JUDGMENT OF THE COURT (Grand Chamber)

12 April 2005 *

In Case C-61/03,

ACTION for failure to fulfil obligations under Article 141 EA, brought on 14 February 2003,

Commission of the European Communities, represented by L. Ström and X. Lewis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by P. Ormond and C. Jackson, acting as Agents, and D. Wyatt QC and S. Tromans, Barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by:

French Republic, represented by R. Abraham, G. de Bergues and E. Puisais, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur), R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, P. Kūris, E. Juhász, G. Arestis and M. Ilešič, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 12 October 2004,

after hearing the Opinion of the Advocate General at the sitting on 2 December 2004,

gives the following

Judgment

1 By its application the Commission of the European Communities seeks from the Court a declaration that, by failing to provide general data relating to a plan for the disposal of radioactive waste associated with the decommissioning of the Jason reactor at Royal Naval College, Greenwich, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 37 EA.

Legal background

2 It is clear from the preamble to the EAEC Treaty that the signatories thereto '[recognised] that nuclear energy represents an essential resource for the development ... of industry and will permit the advancement of the cause of peace', were 'resolved to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources ... and contribute, through its many other applications, to the prosperity of their peoples', were 'anxious to create the conditions of safety necessary to eliminate hazards to the life and health of the public' and '[desired] ... to cooperate with international organisations concerned with the peaceful development of atomic energy'.

3 Under Article 1 EA the task of the European Atomic Energy Community (Euratom) 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'.

4 Article 2 EA is worded as follows:

'In order to perform its task, the Community shall, as provided in this Treaty:

(a) promote research and ensure the dissemination of technical information;

(b) establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied;

(c) facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community;

(d) ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;

(e) make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended;

(f) exercise the right of ownership conferred upon it with respect to special fissile materials;

(g) ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialised materials and equipment, by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community;

(h) establish with other countries and international organisations such relations as will foster progress in the peaceful uses of nuclear energy.'

5 Title II of the Treaty, entitled 'Provisions for the encouragement of progress in the field of nuclear energy', includes, inter alia, Chapter 3, itself entitled 'Health and Safety', which consists of Articles 30 EA to 39 EA.

6 Articles 30 EA and 31 EA provide for the establishment in the Community of basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations. Article 30 EA provides a definition of basic standards. Article 31 EA describes the procedure which applies to the working out and adoption of those standards.

7 Under Article 34 EA:

'Any Member State in whose territories particularly dangerous experiments are to take place shall take additional health and safety measures, on which it shall first obtain the opinion of the Commission.

The assent of the Commission shall be required where the effects of such experiments are liable to affect the territories of other Member States.'

8 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.'

9 The second indent of Article 124 EA states:

'In order to ensure the development of nuclear energy within the Community, the Commission shall:

...

— formulate recommendations or deliver opinions in the fields covered by this Treaty, if the Treaty expressly so provides or if the Commission considers it necessary.'

10 In order to enable plans for the disposal of radioactive waste within the meaning of Article 37 EA to be appraised in a consistent manner, the Commission considered it necessary to specify which types of operation may result in such disposal and, for the different types of operation, which information is to be supplied as the general data. 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) met that objective and it remained in force from 7 December 1990 to 5 December 1999. With effect from 6 December 1999 it was replaced by 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).

The facts

11 The Jason reactor, which had a maximum thermal output of 10 kW, was operated by the United Kingdom Ministry of Defence at Royal Naval College, Greenwich, from

1962 to 1996. It was used to train personnel and for research in support of the nuclear propulsion programme implemented by the United Kingdom Government for the nuclear submarines of the Royal Navy.

12 The file submitted to the Court does not state the date on which the decommissioning of the Jason reactor was completed. However, according to that file, the decommissioning took place after an application to and a decision of the Environment Agency for England and Wales to that effect.

13 In 1998 the Commission was informed that the Jason reactor was to be decommissioned and dismantled. The file does not specify the source of that information and nor does it show whether the decommissioning had already occurred at the date on which the Commission was informed thereof.

14 By letter of 8 January 1999, the Commission requested the United Kingdom to send it details concerning the decommissioning of the Jason reactor. According to the reply of 5 March 1999 of the competent United Kingdom authorities to that request, the Environment Agency for England and Wales had previously given revised approval for the disposal of radioactive waste arising from decommissioning that reactor.

Pre-litigation procedure

15 On 30 January 2001, the Commission sent the United Kingdom a letter of formal notice, setting out the arguments which justified its view that, by failing to provide it with general data relating to a plan for the disposal of radioactive waste resulting

from the decommissioning of the Jason reactor, the United Kingdom had failed to fulfil its obligations under Article 37 EA.

16 The United Kingdom authorities replied to the letter of formal notice by letter of 30 March 2001, which set out the reasons why in their view Article 37 EA is not applicable to military installations, and in which they contended that the United Kingdom has no obligation to provide the Commission with data relating to the decommissioning of the Jason reactor.

17 In the reasoned opinion sent to the United Kingdom on 21 December 2001, the Commission first confirmed the view it had expressed in the letter of formal notice and second requested the United Kingdom to submit its observations within two months of notification of that opinion. The United Kingdom authorities likewise reiterated their view in their reply dated 20 February 2002.

18 In those circumstances the Commission decided to bring this action.

Procedure before the Court and forms of order sought

19 By order of the President of the Court of 28 August 2003, the French Republic was granted leave to intervene in support of the form of order sought by the United Kingdom.

20 The Commission claims that the Court should:

— declare that, by failing to provide general data relating to a plan for the disposal of radioactive waste associated with the decommissioning of the Jason reactor at Royal Naval College, Greenwich, the United Kingdom has failed to fulfil its obligations under Article 37 EA; and

— order the United Kingdom to pay the costs.

21 The United Kingdom and the French Republic contend that the Court should dismiss the Commission's application and order it to pay the costs.

The action

22 The Commission submits that Article 37 EA applies to disposal of radioactive waste from both civil and military installations. It argues, essentially, that that provision aims to prevent any risk of radioactive contamination of another Member State and that, since the protection of the general public against the dangers arising from ionising radiations is an indivisible objective, it must extend to all sources of danger including those resulting from the decommissioning of military installations, such as the Jason reactor.

23 The United Kingdom, supported by the French Republic, replies that Article 37 EA cannot apply to the disposal of radioactive waste from military installations since the

Treaty itself covers only the civil uses of nuclear energy and the provisions of the chapter of the Treaty on health and safety cannot have a scope wider than that of the provisions in other chapters of the same Treaty.

24 In that context, it should be pointed out that, although the Commission has relied in support of its action on arguments based on the specific objectives of Article 37 EA and the other provisions in Title II, Chapter 3, of the Treaty, on health and safety, it has not stated that the provisions of that chapter might be afforded a field of application which differs from that of the Treaty as a whole. The Commission has, by contrast, claimed that its interpretation of Article 37 EA, the only provision which is alleged to be infringed in this case, is supported, in particular, by the fact that the Treaty does not contain any express provision excluding military activities in general from its scope.

25 It is therefore appropriate for the Court to consider at the outset the merits of the interpretation which is the basis of the Commission's action, to the effect that the military uses of nuclear energy may fall within the scope of the Treaty, subject to certain express provisions which lay down limited exceptions.

26 In that regard the signatories of the Treaty, by referring in the preamble thereto to the advancement of the cause of peace, the applications of the nuclear industry contributing to the prosperity of their peoples and the peaceful development of atomic energy, intended to emphasise the non-military character of that Treaty and the supremacy of the aim of promoting the use of nuclear energy for peaceful purposes.

27 Articles 1 EA and 2 EA, which define respectively the mission and the tasks entrusted to the Community, confirm that the objectives pursued by the Treaty are essentially civil and commercial.

28 However, it should be stated that, in the absence of an express provision excluding activities connected to defence from the scope of the Treaty, it is necessary to have regard to other factors in order to determine whether the Treaty is intended also to govern, at least in certain spheres, the use of nuclear energy for military purposes.

29 The evidence on interpretation to be taken into consideration cannot be limited to the historical background to the drawing up of the Treaty, or to the contents of the unilateral declarations made by the representatives of certain States who took part in the negotiations which led to the signature of that Treaty. As the Advocate General rightly pointed out in points 80 and 81 of his Opinion, it is clear from that background and certain declarations mentioned in the travaux préparatoires of the Treaty that its possible application to the military uses of nuclear energy was envisaged and discussed by the representatives of the States who took part in those negotiations. However, it is also apparent that they held differing opinions on that issue and that they decided to leave it unresolved. Consequently, the guidance provided by that evidence is not sufficient for it to be asserted that the framers of the Treaty intended to make its provisions applicable to military installations and military applications of nuclear energy.

30 According to the United Kingdom and the French Republic, the main objection to the argument that the EAEC Treaty may also apply to military uses of nuclear energy is the fact that, unlike the EC Treaty which was signed on the same day as the EAEC Treaty and by the same States, the EAEC Treaty does not contain any derogating provisions specifically intended to safeguard the national defence interests of the Member States. Given the vital importance that the Member States, like all other States, attach to safeguarding those interests, it is inconceivable that

they impliedly waived the right to establish adequate guarantees in a field as sensitive as that of the military applications of nuclear energy. The total exclusion of military activities from the scope of the EAEC Treaty is the only explanation for the absence from that Treaty of provisions equivalent to those in Article 48(4) of the EEC Treaty (which became Article 48(4) of the EC Treaty, now, after amendment, Article 39(4) EC) and Article 223 EEC (which became Article 223 of the EC Treaty, now, after amendment, Article 296 EC).

31 The Commission refutes that argument and submits that Articles 24 EA to 28 EA and the third subparagraph of Article 84 EA show, on the contrary, that the defence interests of the Member States were taken into consideration and that they were the subject of appropriate provisions. Articles 24 EA to 27 EA concern the security system to which information the disclosure of which is liable to harm the defence interests of one or more Member States is to be subject. Article 28 EA lays down the duty for the Community to make good the damage caused, in particular where, as a result of their communication to the Commission, patents or utility models classified for defence reasons are improperly used or come to the knowledge of an unauthorised person. As to the third paragraph of Article 84 EA, in Title II, Chapter 7, of the Treaty, relating to safeguards, it excludes from those safeguards materials 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.

32 However, as the United Kingdom pointed out at the hearing, the existence of those provisions in the EAEC Treaty does not necessarily lead to the conclusion that its rules are applicable, save express exceptions, to the military uses of nuclear energy. The existence of those provisions may also be explained by the fact that the application of certain rules introduced by that Treaty, even if it relates only to civil

activities, is nevertheless liable to have an impact on activities and interests within the field of the national defence of the Member States. That is certainly the case for the rules laid down in Title II, Chapter 2, of the Treaty, which concern dissemination of information, and those in Chapter 7 of Title II, relating to safeguards.

33 Furthermore, it should be emphasised that the allegedly derogating provisions relied on by the Commission are limited in scope. Apart from the two chapters in which those provisions are found, the Treaty does not contain any other provisions which take account of the interests and specific requirements connected with military activities.

34 The United Kingdom argues that if the Treaty had been intended to apply also to military uses of nuclear energy it would have been essential to insert in it a general provision with a content comparable to that of Article 296 EC. Under Article 296(1), the provisions of the EC Treaty are not to preclude the right of each Member State, first, not to supply information the disclosure of which it considers contrary to the essential interests of its security and, second, to take such measures as it considers appropriate for the protection of those interests which are connected with the production of or trade in arms, munitions and war material.

35 In that connection it should be stated that several provisions of the EAEC Treaty confer on the Commission substantial powers which enable it to intervene actively, by means of legislation or in the form of an opinion containing individual decisions, in various spheres of activity which, in the Community, are concerned with the use of nuclear energy. By way of example it is sufficient to mention, apart from the provisions of Title II, Chapter 3, of that Treaty, on health and safety, in particular

Articles 34 EA, 35 EA and 37 EA, the provisions of Title II, Chapter I, on promotion of research. The text of those provisions does not in any way specify whether the activities thus governed are exclusively civil.

36 However, it is clear that the application of such provisions to military installations, research programmes and other activities might be such as to compromise essential national defence interests of the Member States. Consequently, as the United Kingdom and the French Republic have rightly argued, the absence in the Treaty of any derogation laying down the detailed rules according to which the Member States would be authorised to rely on and protect those essential interests leads to the conclusion that activities falling within the military sphere are outside the scope of that Treaty.

37 It should, however, be noted that at the hearing the Commission nevertheless maintained that, according to its interpretation of Article 37 EA, the Member States are not obliged to provide it with any information relating to their military activities. The general data mentioned in that provision, the communication of which is required by the Commission, would concern solely the equipment or installations which are no longer assigned to military use and which the Member State concerned has, for that reason, classified as 'waste'. Furthermore, according to that interpretation, it would be for each Member State to decide both the time from which a military source of radioactive waste must be regarded as waste and the actual content of the general data which, without harming the national defence interests of the Member State concerned, must be communicated to the Commission so that it may perform the task which is entrusted to it under Article 37 EA.

38 The United Kingdom argues that even if the Commission, by its more subtle interpretation of Article 37 EA put forward during the oral procedure, were now prepared to require from the Member States only information which was more limited than that mentioned in Recommendation 1999/829, the action would still be unfounded. By its new interpretation of Article 37 EA, the Commission attempts to

read into it safeguards which are not provided for, precisely because military activities have always been excluded from the scope of the Treaty. Furthermore, that interpretation of Article 37 EA contradicts that given by the Commission to the other provisions of the chapter of the Treaty concerning health and safety. The United Kingdom recalls that, according to the Commission, Article 34 EA, relating to particularly dangerous experiments, also applies to nuclear weapons tests.

39 It should be pointed out that, as the Court has already ruled in Case 187/87 *Land de Sarre and Others* [1988] ECR 5013, Article 37 EA 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 State concerned. The Court held that, in order to maintain the effectiveness of that provision, whose objective is to prevent radioactive contamination, and given the very great importance of the guidelines that the Commission can give to the Member State concerned, it was essential that the Commission be aware in good time of the general data relating to any plan for the disposal of radioactive waste in order, after consulting the group of experts, to be able to deliver an opinion which could be examined in detail by that State in circumstances such that the Commission's suggestions may be taken into account before the authorisation is issued.

40 An interpretation of Article 37 EA to the effect that the Member State concerned might decide both the time from which a military source of radioactive waste must be regarded as civil waste and the actual content of the data which must be communicated to the Commission would be in contradiction with the purpose of that provision. First, any late communication of the data would render nugatory the objective of prevention. Second, any partial communication of the relevant data would make it impossible to deliver an opinion with full knowledge of the facts.

41 Furthermore, an interpretation of Article 37 EA which allowed Member States such discretion as to the time for communicating data and its content would be a source of dispute and would undermine the effective application of that provision.

42 It follows from those considerations that the interpretation of Article 37 EA proposed by the Commission at the hearing cannot be accepted.

43 It must therefore be held that the Commission has not demonstrated that the application of Article 37 EA to the decommissioning of the military installation in question is justified.

44 It is necessary, however, to emphasise that the fact that the Treaty is not applicable to uses of nuclear energy for military purposes and that, accordingly, the Commission is not justified in relying on Article 37 EA in order to require Member States to provide it with information on the disposal of radioactive waste from military installations does not by any means reduce the vital importance of the objective of protecting the health of the public and the environment against the dangers related to the use of nuclear energy, including for military purposes. In so far as that Treaty does not provide the Community with a specific instrument in order to pursue that objective, it is possible that appropriate measures may be adopted on the basis of the relevant provisions of the EC Treaty (see, to that effect, Case C-62/88 *Greece* v *Council* [1990] ECR I-1527).

45 Having regard to all the foregoing considerations, it must be held that Article 37 EA does not impose on the United Kingdom the obligation to provide the Commission with general data relating to the plan for the disposal of radioactive waste associated

with the decommissioning of the Jason reactor and, therefore, the Commission's application must be dismissed.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings must bear their own costs.

On those grounds the Court (Grand Chamber) hereby:

1. **Dismisses the application;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders the French Republic to bear its own costs.**

[Signatures]