OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 8 June 1988

My Lords,

This reference under Article 150 of the Treaty establishing the European Atomic Energy Community raises an important question as to the interpretation of Article 37 of the Treaty. The question has arisen in proceedings brought to challenge the legality of certain decrees made, and authorizations given, by the French Government in respect of a nuclear power-station to be operated by Electricité de France ('EDF') at Cattenom — one of the largest in Western Europe and situated near to the Moselle in northern France, a short distance from the Luxembourg and the German frontiers. The applicants in those proceedings are the Saarland, communes, municipal authorities, associations and individuals in the region; the Governments of Luxembourg, Portugal and Ireland have intervened to support the case of the applicants on this reference.

To design, obtain approval for and construct a nuclear power-station of this size — ultimately four blocks each consisting of a pressurized water reactor with a rated power generation of 1 300 megawatts — takes a long time. The construction is of concern not only to national authorities of the State where the station is to be built, but, where the station is close to national frontiers, to neighbouring States and to the Community as a whole; the Treaty both empowers the Community to lay down basic standards for the protection of workers and the general public (Article 30) and requires that the Commission shall be consulted or notified in respect of specific matters.

In the present case, after a preliminary feasibility study and the lodging of plans with the French authorities, the building of Cattenom was declared to be a work of public utility by French decree dated 11 October 1978. On 29 November 1978 the Commission was supplied, in accordance with Article 41 of the Treaty, with information relating to the investment project for Cattenom. In reply, in its statement of position dated 6 September 1979, the Commission regretted the absence of important information relating to safety aspects and expressed the hope that the project would be developed in close collaboration with the neighbouring Member States. Between 1979 and 1982, building permits were granted by the French authorities for the various blocks and by decrees of 24 June 1982 and 29 February 1984, the 'creation' of the four blocks was authorized by the French authorities.

The generation of nuclear energy, which in turn produces electricity to be supplied to the national grid, is accompanied by the emission of radioactive waste in gaseous, liquid and solid form once the nuclear chain

reaction commences. The disposal of this radioactive effluent is, for the safety of neighbouring communities, a vital aspect of the operation of the plant.

On 31 July 1984, EDF asked the French authorities for authorization to dispose of liquid and gaseous radioactive effluent from each of the four blocks. On 21 February 1986, two orders were issued by the responsible Ministers authorizing the disposal respectively of gaseous and liquid waste. Annual radiation limits were prescribed: 60 curies in total, (i. e. 15 curies per block) for all radio-elements in liquid waste other than tritium, 4 kilocuries for tritium; and 90 kilocuries for gases generally from the four blocks, with 3 curies for gaseous halogens and aerosols. The orders laid down detailed conditions governing the treatment and discharge of such waste, provided for the monitoring of the level of radiation in the surrounding environment and required there to be a round-the-clock watch to check for any departure from normal operating procedures which might lead to an increase in radioactive emissions and further required that in such a case appropriate measures should be taken (JORF, 11.3.1986, pp. 3724 and 3726).

On 28 April 1986 proceedings were brought in the Administrative Court at Strasbourg challenging the validity of those orders, both under national law and on the basis that Article 37 of the Treaty had not been complied with.

On the next day, the French Government sent to the Commission 'general data' about radioactive waste disposal from Cattenom 'in accordance with' Article 37 of the Treaty. By letters of 11 July and 14 August 1986, the responsible Ministry authorized the loading of fuel and the holding of pre-critical cold and hot tests (i. e. those held before and after the various circuits are under pressure).

On 22 October 1986 (within the six-month period provided for in Article 37 of the Euratom Treaty), the Commission issued its Opinion (C(86) 1954 final). In general terms, that Opinion was favourable; but in it the Commission made two specific recommendations — firstly that the responsible authorities in the neighbouring Member States be linked in to the automatic alarm system and be given access to control data automatically and on a permanent basis, and secondly that a re-examination be made of existing procedure, in particular as to the time recommended between the giving of the opinion and the power-station's entry into service. The following day, on 23 October 1986, the responsible ministry wrote to the Director-General of EDF authorizing nuclear power generation to start in the first block of Cattenom, together with progressive testing up to 90% of nominal kilowattage. On 25 October 1986, the first nuclear chain reaction began in Block 1 of Cattenom.

By judgment dated 11 June 1987, the Administrative Court declared void the orders in question, on national law grounds, in so far as they related to Blocks 3 and 4 of the power-station; and stayed the proceedings in respect of the remaining claims (in respect of Blocks 1 and 2)

'until the Court of Justice of the European Communities has given a preliminary ruling on the question whether Article 37 of the

Treaty of 25 March 1957 establishing the European Atomic Energy Community requires the Commission of the European Communities to be notified before the disposal of radioactive effluent by nuclear power-stations is authorized by the competent authorities of the Member States, where a procedure for prior authorization is set in motion, or before such disposal is effected by nuclear power-stations'.

Article 37 comes in Chapter III of the Treaty, headed 'Health and Safety', adopted to give effect to the fourth recital thereto that the Member States (whilst resolved to create the conditions necessary for the development of a powerful nuclear industry) were 'anxious to create the conditions of safety necessary to eliminate hazards to the life and health of the public'. Thus Member States were, by Article 33, required to ensure compliance with the basic standards laid down by the Commission under Articles 30 to 32. Council Directive 80/836/Euratom of 15 July 1980 (Official Journal 1980, L 246, p. 1) (made under Articles 31 and 32 of the Euratom Treaty) amends earlier directives laying down the basic safety standards for the health protection of the general public and workers against the dangers of ionizing radiation.

By Article 34, Member States are required to obtain the opinion of the Commission as to additional health and safety measures to be taken where particularly dangerous experiments are to take place: where the effects of such experiments are likely to affect the territories of other Member States, not only the opinion but the assent of the Commission must be obtained. By Articles 35 and 36, Member States are required to establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards, to keep the Commission informed and to give the Commission access to such facilities to verify their operation and efficiency.

Article 38 requires the Commission to make recommendations to Member States with regard to the level of radioactivity in the air, water and soil and empowers the Commission in case of urgency to issue a directive requiring the Member State to take, within a period laid down by the Commission, 'all necessary measures to prevent infringements of the basic standards and to comply with regulations'. If a Member State fails to comply the Commission or any Member State may 'forthwith' bring the matter before this Court.

It is plain that the effects of building a nuclear power-station cannot be seen simply in the context of one Member State or one national territory. Where a power-station is built near to a frontier, the interests of neighbouring States are as great as those of the State in which the power-station is built.

The Commission has had this in mind. As long ago as 1976, the Commission presented to the Council a proposal for a Council regulation concerning the introduction of a Community consultation procedure in respect of power-stations likely to affect the territory of another Member State (Official Journal 1977, C 31, p. 3). That draft regulation, based on Article 235 of the EEC

Treaty and Article 203 of the Euratom Treaty, refers (sixth recital) to Community-wide consultation existing 'only in respect of plans for the discharge of radioactive effluents likely to cause radioactive contamination of the water, soil or air space of another Member State' and, *inter alia*, would require a Member State, where the consultation procedure has been invoked, to provide data enabling an assessment to be made of the likely environmental effects and potential risks 'at the latest . . . when the competent national authorities receive a request for permission to build or extend a power-station' (Article 3 (2)). So far, however, the Council has not adopted the draft regulation.

More recently, Council Directive 85/337/EEC of 27 June 1985 (Official Journal 1985, L 175, p. 40), which comes into full effect on 3 July 1988, provides for a detailed assessment of the environmental effects of certain projects. For nuclear power-stations this assessment is obligatory for Member States.

The Commission has specifically taken two steps in respect of Article 37 of the Euratom Treaty. Commission Recommendation of 16 November 1960 (Journal Officiel, 21.12.1960, p. 1893) ('the 1960 Recommendation'), which defined the concept of radioactive effluents (paragraph 1) and the activities likely to lead to their generation (paragraph 3), set out the nature of the general data to be communicated to the Commission (Annex I) and recommended that plans for the disposal of radioactive waste be communicated to the Commission at least six months before the planned date for the execution of the waste disposal (paragraph 6).

Whether that period was sufficient was considered doubtful and on 20 November 1980, the European Parliament adopted a resolution relating to the construction of nuclear power plants in frontier zones (Official Journal 1980, C 327, p. 34). It called on the Commission to urge Member States to comply fully with Articles 37 and 41 of the Euratom Treaty and to operate within time-scales sufficiently great to make the procedure there provided for an effective one. It stressed the pre-eminent role of the Commission in ensuring the correct application of those Treaty articles.

Subsequently, Commission Recommendation 82/181/Euratom of 3 February 1982 (Official Journal 1982, L 83, p. 15) ('the 1982 Recommendation') replaced the 1960 Recommendation with more detailed listings. Recital 5 to that recommendation observes that,

'plans for the disposal of radioactive wastes from nuclear reactors and nuclear fuel reprocessing plants necessitate particular attention in the context of Article 37 prior to construction beginning'.

Paragraph 3 recommends that, 'for plans involving category 1 and category 2 operations' (which include Cattenom), 'the relevant parts of the "general data" . . . be submitted to the Commission *whenever possible one year but not less than six months before the planned date of commencement of disposal of radioactive waste*' (emphasis added).

Paragraph 7 recommends that,

'the Commission be notified, before authorization is granted, of any modification of a plan for disposal of radioactive waste, which has already been submitted for its opinion, if such modification could cause any appreciable increase in the effect of such disposal on the exposure of the population'.

Against this background I turn to the precise question asked — does Article 37 require the Commission to be notified: (a) before disposal of radioactive effluent is *authorized* where a procedure for prior authorization is set in motion, or (b) before such disposal is *effected*, i. e. begins?

The question thus turns on whether there has to be notification (rather than whether the Commission's opinion has to be received) before the authorization or the commencement of disposal. That formulation by the national court is justified by the wording of Article 37 which itself has no express provision that the opinion must be received before anything further is done (whether authorization or the commencement of disposal).

At the very least it seems to me, however, despite its wording, that the intendment of the article must be that the opinion is to be received, after consultation of the experts, before the waste disposal begins. If it is not so interpreted the whole process could be nugatory and disposal could begin immediately the data has been supplied.

Beyond that it seems to me that the express wording of the article is neutral between the two positions contended for — notification prior to authorization and prior to actual disposal. There is no express indication either way and there are arguments in each direction.

Thus it is said, on the one hand, that if the opinion was meant to be received before authorization, the article could have said so easily. That seems to me to be an argument of little or no weight. It could equally well have specified 'before disposal began' if that was intended.

Then it is said that in both the 1960 and the 1982 Recommendations, the Commission recommended that plans be communicated a period before 'the planned date for the execution of the waste disposal' (1960) or 'the planned date of commencement of disposal of radioactive waste' (1982). There is no reference, in paragraph 3, to the data being given before the authorization of the plan. On the other hand, in paragraph 4, for plans involving category 1 operations the preliminary 'general data' listed in Annex 2 have to be submitted to the Commission before permission for construction is granted by the competent authorities. Therefore, the argument runs, the first disposal of the waste must be the key date.

There is more force in this textual argument than in the first argument though it is to be noted that, under paragraph 7 of the 1982 Recommendation, modifications to a plan which could cause any appreciable increase in the effect of such disposal on the exposure of the population must be notified before authorization. Despite the emphasis there on the greater risk, it seems to me

curious, since an original unmodified plan may have equal risk, that the recommendation did not specify a period prior to authorization in both cases. It is curious that is, unless the underlying intention was that the 'disposal' referred to in paragraph 3 should have been a disposal which took account of the Commission's opinion. Moreover, it does not seem to me that it can possibly be said that the preliminary general data referred to in paragraph 4, which have to be submitted before authorization, are sufficient to allow the Commission an adequate overview of plans for the discharge of effluent so that future notification is not necessary before authorization. Annex 2 makes it clear that the data are both very preliminary and very general. The existence of this provision does not seem to me to affect the question in this reference.

The Commission apparently adopted the period of six months as the minimum period of notice because of the provision in Article 37 that it should have six months to deliver its opinion. In other words the recommendation was that disposal should not begin until the opinion was given. That seems to me to be running together two different periods which relate to different purposes — i.e. the giving of the Commission's opinion on the one hand and the consideration of the opinion, coupled with putting into effect any modifications proposed in the interests *inter alia* of neighbouring States and the Community as a whole, on the other.

In any event, despite the weight of the Commission's view as to how the Treaty should be applied, it does not seem to me that the statements in the recommendations can govern the proper interpretation of the article.

Reliance is then placed on Article 38 to justify the narrower interpretation of Article 37 (that it is sufficient to give the data before disposal begins). I accept the argument that, if the Commission knows that disposal measures have been or are about to be put into effect which infringe the basic standards or the relevant regulations, it may issue a directive under Article 38 and, if necessary, apply to this Court. Such a situation could constitute 'a case of urgency' within the meaning of Article 38. That, however, is not in my view a conclusive answer against the more extensive interpretation of Article 37. The purpose of Article 37 is to seek to avoid situations of urgency arising with possibly great risk to neighbouring communities. The Commission with its overview of Community developments, aided by the view of the group of experts, is in a position to give guidance so as to prevent situations of urgency, as distinct from dealing with them as they arise under Article 38.

On the other side much emphasis is laid on the words 'any plan' in Article 37. It is said that a 'plan' is in effect no more than a proposal, and that a proposal once authorized ceases to be a 'plan': if definitive measures for its implementation have been taken, it is no longer a plan. For my part, I am not persuaded by this argument. I am not satisfied that as a matter of ordinary language a plan once approved ceases to be a plan. To turn to the language of planning authorities a 'town plan' even when adopted is still properly described as a plan.

At the end of the day it seems to me that, in the absence of clear express guidance, one must ask what is the fundamental object and purpose of the procedure prescribed in Article 37. The answer in my view clearly is that it is to give the Commission, after consulting its experts, and in the light of its experience in the Community and its knowledge of the building of nuclear power-stations, actual or projected, a real opportunity to comment on the plans submitted to it and to make proposals primarily with the health and safety of people who may be affected by the disposal of radioactive effluent, but also with the effect on the environment, in mind.

That answer is not to be qualified by the fact that the Commission can only issue an opinion, which under Article 161 of the Treaty is said not to have binding force or that in Article 34 by contrast the Commission's assent rather than its opinion is required where the effects of particularly dangerous experiments are likely to affect the territories of other Member States. It seems to me inconceivable in a matter with such potentially serious consequences that a Member State would not give the fullest and most careful consideration to the Commission's opinion even if in the end it decided not wholly to comply with it. In my view it has a duty to do so. Indeed counsel for France, as I understood him, whilst reserving a right to depart from the opinion, accepted, as one would have expected, that either pursuant to Article 192 of the Euratom Treaty or under its general obligations as a Member of the Community, France would comply with its obligations and would give full consideration to the opinion of the Commission before continuing.

In my opinion the interpretation, which achieves that object and purpose of Article 37 in the most useful and satisfactory way, is that which requires the Commission's opinion to be obtained and considered before the plan for disposal of radioactive effluent is finally authorized. Counsel for France stressed that in this sort of area neither the Commission nor the Member States are infallible — the more necessary and useful is it, in my view, for the Commission's opinion to be considered before authorization, since, after authorization: (a) there may well be a possibility of those who gave the authorization taking entrenched positions and (b) those to whom the authorization is given may have acquired rights at law, and others may have, by reason of the intervening time-period, lost any right to challenge the authorization. In an area of such potential risk this should be avoided: the opinion should be seen and considered before the final legislative or administrative measure concerning the disposal of radioactive effluent is adopted.

There is, it seems to me, force in the argument that the authorization should come after the opinion has been given, the authorization being the last act which can be challenged in a national court. For the authorization to come after the opinion is likely also to give the Commission a more realistic period in which to consider measures under Article 38 and, if necessary, to apply to this Court.

I am not persuaded by the argument that if the general data have to be notified before authorization they may be so general as to be of limited value. The disposal of waste is

an essential part of the planning of a nuclear power-station and data relating to the disposal of such waste seem likely to be available in adequate time for the procedures contemplated fully to be carried out — not least when regard is had to the time-scale in this case, and the Commission's evidence that from first plan to the first nuclear chain reaction a period of eight years is not unusual.

Nor do I accept that because in some Member States different authorization procedures may be adopted in relation to the disposal of radioactive waste the result is discriminatory. Whatever form the authorization takes — whether as part of the general authorization to set up a nuclear power-station or, as here, as a separate matter (and a requirement of authorization in some form seems virtually inevitable) — the Commission's opinion must be obtained and considered before final authorization is given.

In considering these questions, I have left out of account the particular facts of this case. The construction of Article 37 cannot be affected by the consideration that in this case the Commission's opinion was largely favourable. It is, however, to be noted, *post hoc*:

(1) that the practice of Member States in the absence of a clear ruling has been varied — out of 20 notifications to the Commission under Article 37, six were made less than six months before the power-station was linked to the national electricity grid, nine were notified between six months and a year before entry into service and five more than a year in advance,

(2) that in this case no real explanation has been given as to why notice was not possible within 12 months rather than six months of the commencement of disposal,

(3) that, although the final building permit was given on 31 March 1982, i. e. after the 1982 Recommendation had come into effect, France does not appear to have notified preliminary 'general data' to the Commission, in accordance with paragraph 4 of the recommendation, before granting that final building permit,

(4) that there has been divergence between what were considered to be acceptable levels of discharge of liquid radioactive waste from Cattenom: the order authorizing discharge specified 15 curies per block for all radioactive elements other than tritium; the Convention between France and Luxembourg of 12 March 1986 specified not more than 3 curies per block and in the Decision of the Commission of the Moselle of 27 March 1986, France undertook not to exceed this level; the group of experts, in their report, considered that the higher limits were acceptable but 'noted with satisfaction' the lower limit adopted in the Convention and in the Decision of the Commission of the Moselle: yet the order authorizing the discharge was not amended.

These factors seem to me to indicate the need for a clear and firm rule to be followed under Article 37.

The principles of 'effet utile' (accepted in Community law — e.g. Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825, at p. 837, paragraph 5; Case 22/70 *Commission* v *Council* [1971] ECR 263, at pp. 274 and 275 (paragraphs 15 and 28), p. 280 (paragraph 72) and p. 281 (paragraph 77); Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, at p. 1074, paragraph 23) and of Community solidarity (e. g. Joined Cases 6 and 11/69 *Commission* v *France* [1969] ECR 523, at p. 540, paragraph 16, and Case 39/72 *Commission* v *Italy* [1973] ECR 101, at p. 116, paragraph 25) seem to me to require in the interests of health and safety, efficiency and the protection of the environment, whilst not unduly encroaching on national procedures, that the question referred be answered on the lines that:

'Article 37 of the Treaty of 25 March 1957 establishing the European Atomic Energy Community requires that the Commission be notified and its opinion be given and considered before the competent authorities of the Member States authorize the disposal of radioactive effluent by a nuclear installation.'

The costs of the parties to the main proceedings are a matter for the national court. The costs of the Commission and of the Irish, Luxembourg and Portuguese Governments, which have submitted observations in these proceedings, are not recoverable.