore not seem consistent with evidence of the Treaty authors' intentions at the time.

83. Further, a number of other articles in the EAEC Treaty deal explicitly with military nuclear activities, and demonstrate the concern of the Treaty authors to provide for and respect the sensitive nature of information in this area.

84. The first example of this is found in Articles 24 to 28 EA which, as summarised above,[50] provide for a special security system applicable to information acquired by the Community as a result of carrying out its nuclear research programme if the disclosure of such information is liable to harm the defence interests of one or more Member States. The detailed and comprehensive security regime contained in these articles, together with implementing secondary legislation, is aimed at ensuring that sensitive defence-related information is classified at an appropriate security level insofar as this is 'strictly necessary' for Member State's defence interests. The success of this system depends upon close cooperation between the Commission and Member States.

85. A second example of the Treaty authors' concern to provide for defence-related

47 — See, for example, the comment of M. Faure, 1956, in the name of the French Government: 'If France decides to proceed with military applications and to prepare and then to explode a bomb after four years, France does not intend to forego necessary consultation of its partners or Community control', cited in the *travaux preparatoires* of the EAEC Treaty (eds. S. Neri and H. Sperl, *Cour de Justice des Communautés européennes*, Luxembourg, 1072), p. 246.

48 — Indeed, the authors of the Spaak Report, namely, the Heads of Delegation of the future EAEC Members, took the view that this issue could be resolved only at the highest political level: 'the problem of the possible use of atomic energy for military ends by certain States is of a political character and exceeds the competence (of the authors). (The authors) do not believe that they should respond to this problem in this report', cited at paragraph 65 above, p. 122.

49 — *Travaux preparatoires* of the EAEC Treaty, p XIX.

50 — See paragraph 22 to 33.

nuclear activities is found in Article 84 EA, [51] which, as outlined above, provides for an exception from the Chapter 7, EAEC Treaty, safeguards for certain materials intended to meet defence requirements. It is notable in this regard that not all defence-related materials are exempted from these safeguards, but only those that are 'in the course of being specially processed for [defence purposes] or which, after being so processed are, in accordance with an operational plan, placed or stored in a military establishment'. [52] By implication, therefore, the Chapter 7 safeguards would seem to apply to those defence-related materials not covered by the wording of Article 84(3) EA.

86. A third example of the Treaty authors' objective to preserve the secrecy of sensitive information, albeit not expressly restricted to the defence sector, is Article 194 EA, [53] which provides for a strict duty of secrecy incumbent on anyone obtaining access to sensitive nuclear information classified under the security system of a Member State or of an EAEC institution.

87. In a similar vein, Article 13 EA places a duty on the Commission, in the case of information acquired under that article subject to restrictions on its use or dissemination (e.g., classified information), to ensure compliance with these restrictions. [54]

88. In each case, these examples demonstrate the sensitivity of the Treaty authors to the need to preserve nuclear defence and other secrets. Each represents a balance struck between, on the one hand, the overarching objective of the relevant Treaty chapter (e.g., dissemination of information) and, on the other hand, Member States' legitimate interest to ensure confidentiality in the defence sector and beyond.

D — *The arguments of the United Kingdom and the French Republic*

89. Although I discuss the parties' arguments throughout this opinion, the following arguments merit, in my view, separate attention.

51 — See paragraphs 37 and 38 above.

52 — Article 84(3) EA.

53 — See paragraph 40 above.

54 — See paragraph 36 above.

90. In support of its position, the United Kingdom seeks, as summarised above, to rely on the definition of the Community's task found in Article 1, viz., contribution to 'the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries'. [55]

91. I do not find this argument convincing. In the first place, the wording of Article 1 does not in itself provide any ground for concluding that nuclear energy used for defence purposes is excluded from the scope of the Treaty. On any natural reading, the concept of 'creating the conditions necessary for the speedy establishment and growth of nuclear industries' does not necessarily exclude any application of the Treaty to military facilities. Although, as outlined above, one of the primary motivations of the EAEC Treaty was indeed to encourage the development of a civil and commercial nuclear industry within the Member States, this went hand in hand with a concern to ensure adequate minimum health and safety standards in the nuclear sector. [56]

92. Thus, as noted above, the Council has stated that, 'the European Atomic Energy Community was created to establish conditions of safety necessary to eliminate hazards to the life and health of the public'. [57]

93. In any event, as I have discussed above, interpreting Article 1 as excluding any application of the EAEC Treaty to defence matters would not only be at odds with the evidence of the Treaty authors' intentions contained in the Spaak Report, but would also mean that the provisions of the Treaty dealing expressly with its application to defence would be redundant and serve no purpose.

94. In addition, the French Republic raises an argument based on Ruling 1/78 in which, in its contention, the Court stated that 'materials and facilities intended for military purposes were excluded from the scope of application of the EAEC Treaty'. [58]

95. This is not, in my view, a correct interpretation of the Court's ruling. In that

55 — See paragraph 49 above.

56 — Similarly, while the preamble recognises that 'nuclear energy represents an essential resource for the development and invigoration of industry and will permit the advancement of the cause of peace', thus explaining a primary motivation for the Treaty, it does not show *a contrario* that the authors intended that the Treaty would not apply to military activities.

57 — Decision 94/179, cited at paragraph 71 above.

58 — See paragraph 54 above.

case, the Court was called to pronounce upon the compatibility with the EAEC Treaty of the International Atomic Energy Agency's Convention on the physical protection of nuclear materials, facilities and transport. The Court's statement relied upon by the French Government was made specifically and explicitly with reference to Articles 84 and 86 EA only, in the context of a general comparison between the fields of application of the Convention and the Treaty.[59] The Court did not intend, in my opinion, to lay down any general principle that nuclear materials used for defence purposes per se fall outside the scope of the Treaty.

E — *Relevance of French historical position and European Parliament resolutions*

96. As I outlined above, the Commission in its submissions relies on the French Government's 1960 notification to the Commission of plans to conduct nuclear tests in the Sahara, as well as on a number of 1995 resolutions of the European Parliament in which the Parliament expressed the view that the EAEC Treaty, and in particular Articles 34 to 36 thereof, applied in principle to military nuclear tests made by Member States.[60] In response, the French Republic cites instances, including submissions before the Court, in which it has denied the application of the EAEC Treaty to the military sphere.

97. In my estimation, none of these arguments is conclusive.

98. In the first place, a unilateral position taken by a Member State cannot be relevant to the correct interpretation of the EAEC Treaty. Furthermore, the position taken by the French Government on this issue has not been entirely consistent since the negotiation and entry into force of the EAEC Treaty and thus, in my view, cannot be taken into account in the present assessment.

99. In the second place, a distinction must be drawn for present purposes between acts that the European Parliament performs in its capacity as co-legislator, and purely political Parliamentary statements. While the former are of relevance to the Court, the latter are, by their very nature, non-legal in character. The Parliamentary resolutions cited by the Commission clearly fall into the second

59 — Ibid., paragraph 12.

60 — See paragraphs 44 to 47 above.

category and thus cannot be decisive for the question in point.

F — *Analogy with the EC Treaty*

100. A final important element in interpreting Article 37 EA is, in my view, analogy with the treatment of Member State's defence interests under the EC Treaty.[61] In this regard, Article 296(1) EC is instructive insofar as it is aimed at preserving Member State's essential security interests as regards the supply of defence-related information, providing that, 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'.

101. It is clear that the result of this provision is not that the EC Treaty, as a whole, has no application to the defence sphere. Rather, the article applies only in those particular cases where a Member State considers that its 'essential interests of security' would be harmed if it were obliged to supply a certain piece of information.

102. Thus, for example, it is not the case that Title XIX of the EC Treaty on the Environment has, in principle, no application to environmental issues arising in the defence sector. Rather, and in furtherance of the Article 2 EC objective of a 'high level of protection of the environment', the presumption is that measures taken in furtherance of environmental objectives apply equally within the military sphere unless this would be contrary to essential security interests – as set out in Article 296 EC – in which case an exception for the defence sector must be explicitly provided for in the relevant legislation.[62] This is

61 — For another instance in which analogy with the EC Treaty was used in interpretation of the EAEC Treaty, see Advocate General Van Gerven in Case C-70/88 (cited above at paragraph 46), at paragraph 23: 'I see no valid reason for interpreting the scope of a policy laid down by the EAEC Treaty according to rules different from those relating to the scope of a policy laid down by the EEC Treaty ...' This reasoning by analogy with the EC Treaty is, in my view, in the present case instructive, notwithstanding the principle of independent validity of the EAEC Treaty (see Article 305 EC).

62 — So, for example, waste from military sites is not in principle excluded from Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), likewise military sites are equally eligible for designation as 'special areas of conservation' under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7). In contrast, Article 1(4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of certain public and private projects on the environment, OJ 1985 L 175, p. 40 (as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, OJ 2003 L 156, p. 17), provides that, 'Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes'.

similarly the case for legislation enacted under Title XI on Social Policy or Title XIII on Public Health of the EC Treaty. [63]

103. It is pertinent in this regard to consider the United Kingdom's submission that the absence in the EAEC Treaty of an analogous provision to Article 296 EC constitutes a 'lacuna' in the EAEC Treaty and must be interpreted as meaning that this Treaty was never intended to apply to the defence uses of nuclear power. [64]

104. I do not find this argument persuasive. In my estimation, it is based on an incorrect assessment of the relationship between the EAEC Treaty and the EC Treaty. This relationship is such that, insofar as matters are the subject of provisions in the EAEC Treaty or rules adopted pursuant thereto, the EC Treaty has no application. Thus Article 305(2) EC provides: 'The provisions of this Treaty shall not derogate from those of the Treaty establishing the European Atomic Energy Community.'

105. Importantly, however, insofar as matters are not provided for in the EAEC Treaty or implementing legislation, the EC Treaty may apply. Thus, for example, the Court in its Opinion 1/94 considered the question whether the European Community had exclusive competence to conclude the Multilateral Agreements on Trade in Goods insofar as they apply to EAEC products. Citing what is now Article 305(2) EC, it concluded that this was indeed the case: 'Since the Euratom Treaty contains no provision relating to external trade, there is nothing to prevent agreements concluded pursuant to Article [133] of the EC Treaty from extending to international trade in Euratom products.' [65]

106. This is consistent with the Court's jurisprudence concerning the relationship between the EC Treaty and the ECSC Treaty,

63 — Thus, for example, in principle Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (OJ 1989 L 393, p. 1), also applies to military workplaces.

64 — See paragraph 51 above.

65 — [1994] ECR I-5267, at paragraph 24.

which is set out in Article 305(1) EC in similar terms to Article 305(2) EC. [66]

107. It follows, in my estimation, that the relationship between the EA and EC Treaties belies the existence of any 'lacuna' stemming from the absence in the EAEC Treaty of an analogous provision to Article 296 EC. Rather, insofar as the EAEC Treaty and implementing legislation do not explicitly provide for equivalent safeguards for Member State's essential security interests, the safeguards contained in Article 296 EC may equally apply to products covered by the EAEC Treaty. The United Kingdom's argument on this point must therefore, in my opinion, fail.

VI — Proposed interpretation of Article 37 EA

108. The preceding examination of the scheme and objectives of Chapter 3 of the EAEC Treaty, as well as the treatment of defence in the EAEC Treaty as a whole, leads me to the following conclusion.

109. As I have noted, the question of the potential application of the EAEC Treaty to defence activities was explicitly considered by the Treaty authors during the lead-up to its negotiation. Importantly, the authors of the Spaak Report recognised that the solution to this question required a careful balancing of interests: 'The general view of the Ministers was that it was more important to find a solution that did not definitely exclude military uses, while at the same time ensuring that such a solution could not

66 — See, for example, Case 328/85 *Deutsche Babcock* [1987] ECR 5119, in which the Court held that, 'the very terms of [Article 305(1) EC] require that it should be interpreted as meaning that in so far as matters are not the subject of provision in the ECSC Treaty or rules adopted on the basis thereof, the EEC Treaty and the provision adopted for its implementation can apply to products covered by the ECSC Treaty' (paragraph 10). In his opinion in that case, Advocate General Sir Gordon Slynn observed, 'The provisions of the EEC Treaty, and a fortiori subordinate legislation made under it, are not to "affect the provisions" of the ECSC Treaty or to "derogate from" the European Atomic Energy Treaty. Does this mean that the EEC Treaty is not concerned with coal and steel and that legislation made under it may not make rules in respect of coal and steel or does it have a more limited meaning? In my view the provision has a more limited meaning. It would have been perfectly simply to provide that nothing in the EEC Treaty related to coal and steel products or to the coal and steel industry if that had been intended. That was not done. Instead the limitation imposed is that the provision of the EEC Treaty shall not "affect the provision" of the earlier Treaty, in particular as regards the matters specified. I read that as meaning that the EEC Treaty may apply to coal and steel except to the extent that matters are dealt with in the ECSC Treaty or in rules made under it; in so far as the latter has occupied the ground the EEC Treaty provisions are not to have effect.' See also, the judgment of the Court of First Instance in Case T-308/00 *Salzgitter* v *Commission* (judgment of 1 July 2004, ECR, p. II, 1933), at paragraph 62, and the judgment of the Court of Justice in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, at paragraph 100. The measures adopted on the basis of the EC Treaty following the Chernobyl disaster also illustrate the applicability of this Treaty in the absence of a specific provision in the EAEC Treaty: see Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, at paragraph 17, and *European Parliament* v *Council*, cited at paragraph 46 above.

endanger the safeguards that were recognised as being of primordial importance.'[67]

110. Such a solution avoids the inevitable negative repercussions of an 'all or nothing' approach in which one interest – whether public health or national defence — trumps the other in all circumstances. How then ought this balance of interests to be achieved in practice?

111. First, it is plain from the above discussion that the health and safety provisions of the EAEC Treaty are of vital importance and should be interpreted in a manner that ensures effective protection of public health.[68] Further, as we have seen, the contention that the nuclear defence sector falls per se outside the scope of application of the EAEC Treaty is not, on a systematic interpretation of the Treaty, valid.[69]

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

113. Second, it is also plain that the application of the EAEC Treaty must respect Member State's essential security interests. The Article 37 obligation should not, therefore, apply where, in a particular case, a Member State considers that its essential security interests may be harmed by supplying certain information required under this article.

114. In other words, in the case of each plan to dispose of defence-related radioactive waste, Member States should be entitled to withhold information from the Commission only if they consider this absolutely necessary for the protection of their essential defence interests.

115. In making this assessment, Member States should bear in mind their Article 192

67 — See paragraph 81 above.
68 — See paragraphs 64 to 77 above.
69 — See paragraphs 78 to 88 above.

EA duty of loyal cooperation to 'ensure fulfilment' of their obligations arising under the EAEC Treaty. [70] In my opinion, this duty requires Member States, in carrying out their assessment, to engage in open and constructive dialogue with the Commission in cases where it is considering withholding particular data on defence grounds. In such a case, the Member State should discuss with the Commission whether protection of its defence interests could be achieved by less extreme means than total withholding of the information.

116. Such means might well include, for example, the use of analogous security safeguards for the information as provided for in the legislation implementing Article 24 EA, by 'classification' of the data via attribution of a security grading. [71] Alternatively, the Member State and the Commission may conclude that the provision of less detailed data than foreseen in Commission Recommendation 1999/829 [72] suffices to enable the Commission to determine whether the implementation of the plan for the disposal of radioactive waste is 'liable to result in the radioactive contamination of the water, soil or airspace of another Member State' within the meaning of Article 37 EA.

117. Such a dialogue-based, case-by-case approach avoids the risks that a blanket application of Article 37 EA to the defence sector could pose, as raised by the United Kingdom in its submissions. [73] For example, the risk of 'reverse engineering' important defence-related knowledge from information on the composition of radioactive waste streams would be eliminated if, following discussion between the relevant Member State and the Commission, such data were assigned to a suitably high security grading, being withheld only if absolutely necessary for the protection of defence secrets.

118. I would add that this balance is analogous to that espoused by the EC Treaty, from which the defence sector is not per se excluded, yet under which Member States are not obliged to provide information if this would prejudice essential interests of national security. [74]

119. Finally, given the nature of the above conclusion as a 'middle way' between the respective positions of the Commission and the United Kingdom, it is in my view most appropriate that each party should bear its own costs in the present proceedings.

70 — See paragraph 39 above.

71 — See paragraphs 22 to 33 above.

72 — See paragraph 18 above.

73 — See paragraph 52 above.

74 — See paragraphs 100 to 102 above.

VII — Conclusion

120. In the light of the foregoing observations, I am therefore of the opinion that the Court should:

— declare that, by failing to provide to the Commission general data relating to a plan for the disposal of radioactive waste resulting from the decommissioning of the 'Jason' reactor insofar as is compatible with the essential interests of its national security, and by failing to enter into a dialogue with the Commission as to whether protection of its defence interests could be achieved by less extreme means than total withholding of the information from the Commission, the United Kingdom is in breach of its obligations under Article 37 of the EAEC Treaty;

— order each party and the intervener to bear their own costs.