

How current are Euratom provisions on nuclear supply and ownership in view of the European Union's enlargement?

by André Bouquet*

1. Introduction

This contribution is mainly based on two papers presented at nuclear law conferences in 1998¹ and 2001,² respectively setting out the special provisions governing supplies of nuclear fuels to the European Union (Chapter 6 of the Treaty establishing the European Atomic Energy Community, hereinafter referred to as the "Euratom Treaty") and the right of ownership of the Euratom Community (Chapter 8 of the Euratom Treaty). These special Treaty provisions cannot be compared to anything observed in other legal systems. Hence, with their introduction into the legal systems of the new European Union member states, the question arises as to how current these provisions are and how they have been implemented in practice.

Two of the fundamental objectives of the Euratom Treaty most relevant in this field are to ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels (Article 2d Euratom) and to exercise the Community's right of ownership with respect to special fissile materials (Article 2f Euratom).

Furthermore, the objectives of ensuring the establishment of the basic installations necessary for the development of nuclear energy in the Community (Article 2c Euratom), of safeguarding that material is not diverted from its intended use (Article 2e Euratom), of establishing a common market (Article 2g Euratom) and of maintaining external relations (Article 2h Euratom) can be relevant to nuclear trade and to the Supply Agency's action.

* Mr. Bouquet is Principal Administrator at the Euratom Supply Agency. This contribution sets out the views of the author and in no way commits the Euratom Supply Agency or the European Commission.

1. BOUQUET, A., "Nuclear Supply Provisions in the European Union" presented at the Advanced Training Seminar on the Rules governing International Transfers of Nuclear and Nuclear-Related Material, Equipment and Technology, and the Transport of Radioactive Materials, organised by the OECD Nuclear Energy Agency in Tallinn, Estonia, from 24 to 28 August 1998.
2. BOUQUET, A., "The mysteries of the Euratom Community's ownership right", presented at Nuclear Inter Jura 2001, organised by the International Nuclear Law Association in Budapest in June 2001, not yet published.

The Treaty's philosophy with regard to supply and ownership is the result of a delicate compromise between public authority interventionism and a more free market approach. The interventionism resulted in a monopolistic system of supplies (exclusive right to conclude contracts, right of option, public authority ownership), whereas the free market approach brought about the commercial organisation of the entity responsible for the implementation of supply provisions (separate legal entity, market economy pricing), and also resulted in the users being allowed to have an unlimited right of use and consumption. This system, still rather monopolistic, has been simplified somewhat further, since the beginning, by the introduction of simplified procedures allowing parties to negotiate their contracts themselves, subject to Agency approval (see *infra*).

The supply system as provided for by the Euratom Treaty has not only been designed to intervene effectively in the event of scarcity of nuclear supplies (as was anticipated by most observers) but it can also be applied in the event of an over-supply crisis. Indeed both scarcity and over-supply would be detrimental to the security of supply and viability objectives of the Treaty, and could therefore require corrective action to defend supply stability (see *infra* point 3.6.2).

2. Historical background³

For the good understanding of Chapters 6 and 8 of the Euratom Treaty it should always be recalled that, although the proposals were tabled by the French delegation⁴ and were not very well received by Germany for reasons of free market philosophy, it was in fact not really a European invention.

France strongly supported the centralised Euratom proposal with a supply monopoly and public ownership of all nuclear materials, while the five other partners merely accepted, rather reluctantly, Euratom as a *quid pro quo* for French support for the European Economic Community and its Common Market. On the other hand, some parts of French governmental circles, in particular the *Commissariat à l'énergie atomique*,⁵ were less supportive of the highly supranational characteristics of the Euratom construction as a step to full integration, whereas from this standpoint, Euratom was more

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3. On the negotiation of the EAEC Treaty (Euratom), see GUILLEN, P., "*La France et la négociation du Traité Euratom*", in *L'énergie nucléaire en Europe, Des origines à Euratom*, Euroclio, Bern, 1994, p. 111-129, GUILLEN, P., "*La France et la négociation des traités de Rome: l'Euratom*", and WEILEMANN, P., "*Die Deutsche Haltung während der Euratom-Verhandlungen*", both in SERRA, E., *et al, Il rilancio dell'Europa e I Trattati di Roma*, Bruylant, Brussels, p. 513-524 and p. 531-545, MANIG, W., *Die Änderung der Versorgungs- und Sicherheitsvorschriften des Euratom-Vertrages durch die nachfolgende Praxis*, Baden-Baden, Nomos, 1992, p. 28-48, GOLDSCHMIDT, B., *Le complexe atomique*, p. 304-319, PINEAU, C., and RIMBAUT, C., *Le grand pari, l'aventure du Traité de Rome*, Fayard, 1991, p. 237; HAEDRICH, H., "*Vertrag zur Grundung der Europäischen Atomgemeinschaft (Euratom) Kommentar Artikel 86-92, Kapittel VIII Eigentum*", in VON DER GROEBEN, THIESING, EHLERMANN, *Handbuch des Europäischen Rechts*, Baden-Baden, Nomos, Band 19, No. III A 49, *Vorbemerkung zu Artikel 86-91*, Nos. 7-8, and DOMSDORF, E., *Internationaal atoomeneregierrecht*, 1993, p. 618.
 4. Proposals of 3 December 1956 and of 19 September 1956 (Doc. MAE 675 f/56 and Doc. MAE 279 f/56), quoted in NERI, S., and SPERL, H., *Travaux préparatoires*, p. 164 and 250.
 5. GOLDSCHMIDT, B., *Le complexe atomique*, p. 310, testifies how, disrespectfully, they called Euratom "*Le Raton*" (the little rat).

acceptable to Germany and the others. During the treaty negotiations, ownership was considered as one of the central pieces of this integrated system.⁶

The concept itself of a centralised public authority supply and ownership monopoly for nuclear materials (with the possibility of use by private users) was in fact mainly inspired by Section 52 of the United States Atomic Energy Act of 1954,⁷ as was applicable at that time, and which provided that in essence only a public authority can own nuclear material. It has been reported that the United States diplomacy exercised decisive influence during the negotiation of the Euratom Treaty, and in particular that the United States submitted a memorandum to impose a system of centralised supply and ownership⁸ as a pre-condition for United States supplies of enriched uranium to the new Community, or before it could accept the new centralised Euratom safeguards system instead of imposing a bilateral system of United States inspections abroad.⁹ The understanding that Euratom ownership was seen as a pre-condition for supplies of equipment and materials from the United States was admitted throughout the negotiations and was stated explicitly during the ratification debate before the German Parliament.¹⁰ And indeed, in 1958, shortly after the entry into force of the Euratom Treaty, the first co-operation agreement¹¹ could be concluded with the United States providing for a recognition of Euratom's safeguards, ownership and supply system and hence allowing supplies to take place.

In the meantime, the United States provisions on ownership were repealed in 1964, by the Private Ownership of Special Nuclear Materials Act,¹² but the ownership provisions of the Euratom Treaty were not amended. Consequently, one of the main reasons why Euratom ownership existed disappeared, but the ownership system itself is still part of primary European Union law. According to consistent case law of the E.C.J., treaty provisions cannot be presumed to have lapsed.¹³ Furthermore,

6. Ruling of the Court of 14 November 1978 pursuant to the third paragraph of Article 103 of the EAEC Treaty (Ruling 1/78, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports), European Court Reports (ECR) 1978, p. 2151, point 25: "It is well known that the ideas contained in chapter VIII were one of the major issues in the negotiations which led to the creation of the EAEC; [...]"
7. "All special nuclear material [...] shall be the property of the United States", quoted by DOMSDORF, E., *Internationaal atoomeneregierecht*, 1993, p. 618, and by MANIG, W., *Die Änderung der Versorgungsvorschriften des Euratom-Vertrages durch die nachfolgende Praxis*, p. 37.
8. GOLDSCHMIDT, B., *Le complexe atomique*, p. 308-309, and DOMSDORF, E., *Internationaal atoomeneregierecht*, 1993, p. 618.
9. It should be recalled that at that time the Non Proliferation Treaty was not yet in existence, no IAEA safeguards system was in place and bilateral safeguards inspections were performed abroad by some exporting countries, especially the United States.
10. NERI, S., and SPERL, H., *Travaux préparatoires*, p. 252.
11. Agreement between the European Atomic Energy Community (Euratom) and the Government of the United States of America of 29 May and 18 June 1958 (framework offer to co-operate) and Agreement for co-operation between the Government of the United States of America and the European Atomic Energy Community (Euratom) concerning peaceful uses of atomic energy of 8 November 1958, Official Journal of the European Communities (OJ) No. 17, 19.3.1959 p. 309 and 312 (no English translation). The co-operation agreement has been completed and amended by additional programmes on 11 June 1960, 21-22 May 1962, 22-27 August 1963, 20 September 1972 and 9 August 1972. It has since expired. See for the background GOLDSCHMIDT, B., *Le complexe atomique*, p. 323-327.
12. Public Law 88-489, mentioned by DOMSDORF, E., in *Internationaal atoomeneregierecht*, 1993, p. 619.
13. Court of Justice, 14 December 1971, case 7/71, Commission/French Republic, ECR 1971, p. 1003, This case concerned the provisions of Chapter 6, which France claimed had lapsed (became null and void) as they have not been confirmed by the Council under Article 76 of the Euratom Treaty.

an autonomous treaty revision under Article 90 Euratom has not been decided by the Council, and is not to be expected. Therefore, for the foreseeable future, nuclear operators, in particular in acceding countries, will have to live with the existing system.

Similarly, some have argued that, because the scarcity of nuclear materials did not materialise, Chapter 6 needs to be revised. In addition, a certain Member State politically contested the supranational influence Euratom could exercise. Hence several attempts have been made to revise, under the autonomous Treaty revision procedure of Article 76 Euratom,¹⁴ the provisions of Chapter 6 of the Euratom Treaty,¹⁵ but without success. Given that the second paragraph of Article 76 provides for a decision to confirm or revise Chapter 6 “seven years after the entry into force of this Treaty”, some have supported the idea that following that point in time, Chapter 6 had lapsed (became null and void), but the Court¹⁶ rejected that view and concluded that the provisions of Chapter 6 remain in force, albeit on a temporary basis, until confirmed or revised. This does not prevent, however, the introduction of simplified procedures in the Agency’s rules (see *infra* point 3.3.2).

3. The Supply provisions of the Euratom Treaty

3.1 Exclusive character of the supply provisions

The Treaty provides for a “common supply policy” (Article 52, paragraph 1, Euratom). The concept of a “common policy” normally refers to a comprehensive set of rules under which the Community has exclusive powers and conducts its policy in a certain field. There are only a limited number of such policies, for example the “Common Agricultural Policy” (Articles 32 to 38 of the EC Treaty), the “Common Transport Policy” (Articles 70 to 80 of the EC Treaty),¹⁷ the “Common

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14. Acting on the initiative of a Member State or of the Commission, the Council can amend, by unanimous decision, the provisions of that Chapter, without going through a complete treaty revision procedure which has to be ratified by each Member State. Other autonomous revision procedures of the Euratom Treaty are Article 85 for Chapter 7 (Safeguards) and Article 90 for Chapter 8 (Ownership).
 15. Proposals were made by the Commission in 1964 as amended in 1970, and 1982 as amended in 1984; in 1979 France requested new Commission proposals. See OJ 1965, p. 1991/65, OJ No. C 124, 17.12.1971, p. 7, Commission Document COM(82)732 final, OJ No. C 330, 16.12.1982, Commission Document COM(84)606 final. In a resolution of 24 May 1984 the European Parliament declined to comment in detail on the proposal (OJ No. C 172, 2.7.1984, p. 152). In a reply to a parliamentary question, the Commission mentioned this proposal among those on which the Council would in principle be obliged to act, but as in the meantime the existing provisions remain applicable, this failure to act was not comparable to other areas (OJ No. C 99, 28.4.1986, p. 2). For comments on the proposals see LOOSCH, R., “*Der Vorschlag der Euratom Kommission zur Neuregelung der Versorgungsvorschriften des Kapitels VI im Zweiten Titel des Euratom-Vertrages*”, *Europarecht*, 1966, p. 296, and ALLEN, D., “The Euratom Treaty, Chapter VI: New hope or false dawn?”, *Common Market Law Review*, 1983, p. 473.
 16. Court of Justice Judgement of 14 December 1971, case 7/71, Commission/France, ECR 1971, p. 1003, points 16-29, in particular point 18: “It cannot be presumed that provisions of the treaty have lapsed”. Conclusions by Advocate General Roemer are along the same lines. For annotations see RUZIÉ, D., *La Semaine Juridique – édition générale*, 1972, II 17115, HEBERT, J., *Revue Trimestrielle de Droit Européen*, 1972, p. 299-342, GRUBER, E., *Atomwirtschaft*, 1972, p. 221-222, CONSTANTINESCO, V., *Journal du Droit International*, 1973, p. 539-547, and BRUSCH, P., *California Western International Law Journal*, 1973-74, p. 43-60.
 17. The European Parliament initiated an action for failure to act against the Council for not having set up a common policy, which was partly granted by the Court (see Court of Justice Judgement of 22 May 1985, case 13/83, European Parliament/Council, ECR 1985, p. 1513).

Commercial Policy” (Articles 131 to 134 of the EC Treaty), and the Common Competition Policy (Articles 81 to 89 of the EC Treaty).¹⁸ Albeit on a different scale, the Euratom Treaty’s supply rules, taken together with other provisions, correspond to that concept (a monopolistic system of contract conclusion, right of option and ownership, intervention in pricing, illustrative nuclear programmes, incentives for prospection and joint undertakings, emergency and commercial stocks).

In practice, however, with the simplified procedure and given the fact that some instruments are not used, one could say that merely a part of such a common policy has been implemented. But in any case the core provisions of the Treaty (exclusive right to conclude contracts) have been applied effectively and the other provisions, whose active implementation was not necessary in the prevailing market situation, can always be implemented if needed (stockpiles, prospection, right of option). In its ruling with regard to the conclusion by the Community of the International Atomic Energy Agency’s Convention on the Physical Protection of Nuclear Materials the Court underlined how the supply provisions of the Euratom Treaty “show the care taken in the treaty to define in a precise and binding manner the exclusive right exercised by the Community in the field of nuclear supply in both internal and external relations”.¹⁹

3.2. *The Supply Agency*²⁰

To achieve the general objective of ensuring nuclear fuel supplies, the Treaty provides for a specialised agency, the Euratom Supply Agency, which is operative since 1 June 1960,²¹ and has as its task to ensure regular and equitable supply by means of a common supply policy based on the principle of equal access to sources of supply. The Agency has legal personality and financial autonomy. Its Director-General is appointed by the Commission. The Agency operates under the supervision of the Commission, which has a right of veto over all its decisions (Article 53, paragraph 1, Euratom). This general supervision power and right of veto are not to be confused with the Commission’s right to take a final decision on cases referred to it as set out in Article 53 paragraph 2, Euratom. One can argue that, by allowing an action for failure to act against the Commission on the grounds that it failed to give instructions to the Agency, the Court did not make that distinction properly.²² In addition, the decisions of the Agency in the exercise of its exclusive right to conclude contracts and in the exercise of its right of option can be referred to the Commission

18. Although the title of these provisions is “Common rules on competition” they are usually viewed as forming a real common policy.

19. Court of Justice Ruling of 14 November 1978, Ruling 1/78, ECR 1978, p. 2151, points 14-18.

20. Statutes of the Euratom Supply Agency – Statutes of 6 November 1958, OJ No. 27, 6.12.1958, p. 534, amended by Council Decision 73/45/Euratom of 8 March 1973, OJ No. L 83, 30.3.1973, p. 20, Act of Accession Greece, OJ No. L 291, 19.11.1979, p. 17, Act of Accession Spain and Portugal, OJ No. L 302, 15.11.1985, p. 23, and Act of Accession Austria, Finland and Sweden, OJ No. L 1, 1.1.1995, p. 176. On the Agency’s role in general see GOPPEL, M., (with BOUQUET, A.) “Aims and Policy of the Euratom Supply Agency”, in *Topfuel '95, International KTG/ENS Topical Meeting on Nuclear Fuel in Würzburg, March 12-15, 1995, Bonn, Inforum Verlag, 1995, Vol. I, p. 95-105.*

21. Article 1 of Commission Decision of 5 May 1960 fixing the date on which the Euratom Supply Agency shall take up its duties (and approving the Agency Rules of 5 May 1960 determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials), OJ No. 32, 11.5.1960, p. 776/60.

22. Court of Justice, 16 February 1993, case C-107/91, ENU/Commission, ECR 1993, p. I 599. This was the conclusion of the Advocate General in that case, but it has not been followed by the Court.

(Article 53, paragraph 2, Euratom)²³ by the parties concerned, within a delay of fifteen days.²⁴ The Commission is required to decide within one month and the Commission's decision, or its failure to act if the Commission doesn't decide, are, of course, subject to judicial review²⁵ by the Court of First Instance and by the Court of Justice. The Commission, as representative of the Community, can also be held liable for damages caused by its institutions or its staff.²⁶

The Supply Agency publishes an extensive Annual Report²⁷ which gathers together data on supply and demand for nuclear fuels in the Community, and reports on trends and developments in the supply situation and supply policy. The Supply Agency's annual average natural uranium price, which is used as a price indicator in many supply contracts involving Community as well as non-Community operators, is published in this report.

Given that in most supplier countries, public authorities are involved in the contractual activities of nuclear fuel supply companies,²⁸ the Agency acts as a kind of counterweight²⁹ to public authority

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23. See Commission Decision 93/428/Euratom of 19 July 1993, OJ No. L 197, 6.8.1993, p. 54, Commission Decision 94/95 of 4 February 1994, OJ No. L 48, and Commission Decision 94/285/Euratom of 21 February 1994, OJ No. L 122, 17.5.1994, p. 30. See *infra* points 3.5.4 and 3.6 for discussion of these cases.
 24. Article VIII, paragraph 3, of the Agency Statutes.
 25. Under Article 146 Euratom, two annulment actions have (unsuccessfully) been initiated against the three Commission decisions (see footnote 23) under Article 53, paragraph 2, Euratom: Court of First Instance, 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459; appeal rejected by the Court of Justice, 11 March 1997, case C-337/95P, ENU/Commission, ECR 1997, p. I 1329, and Court of First Instance, 25 February 1997, cases T-149/94 and T-181/94, KLE/Commission, ECR 1997, p. II 161, appeal rejected by the Court of Justice, 22 April 1999, case C-161/97P, KLE/Commission, ECR 1999, p. I 2057. Under Article 148, one action for failure to act has been (successfully) submitted against the Commission for failing to respond to a request: Court of Justice, 16 February 1993, case C-107/91, ENU/Commission, ECR 1993, p. I 599, conclusion of the Advocate General along different lines. The subsequent Commission decision in the ENU case has, however, been upheld by the Courts.
 26. Under Articles 151 and 188 Euratom, two compensation actions have been brought together with the annulment actions in the KLE and ENU cases (see footnote 25).
 27. Available at the following address: http://europa.eu.int/comm/euratom/docum_en.html
 28. E.g. the Canadian Nuclear Safety Commission (formerly Atomic Energy Control Board or AECB) or the Australian Ministry for Trade have to authorise uranium export contracts. In Ukraine Goskomatom signs the contracts. Similar approvals exist in many other countries such as Kazakhstan and others. An important exception is the United States where the contracts as such are generally not subject to public intervention, but the exports require an export licence from the Nuclear Regulatory Commission and imports can be subject to trade restrictions under which contract approval (for so called "matching" contracts) by the Department of Commerce can be required (see point 3.6.1).
 29. PINEAU, C., and RIMBAUT, C., *Le grand pari, l'aventure du Traité de Rome*, p. 237: "du côté français, on estimait indispensable qu'Euratom disposât d'un quasi-monopole pour l'achat et la fourniture des produits fissiles, afin de lui donner au niveau mondial un poids comparable à celui des États-Unis et de l'URSS et de la mettre en mesure d'exercer un contrôle réel permettant d'éviter l'ingérence des Américains".

involvement in the supplier countries, in order to avoid undue constraints with regard to use or further circulation being imposed.³⁰

The Euratom Supply Agency is assisted by an Advisory Committee, which is established by the statutes of the Agency.³¹ It comprises 51 representatives proposed by Member States and appointed by Council from amongst producers, users and experts (Government or private sector). It elects one Chairman and two Vice-Chairmen who hold a one year renewable mandate. The number of representatives varies per Member State and is based on its size (e.g. Germany 6, Ireland 1). The mandate is for two years and is renewable. Discussions and proceedings of the Committee are confidential and its members are bound to secrecy.³² The Advisory Committee acts as a link between Agency and producer and supplier industries. It provides a forum for discussion and guides the Agency on nuclear supply and trade matters. It usually meets twice a year and it can be convened whenever consultation of the Committee is required for certain matters (e.g. to adopt rules on balancing supply and demand, for the annual balance sheet and for the annual report).

The Court of First Instance of the European Communities established that the Agency has a broad margin of discretion by stating “where decisions concerning economic and commercial policy and nuclear policy are concerned, the Agency has a broad discretion when exercising its powers” and it went on by confining the Court’s review to “identifying any manifestly wrong assessment or misuse of power”.³³

3.3. *Tools of the Supply Agency*

The Agency has several tools to achieve its mission. The two major tools established in the Treaty are the), and the exclusive right to conclude contracts for the supply of nuclear materials (Article 52 Euratom Agency’s right of option (Article 57 Euratom). In addition, the Agency has other specific means of action such as the right to receive notification of transformation and small amount contracts (Articles 75 and 74 Euratom), its intervention to obtain Commission export authorisation for export of Community production (Article 59 Euratom), its contacts with Euratom Safeguards (Chapter 7) and its role in the management of the Community’s ownership right for special fissile materials (Chapter 8, see *infra*). Furthermore, the Treaty provided for some additional means of intervention for the Commission and the Agency in the nuclear fuel cycle, but they have not really been used, such as the establishment of commercial stockpiles by the Agency (Article 72, paragraph 1, Euratom), the establishment of emergency stockpiles by the Commission (Article 72, paragraph 2, Euratom) and Commission support and recommendations in the field of uranium prospection (Article 70 Euratom).

30. E.g. attempts to limit the use of material to one reactor (preventing any resale without consent of the supplier country) or to impose that natural uranium concentrates are also converted into hexafluoride in the exporting country (this was the aim of the now abandoned Canadian “upgrading” policy).

31. Articles X to XIV of the Statutes of the Euratom Supply Agency.

32. Article XIV of the Statutes.

33. Court of First Instance Judgement of 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459, point 67; appeal against this judgement was rejected by the Court of Justice in its Judgement of 11 March 1997, case C-337/95P, ENU/Commission, ECR 1997, p. I 1329.

3.3.1. Right of option³⁴

The right of option is applicable to material produced in the Community. It applies to the full ownership of ores and source materials and to the right of use and consumption of special fissile materials, because special fissile materials are already under the ownership of the Community (see *infra* point 5.2). Although at the entry into force of the Treaty, this right of option was supposed to be a very important supply instrument,³⁵ in practice it has never been applied independently.³⁶ It is exercised through the conclusion of supply contracts in a simplified manner, according to which the Agency waives the exercise of its right of option and concludes the contract between the parties.

If a producer, or two or more connected undertakings, carries out more than one stage of the nuclear fuel cycle, the material can be offered to the Agency at any stage of this cycle [Articles 58, 62(2)(c) and 63 Euratom]. In other words, connected undertakings are exempted from the Agency's right of option. This exception is subject to the condition that the connection has been communicated to and discussed with the Commission (Article 58, paragraph 2, Euratom, referring to Articles 43 and 44) and only applies to the right of option as such, not to the Agency's exclusive right to conclude contracts. Therefore connected undertakings are not exempt from the obligation to submit all their supply contracts, including their mutual contracts, to the Agency.

3.3.2. Conclusion of contracts

The exclusive right to conclude contracts, as provided under Article 52 Euratom, is the central operating tool for the Agency. It applies to all supply contracts, such as purchases and sales of materials (natural uranium, depleted uranium, enriched uranium, thorium, plutonium), exchanges and loans, and (toll) enrichment contracts (see on this point 5.1). It applies to supplies from both inside and outside the Community (Article 64 Euratom).

In order to be valid under Community law, such supply contracts have to be concluded by the Supply Agency. The legal consequence of an infringement of this obligation, and in particular the status of a supply contract which was not concluded by the Agency, is not clearly established: Is the contract still binding between the parties? Can it be declared null and void (*ex tunc*)? Can it be resolved for the future (*ex nunc*)? Should the contract simply be considered as non-existent? The answers to these questions probably should come from the provisions on contract law of the (national) law applicable to the contract, because, unlike in the case of competition law where it is provided that prohibited agreements are automatically void (Article 81, paragraph 2, EC Treaty), there is no Euratom Treaty provision setting out the contractual consequences of an infringement of Article 52 Euratom. Furthermore, the Court's case law establishing the liability of Member States for infringement of directives³⁷ could also be relevant if a Member State is held responsible for such an

34. ERRERA, J., SYMON, E., VAN DER MEULEN, J., and VERNAEVE, L., *Euratom Analyse et Commentaires du Traité*, Brussels, Librairie Encyclopédique, 1958, p. 118 and 126-133, HAEDRICH, H., *Kommentar Artikel 52*, in VON DER GROEBEN, THIESING, EHLERMANN, *Handbuch des Europäischen Rechts*, Baden-Baden, Nomos, Band 19, No. III A 47, p. 16.

35. MANIG, W., *Die Änderung der Versorgungs- und Sicherheitsvorschriften des Euratom-Vertrages durch die nachfolgende Praxis*, Baden-Baden, Nomos, 1992, p. 44.

36. PIROTTE, O., *et al*, *Trente ans d'expérience Euratom, La naissance d'une Europe Nucléaire*, Brussels, Bruylant, 1988, p. 93-94.

37. Court of Justice Judgement of 19 November 1991, Francovich and Bonifaci/Italy, cases C-6/90 and C-9/90, ECR 1991, p. I 5357, Conclusions Mischo.

infringement. Along these lines, a Member State could be held liable for the negative consequences of such an infringement, e.g. if a national court revokes or declares null a supply contract which has not been submitted as a consequence of that Member State's interpretation of the Treaty. In this respect, it should be recalled that the Member States are responsible for the communication of the necessary information and to ensure that the Agency can act freely on their territory (Articles 55 and 56 Euratom).

In practice, a simplified procedure was introduced from the outset. The Agency's Rules of 1960³⁸ as modified in 1975,³⁹ which are based on Article 60, paragraph 6, Euratom and which have been approved by the Commission,⁴⁰ provide for simplified modalities on how supply is balanced against demand. Formally the simplified procedure provision (Article 5bis of the Rules) applies only to contracts concerning source materials (natural and depleted uranium, thorium) but in practice, it is also applied by analogy to contracts concerning special fissile materials (enriched uranium and plutonium).

The procedure allows parties to negotiate directly with their suppliers, subject to the submission of the contract to the co-signature of the Agency. Parties are encouraged to use a submission form, and if there are any uncertainties, to discuss them informally with the Agency before submitting the contract formally. If the Agency agrees with the contract, it concludes the contract by co-signing the three original copies, attributing a reference number, and returning two originals to the parties; the third original is kept for the Agency's files.

The compatibility of this simplified procedure with the Treaty was challenged in the ENU case. The Court of First Instance, uncontradicted by the Court of Justice, concluded, without formally examining the validity of the Rules, that this procedure is compatible with the system of Chapter 6 of the Euratom Treaty.⁴¹ This conclusion should apply not only to the simplified procedure for natural uranium, but it also could be invoked for the application by analogy of this procedure to contracts concerning special fissile materials.

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38. Rules of the Supply Agency of the European Atomic Energy Community determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials, of 5 May 1960, OJ No. 32, 11.5.1960, p. 777/60. It should be noted that the name of the Agency is not correctly mentioned in the title (compared with Article I Statutes of the Euratom Supply Agency, OJ No. 27, 6.12.1958, p. 534).
 39. Regulation of 15 July 1975 of the Supply Agency of the European Atomic Energy Community amending the rules of the Supply Agency of 5 May 1960 determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials, OJ No. L 193, 25.7.1975, p. 37. It is noted that besides the name of the Supply Agency (see previous note) the designation of the legal instrument is not the same as in the enabling legal basis, Article 60, paragraph 6, of the Treaty (where the instrument is designated as "rules").
 40. Commission Decision of 5 May 1960 fixing the date on which the Euratom Supply Agency shall take up its duties and approving the Agency Rules of 5 May 1960 determining the manner in which demand is to be balanced against the supply of ores, source materials and special fissile materials, OJ No. 32, 11.5.1960, p. 776/60. The Commission's Decision approving the amendment of 1975 has not been published but its existence has been confirmed in the Court of First Instance's Judgement of 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459, point 44.
 41. Commission Decision 93/428/Euratom, of 19 July 1993, OJ No. L 197, 6.8.1993, p. 54, point 7, Court of First Instance Judgement of 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459, points 71-73.

It is important to notice that the exclusive right includes also the right to refuse, in a reasoned decision, the conclusion of the contract, or to impose conditions. The possibility of imposing conditions on a contract rather than refusing its conclusion has been recognised by the Commission⁴² as a means of action. This was confirmed by the Court of First Instance⁴³ in the KLE case. As stated earlier, such an Agency decision can be referred to the Commission and the Commission's decision can ultimately be challenged before the Courts.

Further simplified modalities of implementation are under consideration by the way of informal arrangements, but to date, no formal amendments to the Rules have been proposed.

3.3.3. Notification of contracts

Under Article 74 Euratom, transfers of small quantities are not subject to conclusion by the Agency, but information must be provided to the Agency on these transactions.⁴⁴ For source materials (natural uranium, thorium or depleted uranium), this procedure applies to contracts for not more than one metric ton⁴⁵ per transaction or five tons per year and for special fissile materials the limits are 200 grammes of uranium-235, uranium-233 or plutonium per transaction and 1 000 grammes per year.

Another exception concerns contracts relating to the processing, conversion or shaping of materials, as provided for in Article 75 Euratom. These contracts are usually designated as "transformation contracts" in order to differentiate them from "supply contracts" covered by Article 52 Euratom. In practice, conversion, fabrication and reprocessing contracts⁴⁶ are considered to be transformation contracts. Enrichment should not be regarded as a mere transformation, but must be considered as a supply operation (see point 5.1). By analogy,⁴⁷ storage contracts are treated in the same way as transformation contracts. Article 75 differentiates between transformation contracts concluded by: (a) Community customers and suppliers ("domestic" contracts), (b) Community customers and foreign suppliers ("imports" of transformation services), and (c) non-Community customers and Community suppliers ("export" of transformation services). For "imports" the Commission has the power to prevent the contract if transformation cannot be performed efficiently,

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42. Commission Decision 94/285/Euratom of 21 February 1994, OJ No. L 122, 17.5.1994, p. 30, point 20.
 43. Court of First Instance Judgement of 25 February 1997, cases T-149/94 and T-181/94, KLE/Commission, ECR 1997, p. II 161, point 107.
 44. Commission Regulation 17/66/Euratom, of 29 November 1966 exempting the transfer of small quantities of ores, source materials and special fissile materials from the Rules of the Chapter on Supplies, OJ No. 241, 28.12.1966, p. 4057/66, as amended by Regulation (Euratom) No. 3137/74 of the Commission of 12 December 1974, OJ No. L 333, 13.12.1974, p. 27.
 45. As it is clear in other linguistic versions of Article 1 of Regulation 17/66 that metric tons are intended, we are of the opinion that the expression "ton" in the English version (which could mean "short ton" or 2 000 lbs.) should be understood to mean "metric ton".
 46. For reprocessing this has been explicitly recalled in a Commission decision in a competition case: Commission Decision of 23 December 1975 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.940/a – United Reprocessors GmbH), OJ No. L 51, 26.2.1976, p.7, in particular point 3. It should be noted that this approach, which is compatible with the practice, could be conceptually debatable, on partly the same grounds as for enrichment.
 47. In practice most transformation contracts comprise a period of storage before or after processing of the materials. If an analogous treatment was not applied, it has been stated that storage contracts should be authorised by the Agency, because under Article 72, paragraph 1, Euratom the competence to establish commercial stocks belongs to the Agency.

safely and without losses (Article 75, paragraph 2, Euratom). Special fissile materials temporarily imported under contracts for the “export” of transformation services are excluded from the Community’s right of ownership (see point 4.2). The existence of transformation contracts has to be notified to the Agency, together with some basic information. Unlike the exception for contracts concerning small amounts, no implementing regulation has been enacted to regulate the precise procedure and the information required. Parties are informally encouraged by the Agency to use a notification form with all the useful information.

If the information on the small amount contract or the transformation contract is complete, the Agency acknowledges the notification and attributes a reference number which is to be used in notifications to the Euratom Safeguards Office. With the exception of the (theoretical) possibility that the Commission prevents “imports” of transformation services, these exempted contracts are not subject to any Community authorisation or decision.

3.3.4. Commission authorisation of exports and very long term contracts

When, in addition to the Agency’s conclusion, an authorisation or agreement by the Commission is required for an operation, as is the case for exports of nuclear materials produced in the Community (Articles 59 and 62 Euratom) and for contracts of more than ten years (Article 60, paragraph 2), the Agency initiates the request to the Commission and communicates to the parties concerned the tenor of the Commission's decision.⁴⁸ The export authorisation does not replace the Agency’s conclusion of the export contract. If the contract is concluded before an export authorisation is given, the Agency’s conclusion is made conditional upon deliverance of the Commission’s authorisation. In the meantime, the supplier can transfer the title to the material in the Community to the non-Community customer, but parties are bound to wait for the Commission authorisation before physically exporting the material.

The requirement for Commission authorisation prior to export applies only to material produced in the Community. Only uranium mined or enriched in the Community and plutonium irradiated in a reactor in the Community are considered as “Community production”. Conversion, fabrication or reprocessing in the Community, as well as any other transit or storage in the Community of material which does not constitute production would not require an authorisation.

An export operation includes two aspects, namely the physical movement (transportation) of the material to a country outside the Community, and the intention to dispose permanently of that material outside the Community. Therefore physical movements of material under Article 75, paragraph 1(b) Euratom, i.e. temporary export of the material for processing outside the Community, are not considered as exports in the meaning of Articles 59 and 62 Euratom.

Articles 59 and 62 set two tests or conditions which must be fulfilled before an export is authorised. First there is a kind of “Community preference” to the benefit of Community users, because the terms offered outside the Community must not be more favourable to those offered in the Community. In practice, the Agency examines whether there is any need in the Community for the material proposed for export. In some cases, detailed information on the offers in the Community is compared to the export contract, while in other cases it can be established from the outset that the material is not needed as supply for the Community users. The second test is not very precise. Article 59 states that the Commission cannot give its authorisation “if the recipients of the supplies fail to satisfy it that the general interests of the Community will be safeguarded”. Although this provision

48. These decisions are normally not published.

is part of a Chapter on supplies, this so called “general interest” test is usually understood to focus on the political aspects of the export. These aspects remain very sensitive from a point of view of division of powers between the Member States which remain competent for non-proliferation policy as such, and the Commission, which is competent for safeguards. Pursuant to this mandate, the Commission verifies whether the provisions of the Nuclear Non Proliferation Treaty, the Nuclear Suppliers Guidelines⁴⁹ and other non proliferation related instruments are duly taken into account.

In practice, the Commission merely verifies whether the recipient country is party to the Non-Proliferation Treaty,⁵⁰ has (at least if it concerns a non nuclear weapon state under the Non-Proliferation Treaty) a “full scope safeguards” regime⁵¹ involving all nuclear installations of the country, has adhered to the Nuclear Suppliers Guidelines for further transfers, and has adhered to the Physical Protection Convention and IAEA guidelines.⁵² Usually no special assurances are requested from the exporter or recipient states. In practice, the authorisation procedure has not been used to obtain prior consent rights over further transfers of materials.⁵³

It should be observed that with the entry into force of the so called “dual use” regulation,⁵⁴ the real importance of this procedure as well as the controversial character of its applications, has been reduced.

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49. Referred to as IAEA document INFCIRC/254 as revised, available at: <http://www.iaea.org/worldatom/Documents/>
 50. Treaty on the Non-Proliferation of Nuclear Weapons (1968), United Nations Treaties Series (UNTS). No. 10485, vol. 729, p. 169-175, available at: <http://www.iaea.org/worldatom/Documents/Legal/npttext.shtml>.
 51. This condition is set out in the Nuclear Suppliers Guidelines. A model protocol of “full scope safeguards” is in IAEA document INFCIRC/153(corr). So far it is not required for the recipient country to have signed an additional protocol, the model of which is established in IAEA document INFCIRC/540. Plant specific safeguards as foreseen by IAEA document INFCIRC/66 would normally not be sufficient. For all INFCIRC documents see <http://www.iaea.org/worldatom/Documents>.
 52. Convention on the Physical Protection of Nuclear Material, INFCIRC/274/Rev.1 and Recommendations on the physical protection of nuclear material, INFCIRC/225/Rev. 4(corr); for all INFCIRC documents see <http://www.iaea.org/worldatom/Documents>.
 53. The only case of a Community consent right for retransfers of nuclear materials is not based on export authorisation mechanisms, but is provided for under Article 8.1(C)(i) and point B of Agreed Minute of the Agreement for cooperation in the peaceful uses of nuclear energy between the European Atomic Energy Community and the United States of America (OJ No. L 120, 20.5.1996, p. 1). These rights apply to materials initially transferred from the Community to the United States and made subject to the agreement, whether produced in the Community or not.
 54. Council Regulation (EC) 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, OJ No. L 367, 31.12.1994, p. 1 and Council Decision (CFSP) 94/942 of 19 December 1994 on the Joint Action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual use goods, OJ No. L 367, 31.12.1994, p. 8, as revised several times, now replaced by Council Regulation (EC) No. 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ L 159, 30.6.2000, p. 1, as revised *inter alia* by Council Regulation (EC) No. 2889/2000 of 22 December 2000, OJ L 336, 30.12.2000, p. 14.

3.4. *Links between supply provisions and safeguards (Chapter 7)*

In practice, the supply rules of Chapter 6 are often applied in connection with the safeguards rules of Chapter 7.

First the Agency communicates, at the same moment it sends back the concluded contracts (see point 3.3.2) or the notification acknowledgment (see point 3.3.3), the existence and the main elements (quantities, delivery schedules, conditions imposed by supplier country) of supply contracts concluded or notified to it. This does not include strictly commercial information such as the prices.

This information allows the Euratom Safeguards Office in Luxembourg to attribute a letter code in its accounting system which reflects conditions imposed by the supplier country.⁵⁵ Furthermore, in order to allow the link between contracts and physical movements of materials to be made, the reference numbers, attributed by the Agency to supply and transformation (including by analogy storage) operations, are to be used in the advance notifications of imports and exports which have to be made to the Euratom Safeguards Office.⁵⁶ If the materials are Community-produced, the intervention of the Commission must also be mentioned in the advance notifications, in order to check that the export was duly authorised (see point 3.3.4).

The Agency also intervenes in the contractual aspects of assurances given to supplier countries that nuclear material can be accepted under the respective Agreement with the Community.⁵⁷ In practice the Agency's role is to confirm, before an announced import is accepted, by the Safeguards Office, under the agreement, that the transaction is duly covered by a contract concluded by the Agency or by a contract notified to it.

Finally, the Agency intervenes in the contractual aspects of exchanges of safeguards obligations and codes.⁵⁸ These are exchanges of safeguards attached to certain materials at two different locations, without moving the material or changing other characteristics, such as the origin, of the material. The Euratom Safeguards Office authorises these exchanges after the Agency has given its approval for the contractual aspects, and after its own examination (mainly of the equivalence of the materials involved). These exchanges are then performed by the operators through a simultaneous modification of the safeguards codes in an "inventory change report".⁵⁹ If one of the amounts is located outside the Community, the safeguards authorities of the third state concerned must also be involved.

55. Annex II, note 17 of Commission Regulation (Euratom) 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom Safeguards, OJ No. L 363, 31.12.1976, p. 1, in particular p. 38.

56. Annex V, point 15, and Annex VI, point 13, of Commission Regulation (Euratom) 3227/76, OJ No. L 363, 31.12.1976, p. 47 and 49.

57. *E.g.* the exchanges of assurances between the United States and the Community under the administrative agreement provided for by Article 15 of the Agreement for cooperation between the European Atomic Energy Community and the United States of America, OJ No. L 120, 20.5.1996, p. 1; the administrative agreement itself has not been published.

58. These operations are sometimes referred to as "flag swaps".

59. Annex II of Commission Regulation (Euratom) 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom Safeguards, OJ No. L 363, 31.12.1976, p. 1 (see p. 30).

3.5. Principles governing nuclear supplies

3.5.1. Security of supply

The overriding principle governing the implementation of supply provisions is to ensure security of supply. The Court has made it clear that even if other Treaty objectives have to be taken into account by the Agency, the most important one is the security of supply.⁶⁰ In line with this principle, the Court has accepted that the viability of manufacturing industries could be taken into account in Agency decisions, but added that this should be done in the broader perspective of the security of supply. Security of supply has also gained a rather prominent place in the debate on energy in general which the Commission launched in November 2000 through its “Green Paper”⁶¹ on the subject.

This principle is implemented through binding and non-binding actions of the Supply Agency. The Agency has recommended in several Annual Reports⁶² that users should cover most of their needs well in advance through long term contracts with primary producers, at sustainable prices, i.e. prices allowing the recovery of the cost of production and a sustained producing activity. Furthermore, the Agency recommends maintaining a sufficient level of strategic stockpiles to face any unforeseen difficulty and to allow optimal use of contract flexibilities. In general, the Agency recommends diversification of sources and avoidance of excessive dependence on any single source of supply to ensure that political or other problems in a given country or area would not disrupt the supply situation. The policy of maximum dependence on certain sources of supply, in particular with regard to former Soviet republics, is based on this general objective (see point 3.6.2)

3.5.2. General obligation to supply, except obstacles

According to Article 61 the Agency is obliged to satisfy all orders except if there is a material or legal obstacle preventing it from doing so. The Court confirmed this general requirement but qualified it by adding that the Agency has a broad margin of appreciation in the evaluation of such legal (or material) obstacles.

Therefore the Agency can weigh up the different, possibly conflicting, objectives in order to adopt a position on a given contract. If a restrictive usage provision in a contract might be considered contrary to the Treaty objective of free circulation of nuclear goods, the contract might have to be accepted on the basis of the objective of security of supply because otherwise indispensable supplies might not be obtainable.

60. Court of First Instance Judgement of 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459, points 57-59.

61. European Commission, “Green Paper Towards a European Strategy for the Security of Energy Supply”, 29 November 2000, COM(2000)769 final, http://europa.eu.int/comm/energy_transport/en/lpi_lv_en1.html.

62. Annual Report 1999, p. 7, <http://europa.eu.int/comm/euratom/euratom99.pdf>.

3.5.3. *Equal access and non discrimination*

The Treaty provides for equal access to users without discrimination as to the use for which materials are intended, except where illicit uses or uses contrary to the uses imposed by the supplier are contemplated. Historically, the equal access provision was intended to allow France to gain access to Belgian Congo uranium at the expiry of an exclusive supply contract with the United States.⁶³ By that time Congo was independent and the uranium market was plentiful, thus such access no longer had its original importance. A further application of the principle of equal access is made in relation to some pricing practices (see point 3.5.5).

The non-discrimination provision reflects the compromise allowing military programmes and was essential to those Member States which wanted to keep the military option open.

As a consequence of the obligation to ensure that the use imposed by the supplier is effectively pursued, it is essential that the Agency is fully involved in the so-called “safeguards clause” in the supply contracts, i.e. the clause in which parties agree for example that material will only be used for peaceful and non explosive uses. If the restrictions imposed upon the use are contrary to other Treaty provisions, e.g. a restriction to use the material only in one reactor or a provision subjecting any retransfer to prior consent, even within the Community, both of which may be considered contrary to the free circulation of goods as set out in Chapter 9 of the Treaty, the Agency could refuse to accept such clauses. Following conclusion of the contract, the Agency communicates the conditions imposed by the supplier country or the tenor of the safeguards clause to the Euratom Safeguards Office, which will ensure that the conditions are complied with (see point 3.4).

In more recent practice, the non-discrimination principle has been relevant for another purpose, namely in respect of the proportional allocation amongst the users of the limited amounts of NIS supplies which are allowed (see point 3.6.2). In order to comply with this principle, the Agency and the Commission distribute the limited amounts amongst all the users according to their respective needs.⁶⁴ The Court accepted that if a contract would give one user privileged access to a disproportionate part of the limited amounts available, the Agency could refuse such a contract, invoking the principle of equal access as a legal obstacle to its conclusion.⁶⁵

3.5.4. *No Community preference for domestic production*

Some had taken the view that, by analogy with such a principle in agriculture,⁶⁶ there is a general principle of Community preference for domestic production, i.e. that users are obliged to prefer Community supplies to imports. In the ENU case it was even claimed, on the basis of Article 66 of the Treaty, that this principle applies even if prices of imports are more favourable than domestic

63. GOLDSCHMIDT, B., *Le complexe atomique*, p. 310-311.

64. Decision 94/285/Euratom of 21 February 1994, OJ No. L 122, 17.5.1994, p. 30, point 14.

65. Court of First Instance Judgement of 25 February 1997, cases T-149/94 and T-181/94, KLE/Commission, ECR 1997, p. II 161, point 104.

66. Initially, for agriculture this principle seemed to be recognised as binding by the ECJ [see Judgement of 13 March 1968, case 5/67, *Beus*, ECR 1968 (English edition), p. 83], but subsequently the Court of Justice interpreted this principle merely as a possible approach, not as a binding principle (see Judgement of 14 July 1994, case C-353/92, *Greece/Council*, ECR 1994, p. I 3411, point 50, and conclusions of Advocate General Jacobs, points 77-82).

natural uranium prices, unless the latter prices are “abusive”. The Commission⁶⁷ and the Court⁶⁸ rejected this interpretation of Article 66, as this provision is designed to create an exceptional regime allowing imports in the event of a crisis resulting in abusive pricing, rather than to give a preference to Community producers. Therefore, the Agency is clearly not allowed to impose preferential purchase of Community production under different conditions, but it would appear that the Court did not exclude the right, without imposing any obligation in this sense, to allow preferential treatment for Community production under equal conditions.

The principle of “community preference”, in the sense of a non-binding principle to favour Community production given equal conditions, was also mentioned by the Council in a Resolution, which is by nature a non-binding recommendation (Article 161 Euratom Treaty). On 4 June 1974, i.e. well before any substantial Community civil enrichment industry was set up, the Council recommended that European users, given equal economic and commercial conditions, place their orders preferably with European uranium-enrichment firms.⁶⁹ In retrospect, this recommendation remains perfectly in line with the Court’s position in the ENU case.

Finally there is, also given equal conditions, a kind of “Community preference” for Community users to have access to production proposed for export. Indeed Article 59 states that exports can only take place under conditions which are not more favourable than offers made to the Agency (for the practical implementation of this principle, see point 3.3.4). In broader terms, the Court rightly concluded from the general scheme of the Treaty that it contains a preference for the users, not for the producers.⁷⁰

3.5.5. *Market pricing*

According to Article 67 of the Treaty, prices result from the balancing of supply against demand. In the essentially non-monopolistic simplified procedure of co-signature, this is achieved through free negotiations between a seller and a buyer (see point 3.3.2). This provision does not mean that any price has to be accepted as long as it was freely agreed by the parties. In some Agreements entered into by the Communities, especially with State-trading countries or with States with economies in transition from a State-trading system to a market economy, there are provisions that trade shall take place at “market related prices”.⁷¹ The Court accepted⁷² that if the Agency finds that prices are incompatible with such a provision, e.g. exceptionally low prices unrelated to normal

67. Decision 93/428/Euratom of 19 July 1993, OJ No. L 197, 6.8.1993, p. 54, points 8-10.

68. Court of First Instance Judgement of 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459, point 63, appeal rejected by Court of Justice Judgement of 11 March 1997, case C-337/95P, ENU/Commission, ECR 1997, p. I 1329.

69. Council Resolution of 4 June 1974 concerning the supply of enriched uranium of the Community, OJ No. C 69, 14.6.1974, p. 1.

70. Court of First Instance Judgement of 15 October 1995, cases T-458/93 and T-523/93, ENU/Commission, ECR 1995, p. II 2459, point 60.

71. See Article 14 (still applicable) of the Agreement of 18 December 1989 between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation, OJ No. L 68, 15.3.1990, p. 3.

72. Court of First Instance Judgement of 25 February 1997, cases T-149/94 and T-181/94, KLE/Commission, ECR 1997, p. II 161, points 96-101.

market economy prices or to the normal cost of production, this can constitute a legal obstacle within the meaning of Article 61.

If prices are designed to secure a privileged position for some users, the Agency can report them to the Commission and the Commission can set the prices at a level compatible with the principle of equal access (Article 68). This provision has never been used.

3.6. Implementation of the supply policy (in particular with regard to NIS supplies)

In the early 90s, massive natural uranium supplies from the Soviet Union, and later from the New Independent States of the former Soviet Union, entered into the Western markets at very low prices. It seems that these sales were essentially driven by some trading companies trying to achieve high market shares at very low prices. Following several formal and informal complaints both in the United States and in Europe, restrictions or policies have been introduced to limit the authorised levels of supply from these sources.

3.6.1. United States restrictions

Unlike in Europe (where supply policy tools have been used), trade restrictions have been introduced in the United States in relation to anti-dumping investigations following a complaint by the manufacturing industry.⁷³ These investigations resulted in preliminary affirmative findings of dumping⁷⁴ and injury, but were subsequently suspended by negotiated arrangements, called “suspension agreements”. These agreements contain agreed quantitative export limitations in respect of Russia,⁷⁵ Kazakhstan,⁷⁶ Uzbekistan⁷⁷ (and Tajikistan⁷⁸ and Kyrgystan⁷⁹), and Ukraine.⁸⁰ In the

73. Petition of 8 November 1991 by the Ad Hoc Committee of Domestic Uranium Producers, Decision to initiate an investigation by the Department of Commerce (DOC) of 5 December 1991, 56 Federal Register, p. 63711 (case A-821-802). The investigations were initially based on exports from the Soviet Union and continued in respect of exports from the individual former Soviet republics.

74. Preliminary Determination of Sales at Less Than Fair Value: Uranium from Kazakhstan, Kyrgystan, Russia, Tajikistan, Ukraine and Uzbekistan; and Preliminary Determination of Sales at Not Less Than Fair Value: Uranium from Armenia, Azerbaijan, Belarus, Georgia, Moldova and Turkmenistan, Federal Register, 3 June 1992, p. 23380.

75. Agreement suspending the antidumping investigation on uranium from the Russian federation, of 16 October 1992, Federal Register, 30 October 1992, p. 49220 and p. 49935, as amended on 11 March 1994, Federal Register, 1 April 1994, p. 15373, on 3 October 1996, Federal Register, 4 November 1996, p. 56665 (two amendments), on 7 May 1997, Federal Register, 15 July 1997, p. 37879, and on 27 July 1998, Federal Register, 31 July 1998, p. 20516.

76. Agreement suspending the antidumping investigation on uranium from Kazakhstan, of 16 October 1992, Federal Register, 30 October 1992, p. 49220 and p. 49222, as amended on 7 February 1995, Federal Register, 14 March 1995, p. 13699, on 27 March 1995, Federal Register, 12 May 1995, p. 125692, and on 29 September 1998, Federal Register, 9 December 1998, p. 67858, terminated by Kazakhstan and subsequently the resumed investigation was terminated by a negative determination of injury.

77. Agreement suspending the antidumping investigation on uranium from Uzbekistan, of 16 October 1992, Federal Register, 30 October 1992, p. 49220, as amended and terminated after review by a negative determination of injury.

78. Agreement suspending the antidumping investigation on uranium from Tajikistan, of 16 October 1992, Federal Register, 30 October 1992, p. 49220, terminated by Tajikistan and subsequently the resumed investigation was terminated by a negative determination of injury.

meantime, since for various motives all the other agreements or antidumping orders were terminated,⁸¹ only the restrictions for Russia are still in place. Russia is allowed to export to the United States a limited amount annually under so called “matching” arrangements, i.e. on condition that Russian material is sold together with an identical amount of freshly produced United States uranium. The Department of Commerce has to authorise individual contracts.

The suspension agreement contains very strict anti-circumvention provisions. First non-Russian material obtained through an exchange involving Russian material is included under the import restriction as an “indirect import” of Russian material. Secondly, all imports, even imports from other countries than Russia, have to be covered by written assurances that the material was not obtained through such an exchange. Although the Agency is not responsible for the enforcement of United States trade restrictions, it has always taken the view that Community companies should not be party to a transaction which could be contrary to these United States restrictions. Most market operators cover themselves with an “anti-circumvention” clause in which typically the delivering party guarantees that the material was not obtained through an exchange involving restricted material or under an operation designed to circumvent the restrictions, and the recipient party guarantees that it has no intentions to use it under such an exchange or any operation designed to circumvent the restrictions.

In addition to the suspension agreement, an act of Congress⁸² regulates the imports of a specific category of Russian materials, namely natural uranium feed (deemed to be Russian) derived from disarmament of Russian highly enriched uranium (HEU) warheads under the agreement between the United States and Russia. The amendment of 3 October 1996 to the Russian suspension agreement had excluded this HEU feed material from the scope of the suspension agreement’s restrictions, in order to cover such material in a separate act.⁸³ Under this Act, a limited annual amount (increasing progressively from some 770 tonnes of uranium in 1998, to 3000 tonnes in 2001, and up to 7 700 tonnes in 2009 and thereafter) of such material can be sold for end use in the United States,

79. Agreement suspending the antidumping investigation on uranium from Kyrgystan, of 16 October 1992, Federal Register, 30 October 1992, p. 49220, terminated after review because not pursued further by petitioners or interested parties.

80. Agreement suspending the antidumping investigation on uranium from Ukraine of 16 October 1992, Federal Register, 30 October 1992, p. 49220, terminated by Ukraine and the resumed investigation resulted in affirmative determinations of dumping and injury. Subsequently the anti dumping order was terminated after review by a negative determination of injury.

81. See previous footnotes: Suspension agreements with Ukraine, Tajikistan and Kazakhstan were terminated by these countries. For Ukraine initially an antidumping duty was decided, but it was repealed following a “sunset” review. For Tajikistan and Kazakhstan the DOC made affirmative determinations of dumping but the ITC made negative determinations of injury, which terminated the investigation. For Kyrgystan and Uzbekistan the suspension agreements were terminated after a “sunset” review. For Kyrgystan this was decided from the outset as no interested party requested continuation, while for Uzbekistan the DOC determined that dumping was likely but the ITC determined that injury would not be likely. The Court of International Trade upheld the ITC decisions on Kazakhstan and Uzbekistan in its decisions of 24 January and 14 August 2001 (http://www.uscit.gov/slip_op/Slip_op01/01-08.version2public.PDF and http://www.uscit.gov/slip_op/Slip_op01/01-103.pdf), and remanded on 30 August 2001 DOC’s decision to base its dumping determination concerning Uzbekistan on the best information available (http://www.uscit.gov/slip_op/Slip_op01/01-114.pdf).

82. USEC Privatisation Act, United States Code, Title 42, Section 2297h-10 (http://www.access.gpo.gov/su_docs/aces/aaces002.html).

83. Federal Register, 4 November 1996, p. 56665.

while the rest can be exported or used in Russia for blending purposes. The enrichment component can be freely sold by the “executive agent” (the United States enrichment corporation or USEC) to the United States end users. The aim of this act being to facilitate the recycling of military materials, the implementation procedure⁸⁴ is uncomplicated and there is no individual authorisation of contracts. An agreement has been made between the United States and Russia to facilitate an option agreement for the purchase of an important portion of this material by the Western companies Cogema, Cameco and Nukem.⁸⁵

3.6.2. European Community policy

A Community policy was announced in 1992 to be implemented through the exercise of the Agency’s right to refuse contracts. The Community’s antidumping regulation has not been used for that purpose.

This policy is implemented with respect to the NIS supplies by the requirement that individual users do not depend upon the NIS for natural uranium for more than approx. one quarter of their needs, and for more than approx. one fifth for enrichment. This policy has not been enacted in formal legislation, but is applied on a case-by-case basis by deciding for each contract on an individual basis whether to conclude the contract, to impose conditions or to refuse conclusion. It is not a quantitative import restriction or quota. A certain degree of flexibility can be allowed, so that for some years a user can be permitted to exceed its entitlement, but the negative balance will be carried onwards. The Agency has in some cases allowed utilities with very small needs to exceed the normal level, to combine purchases of NIS material together with Community production, or to rearrange delivery schedules.

The implementation of the policy has been explained in several conference papers⁸⁶ and has recently been set out in the Annual Reports.⁸⁷

The policy has been clearly supported by the Commission in political statements⁸⁸ and in documents such as the Green⁸⁹ and White⁹⁰ Papers on energy policy and in a policy programme.⁹¹ It has been formally endorsed in an individual decision in the KLE case.⁹²

84. Notice of 26 July 1999, Federal Register, 6 August 1999, p. 42925.

85. Uranium Institute News briefing, 24-30 March 1999 (<http://www.world-nuclear.org/nb/nb99/nb9913.htm>).

86. Agency officials have made several presentations at different industry conferences on the implementation of the policy, see GOPPEL, M., “Supply of Nuclear Fuel in Euratom”, World Nuclear Fuel Markets, 18th Annual Meeting, Atlanta, 14 May 1991, GOPPEL, M., “Nuclear Fuel Supply in the European Community” *Deutsches Atomforum*, Winter Session 1992, Bonn, 28-29 January 1992, BLANQUART, J.C., (with BOUQUET, A.), “Nuclear trade between the CIS Republics and Euratom, an update”, Nuclear Energy Institute, Fuel cycle 95 Seminar, Coronado (San Diego), 4 April 1995, BLANQUART, J.C., (with BOUQUET, A.), “Some recent trends in nuclear supplies to Euratom users”, World Nuclear Fuel Markets, 23rd Annual Meeting, Edinburgh, 19-21 May 1996. Furthermore, the legal basis of the policy was analysed in reports to the International Nuclear Law Association: Report of Working Group No. 3 “*Impact des accords bilatéraux et multilatéraux sur l’évolution des échanges nucléaires*”, Nuclear Inter Jura 1997, Tours, 14-19 September 1997, p. 23-27, “Certain legal problems relating to East-West nuclear exchanges”, Nuclear Inter Jura 1995, Helsinki, 3-7 September 1995, part III, and “Nuclear trade in a world increasing globalisation”, Nuclear Inter Jura 1999, Washington DC, 24-29 October 1999, p. 13-14.

87. Euratom Supply Agency, Annual Report 1997, p. 10-11, Annual Report 1998, p. 10-12, Annual Report 1999, p. 5-9, and Annual Report 2000, p. 9-12.

The legal validity of the policy has been confirmed by the Court of First Instance in its judgement of 25 February 1997.⁹³ Ruling against the conclusion of a low-priced contract which would have resulted in excessive dependence upon NIS supplies, the Court stated that the Agency and the Commission raised three legal obstacles within the meaning of Article 61 (see point 3.5.2): (1) incompatibility with diversification policy, (2) prices which are not “market related prices” and (3) risk of a privileged position if one user could take more than his share of the allowed supplies. The Court of Justice rejected an appeal against this judgement in its final judgement of 22 April 1999.⁹⁴ It examined the first legal obstacle, not on the strict basis of Article 61 (because this provision is in the section on intra-Community supplies) but on the basis of a general principle, and concluded that this obstacle was sufficient on its own, without examining or criticizing the two other obstacles.

For contracts existing upon accession to the European Union, a special transitional provision exists (see point 3.7).

The Partnership and Co-operation Agreements (PCA) concluded between the Communities and its Member States and former Soviet countries have not affected in substance the policy. In the case of Russia, the “rights and powers” of the Supply Agency have been explicitly recognised in a joint declaration in relation to the nuclear trade provision.⁹⁵ The main general trade provisions of the PCA are excluded and are replaced by the key trade provisions of the Agreement with the USSR.⁹⁶ These include the provision on “market related prices” (see point 3.5.5) and a provision that trade shall be conducted in accordance with the respective regulations of each party.⁹⁷ These provisions are maintained until a specific nuclear agreement enters into force.

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88. Statement in the European Parliament by Sir Leon Brittan on behalf of the Commission, Oral question H-1087, OJ Annex Proceedings of the European Parliament, No. 424, 18.11.1992, p. 227, and Reply by Sir Leon Brittan on behalf of the Commission to Written question E-2042/93, OJ, No. C 219, 8.8.1994, p. 58.
 89. Green Paper for a European Union Energy Policy, Document COM(94)659 final, adopted on 11 January 1995, point 195.
 90. White paper: An Energy Policy for the European Union, Document COM(95)682 final, point 79.
 91. Illustrative Nuclear Programme of the Community (known under its French acronym PINC), Document COM(97)401 final.
 92. Decision 94/285/Euratom of 21 February 1994, OJ No. L 122, 17.5.1994, p. 30.
 93. Court of First Instance Judgement of 25 February 1997, cases T-149/94 and T-181/94, KLE/Commission, ECR 1997, p. II 161.
 94. Court of Justice Judgement of 22 April 1999, case C-161/97P, KLE/Commission, ECR 1999, I, p. 2057.
 95. Article 22 and related joint declaration and exchange of letters of the Agreement on Partnership and co-operation establishing a partnership between the European Communities and the Member States, of one part, and the Russian Federation, on the other part, OJ No. L 327, 28.11.1997, p. 3, see also identical Article 15 of the Interim Agreement, OJ No. L 247, 13.10.1995, p. 3.
 96. Agreement of 18 December 1989 between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic co-operation, OJ No. L 68, 15.3.1990, p. 3.
 97. Articles 6 and 14 of the Agreement of 18 December 1989 between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic co-operation, OJ No. L 68, 15.3.1990, p. 3.

3.7. Transitional provisions of the Euratom Treaty

Article 105 of the Euratom Treaty provides for a comprehensive transitional regime for existing supply contracts (and also for existing international agreements).

Under this provision, supply contracts (and transformation contracts) which were concluded before accession will remain valid after accession, subject to a notification of copies of these contracts to the Commission within 30 days after entry into force. The Commission transmits the copies of contracts to the Agency which assigns a contract reference for further use. This is not a conclusion by the Agency and therefore the Agency is not entitled to refuse conclusion of these existing contracts by virtue of the supply policy with regard to NIS supplies. Consequently, such contracts would in effect be “grandfathered” (meaning that a sort of immunity, guaranteed validity or “paternal” protection is given), but this does not mean that the existence of these contracts will not be taken into account when new contracts are examined. In other words the clock is not put back to zero.

This acquired right applies to all the deliveries provided for by the contract, as well as firm options which include pricing and quantities. It is necessary, however, for the Agency to conclude extensions of contracts (and hence, standard Community policy may be applied).

In the interests of clarity, it should be noted that for contracts signed between the date of signature of the Act of Accession and its entry into force, there is in theory a possibility to submit such contracts to the Court if the decisive reason for the contract was to evade the Treaty (Article 105, second sentence). This possibility has never been used.

4. The ownership provisions of the Euratom Treaty

One of the most unique and hence mysterious features of the nuclear law of the European Communities is the Community’s ownership right over special fissile materials. It has been qualified as a legal “*curiosum*”.⁹⁸ In the past, when the issue was a new and intriguing subject matter, it was studied to quite some extent in the doctrines covering the fields of civil and European Law, but the last few decades have been much more discreet.

According to Article 86, “Special fissile materials shall be the property of the Community”. This is a very broad provision, which requires qualifications and exceptions to specify its exact scope. It is to be noted that it is not the Euratom Supply Agency (which has a legal personality separate from the Euratom Community) but rather the Euratom Community itself (one of the three European Communities with legal personality), which has the ownership.

4.1. Extent of Euratom ownership

First of all, only “*special fissile materials*”, i.e. enriched uranium and plutonium, as defined by Article 197 of the treaty, are subject to Euratom ownership. Ores and source materials (natural and depleted uranium, thorium) are not subject to the ownership right. “Fissile” materials, not defined as such by the Council (e.g. some artificial fissile transuranium elements beyond plutonium), do not fall under Euratom ownership. Fission products in waste are also not in the category of special fissile materials.

98. KAPTEYN and VERLOREN VAN THEMAAT, quote in DOMSDORF, E., *Internationaal atoomeneregerecht, De betrokkenheid van Nederland bij meer dan honderd verdragen*, 1993, p. 616.

Article 86 further provides that “The Community’s right of ownership shall extend to all special fissile materials which are produced or imported by a Member State, a person or an undertaking and are subject to the safeguards provided for in Chapter 7.” These two conditions (1) of production or import in the Community and (2) of submission to safeguards are cumulative.

Hence material imported or produced in the Community which is intended for defence requirements, and is thus exempted from Euratom safeguards by virtue of Article 84, paragraph 3, will remain outside Euratom ownership. As Euratom safeguards are limited to materials located on the territory of member States, Euratom ownership will, of course, not extend to materials destined for use in Community reactors, but located outside the Community, although such materials are subject to the supply provisions (Chapter 6), because contracts are to be concluded regardless of the delivery location. A contract of sale for delivery of special fissile materials to a Community user in the United States would be subject to conclusion by the Agency but the material would not (yet) be subject to ownership. Conversely, without prejudice to an important exception for transit materials under transformation contracts (Article 75c), materials belonging to non-Community users are in principle susceptible to be owned by the Community while located in the Community. In connection herewith, the question of what material is “produced” in the Community is quite delicate, in particular with regard to non-Community material enriched in the Community. This question relates to the old debate between the Commission and some Member States on the status of enrichment and enrichment contracts. Depending on whether enrichment is considered as a production or a transformation, the material will be owned by the Community or not (see *infra* point 5.1).

For nuclear waste, Euratom ownership will apply if it contains special fissile materials and as long as it is under safeguards. Vitrified waste from reprocessing will only be susceptible to fall under Euratom’s ownership if it contains sufficient amounts of plutonium or enriched uranium. As this waste contains essentially the fission products and in principle the plutonium and uranium have been removed for recycling, it will probably not often fall under Euratom’s ownership. On the other hand, spent fuel which is to be conditioned for direct disposal clearly contains important amounts of plutonium and may contain (depending on the discharge burn-up) residual enriched uranium. For both categories (waste and spent fuel) Euratom ownership will end when safeguards end. Euratom safeguards can cease to apply when the Euratom Safeguards Office determines under Article 23 of Regulation 3227/76⁹⁹ that the installation only holds material that is not (or rather is no longer) used for nuclear purposes and that the incorporated nuclear materials are “virtually irrecoverable” (installation exempted from safeguards) or when, under Annex II of the Regulation, a “measured discard” is entered as an “inventory change report” in the materials accounting system (materials ceasing to be under safeguards while installation remains safeguarded).

For material which is illegally introduced into the Community, and is then seized by the police, the situation is somewhat unclear. It seems that before a judge has made a ruling in relation to such material, it cannot be considered as legally “imported” within the meaning of Article 86, and thus it is not (yet) owned by the Community. After such a ruling, however, there can be no doubt that the material is to be considered as “imported” and, without prejudice to the judge’s seizure decision on the right of use and consumption, the Community automatically becomes “owner” under Chapter 8 of the Euratom Treaty.

With regard to lease, leasing or renting of nuclear materials belonging to a third party, the implications of Euratom ownership are delicate to evaluate. Under the now expired and replaced

99. Commission Regulation (Euratom) No. 3227/76 of 19 October 1976 concerning the application of the provisions on Euratom safeguards, OJ No. L 363, 31.12.1976, p. 1.

co-operation agreement¹⁰⁰ between Euratom and the United States of America, it was confirmed that the United States Government can lease material and retain ownership of such material without violating the Euratom Treaty, and that, without prejudice to the United States' rights, the Community can enforce the rights conferred to it under Chapter 8 of the Treaty. This hybrid solution splits the public authority ownership between the United States and the Community, while leaving the right of consumption to the users. The policy of the United States was to make special fissile materials available to users under leasing contracts, concluded by the Agency as supply contracts. It was confirmed that this construction didn't result in any practical problems.¹⁰¹ Subject to a solution of some very delicate legal problems it raises under waste and spent fuel provisions, leasing may become again relevant under the new Russian legislation which allows the import of foreign spent fuel, because one of the envisaged contractual constructions to organise such imports is the leasing of fuel or enriched uranium by Russian suppliers to Western users.

Materials (e.g. natural uranium) and other nuclear items (e.g. nuclear equipment), which are not owned by the Community, are subject to the law of each Member State to determine the "system of ownership" (Article 91). In practice the law of the country where the material is located will determine the applicable ownership provisions.

Without prejudice to the exact delimitation of the rights of ownership and of usage (see *infra*) the Court of Justice based its "Physical Protection" ruling,¹⁰² which decided on the Community's competence to participate in that Agreement, for a large part on the Community's ownership right. The other grounds were Community competencies with regards to safeguards and supply. The Court took the view that these rights are not only indirectly relevant (in connection with supply or safeguards), but that "the system of property ownership is directly relevant to the problems raised by the draft Convention". The Court holds that: "the system of property ownership by the treaty signifies that, whatever the use to which nuclear materials are put, the Community remains the exclusive holder of the rights which form the essential content of the right of property. Thus, in the final analysis, the Community retains the right to dispose of special fissile materials; that concept is the basis of the supply arrangements as described above. [...] therefore, it is the Community, and the Community alone, which is in a position to ensure that in the management of nuclear materials the general needs of the public are safeguarded in its own field. [...] As a result [...], when a new requirement of general interest appears it is primarily for the owner of the nuclear materials, that is to say the Community, to meet it."

4.2. Exceptions to Euratom ownership

Besides the afore-mentioned exemption for defence materials or fissile material in waste no longer under safeguards (see *supra* point 4.1), the Treaty (Article 75, final paragraph) provides for an exception to Chapter 8 for materials in transit to be processed, converted or shaped for non-Community parties (Article 75c). Such material is not subject to Euratom ownership, although it remains under Euratom safeguards. Hence special fissile materials not produced in the Community (e.g. uranium enriched in the United States or in Russia), which belongs to a third party (e.g. a

100. Article 1C of the Additional Agreement for cooperation between the United States of America and the European Atomic Energy Community (Euratom) concerning peaceful uses of atomic energy of 11 June 1960, OJ 29.4.1961, p. 668.

101. See an intervention by Agency Director-General OBOUSSIER, F., in LUKES, R., (ed) *Zweites Deutsches Atomrechts-Symposium*, 15 May 1974, p. 104.

102. Ruling 1/78 (Physical Protection), ECR 1978, p. 2151, points 25-30.

Japanese user), and is transformed (e.g. conversion and fabrication) in the Community and then is to be returned outside the Community, would not be subject to Euratom ownership. To appreciate the extent of this important exception, it should be noted that the consideration of enrichment as production or transformation is, as already indicated, essential (see *infra* point 5.1).

4.3. Ownership right and “right of use and consumption”

In practice the ownership right has only quite limited effects, as the unlimited right of use and consumption can remain in the hands of nuclear economic operators. Article 87 provides that “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.” The wording chosen confirms the very extensive rights left to the user. These rights can be compared to the right of *usus*, *abusus* and *fructus* of the Civil Code and Roman Law, where these rights constitute the elements of the owners’ prerogatives.

To benefit from this right, the holder must have obtained possession “properly”, which means that the supply provisions, including the Agency’s exclusive right to conclude contracts, have been duly respected. The Agency’s rights, in particular those with regard to the right of option, are explicitly mentioned in Article 87 as one of the three categories of provisions to which the right of use and consumption is subject. This provision will allow the user to have the fuel processed during the different stages of the nuclear fuel cycle, to consume the manufactured fuel in a nuclear reactor, to have the irradiated fuel reprocessed and recycled (if so decided) and finally, to have the obligation rather than the right, to dispose of the vitrified waste or to dispose directly of the spent fuel. Subject to the procedures and interventions by the Supply Agency it will also be possible for the holder to sell or exchange materials not required for own use.

The value of the material will also be mentioned on the active side of the accounts as an asset (see Article 89, 1, a, and 2), and liabilities attached to nuclear materials, including the responsibility to manage the nuclear waste resulting from irradiation in a reactor, will have to be borne by the party holding the right of use and consumption.¹⁰³ In other words all the positive and negative patrimonial rights to the material, the “title” in common language, are vested in the party holding the right of use and consumption. This is confirmed by the provisions on accounting (see *infra*).

4.4. Accounting

Articles 88 and 89 of the Treaty provide that a special account, called “Special Fissile Materials Financial Account”, is to be kept by the Agency, on behalf of the Community, expressing the value of such materials. Article 89 provides that: “1. In the Special Fissile Materials Financial Account: (a) the value of special fissile materials left in the possession of or put at the disposal of a Member State, person or undertaking shall be credited to the Community and debited to that Member State, person or undertaking; (b) the value of special fissile materials which are produced or imported by a Member State, person or undertaking and become the property of the Community shall be debited to the Community and credited to that Member State, person or undertaking. A similar entry shall be made when a Member State, person or undertaking restores to the Community special fissile materials previously left in the possession of or put at the disposal of that State, person or undertaking. 2. Variations in value affecting the quantities of special fissile material shall be expressed for

103. PIROTTE, O., *et al*, *Trente ans d’expérience Euratom*, p. 72.

accounting purposes in such a way as not to give rise to any loss or gain to the Community. Any loss or gain shall be borne by or accrue to the holder. [...]”.

The value is an asset for the holder and variations (positive and negative) will thus accrue to the holder, not to the Community. In effect, this special accounting mechanism provides that the value of materials produced or imported is credited to the Community, but that at the same time the same value is credited to the user, automatically resulting in a zero balance for the Community, and that consequently the account will always have a zero balance for the Community and the balances between the suppliers and users will be exactly the same as reflected by their respective private business accounts.¹⁰⁴ The Agency¹⁰⁵ is treated as any other user when it exercises its right of option and in this case, the accounts show a net balance for the Agency (not for the Community).

Such special accounts have not been established in practice. The reason given¹⁰⁶ for this omission is that it results from political decisions by the Council in the years 1958-1960. Implicitly the reason is that as the Agency’s right of option is not used and a simplified procedure is in place where supply contracts are negotiated directly between the supplier and the user, it would make no sense to follow in detail the value of nuclear materials, as the balance for the Community (automatically) and the Agency (because this option is not used) would always be zero anyway and the relations between suppliers and users can be perfectly reflected in the regular private business accounting systems and instruments (book transfer, invoice). No complaints have been made in respect of this omission and there have been no practical difficulties as a consequence of this political decision to follow a minimalist approach for the implementation of the accounting provisions. Proper knowledge by the Supply Agency of price conditions for other purposes than the management of the Community’s ownership right (e.g. to verify that prices are “market related” or to publish an average price of deliveries) can be obtained through the contracts themselves, without requiring a special Community accounting system.

4.5. *Doctrines on the nature of “ownership”*

Dr. Domsdorf¹⁰⁷ identifies six different interpretations of the Euratom ownership concept, mainly in the German and Dutch doctrines:

104. For examples, see ERRERA, J., *et al*, *Euratom Analyse et Commentaires du Traité*, p. 166-168.

105. The same would apply for the Commission or the Agency establishing commercial or security stocks under Article 72.

106. Reply given by the Commission to oral question H-118/88 by Mr. Ford in the European Parliament on 6 July 1988 (Debates of the European Parliament, No. 367, p. 219): “Articles 88 and 89 of the Euratom Treaty have never been implemented and there is no ‘Special fissile materials financial account’. This situation, which has existed since the Euratom Treaty came into force, is the result of decisions taken by the Council and Commission having regard to the circumstances prevailing at the time the Euratom Supply Agency was set up in the period 1958-60 [...]”. The validity of this reply was reconfirmed in the Commission reply of 10 December 1992 to written question No. 2254/92 by Ms. Dinguirard (OJ No. C 90, 31.3.1993, p. 24-25).

107. DOMSDORF, E., *Internationaal atoomeneregierecht*, 1993, p. 617-618, where he quotes the following publications for the respective views: (a) BALLERSTEDT, K., “*Das Eigentum an Kernbrennstoffen*” in *Veröffentlichungen des Instituts für Energierecht an der Universität Bonn*, Düsseldorf, Heft 6, p. 34, BÖHM, P., *Die internationale Regelung der Eigentumsverhältnisse im Bereich des rechtlichen Verwendung der Atomenergie*, Dissertation, Saarbrücken, 1959, p. 55, KNAPPMANN, K., *Das Eigentum im Euratomvertrag und der Besitz im Atomgesetz im Vergleich zu den gleichlautenden Begriffen im*

- (a) Ballerstedt, Böhm and Knappmann’s position that the private law term “ownership” is used by mistake, because all of the owner’s rights (use and consumption) are in the hands of the user; the rights meant by Article 86 are merely a collection of sovereign public law rights of the Community;
- (b) Drück, Errera, Vedel, and Vogelaar’s interpretation that Chapter 8 makes a distinction between, on the one hand, the purely formal ownership and accounting without private law consequences, which is designed to ensure Community competence in the fields of safeguards, supply and safety, and on the other, the rights and duties the users hold (without formal “title”);
- (c) Mattern-Raisch’s opinion that Euratom ownership is a new *sui generis* legal concept, with a real private law content (otherwise another term would have been chosen), which cannot be assimilated to the legal concept of ownership in Member States;
- (d) Haedrich and Pelzer’s view that, notwithstanding certain special characteristics, Euratom ownership is in essence the same as private law ownership in the Member States;
- (e) Feenstra’s parallel with historical feudal law where ownership rights are split between the lord (liege) who is “*dominus directus*” (the Euratom Community) and the vassal (liege man) who is “*dominus utilis*” (the user);
- (f) Lukes’ view that the Community’s ownership is determined by Community law only and is the sum of all the possibilities the Community has to intervene and limit the free disposition of the parties.

BGB, Dissertation, Münster, 1964, p. 101; (b) DRÜCK, H., *Die internationale Zusammenarbeit bei der friedlichen Verwendung der Atomenergie innerhalb Europas*, Frankfurt, 1959, p. 92, ERRARA, *et al*, *Euratom Analyse et Commentaires du Traité*, p. 163 and 168, VEDEL, G., “*Le régime de propriété dans le Traité Euratom*”, *Annuaire Français de Droit International*, 1957, p. 586, VOGELAAR, T.W., *Het eigendomsrecht van Euratom over bijzondere splijtstoffen*, Assen, 1961, p.15; (c) MATTERN-RAISCH, *Atomgesetz-Kommentar*, 1961, *Verbemerkungen vor Par. 3 Atomgesetz, Randnummern 7-14*; (d) HAEDRICH, H., “*Das Eigentum der Europäischen Atomgemeinschaft an Kernbrennstoffen*” in *Festschrift für C.F. Ophiüls*, Karlsruhe, Müller, 1965, p. 62., PELZER, N., “*Die rechtliche Problematik der Beschränkungen der deutschen Atomwirtschaft durch den Euratomverträge*”, *Der Betrieb*, 1962, p. 398; (e) FEENSTRA, R., in VOGELAAR, T.W., *Het eigendomsrecht van Euratom over bijzondere splijtstoffen*, Assen, 1961, p. 37; and (f) LUKES, R., “*Die Eigentumsregelung für die besonderen spaltbaren Stoffe im Euratomvertrag*” in *Zweites Deutsches Atomrechts-Symposium*, 15 Mai 1974, Köln, Heymans, p. 54. Not all these references could be consulted for the present study. See also additional doctrine references: BÖHM, “*Die juristische Problematik der des europäischen Kernbrennstoffeigentums*, *Neue juristische Wochenschrift*, 1961, p. 1553, and “Ownership of nuclear materials in Euratom”, *The American Journal of Comparative Law*, 1962, p. 167, HAEDRICH, H., “*Vertrag zur Grundung der Europäischen Atomgemeinschaft (Euratom) Kommentar Artikel 86-92, Kapitel VIII Eigentum*”, in VON DER GROEBEN, THIESING, EHLERMANN, *Handbuch des Europäischen Rechts*, Baden-Baden, Nomos, Band 19, No. III A 49, KRUSE, “*Kernbrennstoffeigentum*”, *Atompraxis*, 1957, p. 250, SCHNORR, “*Die Eigentumsordnung im Euratom-Vertrag*, *Wirtschaftsdienst*, 1961, p. 124, STEIN, R., “*Le régime de propriété*”, in GANSHOF VAN DER MEERSCH, W., *Les Nouvelles, Droit Européen*, Brussels, Larcier, 1969, p. 1157-1161, VOGELAAR, T., “*Le régime des combustibles nucléaires dans le traité de Rome*”, in OEEC/ENEA, *L’industrie devant l’énergie nucléaire*, III, Conférence de Stresa, Part 2, *Droit Atomique: Législation et Administration*, Paris, 1960, p. 31. (Not all consulted).

By integrating these partly overlapping and partly conflicting views, Domsdorf draws his own opinion that the choice of the term “ownership” is historically determined, and that Article 87 empties Euratom ownership of all of its economic content, which lies with the user. But for him, this does not mean that there are no private law consequences at all. In other words, besides the obvious sovereign public law prerogatives for the Community (supply, safeguards, safety), acquisition through prescription or attachment may be barred by the Community’s ownership right, or at least limited to the right of use and consumption, and the Community could make a claim to recover its ownership.

It is probably possible to re-group the different doctrines into three main schools of thought:

- 1) Community ownership as a private and public law concept to be interpreted in accordance with the different Member States’ legal systems;
- 2) Community ownership as a *sui generis* essentially public law concept with real content, namely the addition of the Community’s intervention rights, with some indirect private law consequences attached to it; and
- 3) Community ownership as an “empty shell”, merely reconfirming already existing intervention rights of the Community.

From this examination of the legal doctrine, no clear conclusions can be drawn to give detailed guidance in respect of the interpretation of Chapter 8 of the Euratom Treaty, but a few points seem to be accepted at least by a majority:

- 1) The word “ownership” is to be explained by the historical background, in particular in the United States. This *sui generis* system is a specific Community law system, which would be hard to fit into any Member State system of ownership.
- 2) All the economical aspects of the material, both as an asset and a liability, are vested in the user, although the existence of the Community’s rights has some secondary and indirect private law consequences (right to revindicate, prescription, attachment), without patrimonial consequences.
- 3) The Community’s rights are mainly the sovereign public rights of control over the material, in particular with regard to supply, safeguards and safety. Because of this, the Community’s rights are thus not an “empty shell”.

These doctrinal debates have never been settled, because no guidance has been given by Court of Justice case law, but in view of established practice, it can be considered that the remaining doctrinal questions are mainly (but not completely, as we will see below) of academic interest.

This is not the case, however, for the more indirect relations between the supply and ownership provisions.

4.6. Practical impact of Euratom ownership on economic operators

Notwithstanding the doctrinal complexities, Euratom ownership does not create substantial problems in practice. Community ownership is a rather “naked” ownership, which does not contain the usual economical components of ownership. These components remain in the hands of the entity which has the right of use and consumption. Hence, no expropriation procedure is necessary upon

accession in order to establish the Community's ownership right; Euratom ownership results automatically from the entry into force of the Euratom Treaty and no assets subject to be compensated are taken away from private persons. Consequently, constitutional or legal protection against expropriation without compensation would simply not be affected.

From a commercial accounting standpoint, special fissile materials are reflected as assets, possibly with liabilities attached, in the users' accounts. Holders can therefore act as if they have full ownership rights.¹⁰⁸ Hence it is possible to use nuclear materials as collateral or security to obtain financing.¹⁰⁹ As stated above, in practice the Special Fissile Materials Financial Account is not in place.

The practical indirect effects are more visible with regard to rights of ownership and use in connection with supply provisions. If a contract subject to conclusion has not been concluded by the Supply Agency, there is a risk that the control over the right of use and consumption is debatable. This could result in uncertainties in the event of a dispute between contracting parties. As the question of which contracts for special fissile materials are subject to conclusion is disputed for enrichment contracts (see *infra*), it can be difficult for operators to find out what the status of their materials is. Depending on the outcome of that question, operators may be well advised to submit their enrichment and subsequent transfer contracts to the Agency for conclusion in order to be sure of their right of use.

The Euratom ownership issue has been invoked recently in pending litigation between two non-Community users (with the involvement of a Community fuel manufacturer as storage site)¹¹⁰. In this case, non-Community natural uranium, enriched in the United Kingdom, and subsequently kept in storage in a fabrication plant, was claimed by both the original non-Community user and by another non-Community user who had received it under a loan contract with a defaulting United States trader. Part of the dispute concerned the question whether under the Euratom Treaty it was possible to transfer ownership or title to these disputed materials without the Community intervening (through the Commission or the Supply Agency). So far, the issue was avoided by the first Court on the grounds that enrichment took place in the UK in 1983 and 1984. The Court stated, erroneously it appears, that enrichment happened outside the Community ambit, and that enriched uranium had been subsequently imported into the Community (Germany) for fabrication. Hence Article 75c would apply and Community ownership would be excluded (see *supra*). The Court did not elaborate on the issue of enrichment as a supply or transformation contract and the consequences of the outcome of this unsolved question. As such, the Court's reasoning would probably be correct if the factual starting point (that the United Kingdom was not part of the Community in 1983) was correct (e.g. in the case of enrichment of non-Community uranium in the United States or Russia prior to import for fabrication and storage). As the United Kingdom is a Community Member State since 1973, this conclusion is obviously wrong. In a subsidiary order, the Court stated that even if Euratom ownership existed due to import into Germany, the rights of use and consumption would have been transferred by contract. It will be interesting to follow the outcome of this case, especially with regard to the indirect effects of supply provisions on ownership, and in particular in relation to enrichment contracts. This case demonstrates again that it is advisable, in order to avoid any possible practical problems in

108. Commission Legal Service note mentioned in MANIG, W., *Die Änderung der Versorgungs- und Sicherheitsvorschriften des Euratom-Vertrages durch die nachfolgende Praxis*, p. 40.

109. See for a discussion of this in German doctrine: LUKES, R., (ed) *Zweites Deutsches Atomrechts-Symposium*, 15 Mai 1974, p. 125.

110. Points 3 and 4 of the Judgement of the *Landesgericht Osnabrück*, 17 March 2000, *Texas Utilities vs. Industrias Nucleares do Brasil* and Siemens, case No. 3 HO 154/96, (presumably) not published; case presumed to be still pending in appeal.

connection with Euratom ownership in the event of litigation, to submit contracts to the Agency for application of the appropriate supply provisions of the Euratom Treaty.

In one other case,¹¹¹ Euratom ownership has been implicitly relevant as one of the aspects of the legal issues at stake. This case concerned the dispute over some spent fuel from the United States Elk River prototype reactor, which had been sent to the Community (Italy) for reprocessing and was due to be subsequently returned to the United States. At a certain point in time the United States no longer wished to take back the material and proposed, in 1973, to transfer ownership to the operator. As this transfer proposal was never concluded by the Supply Agency, it has been argued that Euratom had not acquired ownership and that consequently the operator could not have obtained the right of use and consumption, with its liabilities. Hence the United States still owned the material and was required to take it back. The Court dismissed the case on political grounds, without ruling on the Euratom ownership and supply issues.

5. Links between ownership right and supply provisions (Chapter 6 of the Euratom Treaty)

After explaining the provisions of Chapters 6 and 8 the links between the two need to be examined in more detail.

The links between ownership and supply provisions are numerous and important. The most important ones are the status of enrichment contracts, the extent of the Agency's right of option and the conditionality of proper contract conclusion for the right of usage.

5.1. *The status of enrichment contracts*

It has already been explained that the status of enrichment contracts as supply or transformation operations can determine the ownership status of materials in transit for non-Community parties. If such a contract is merely a transformation contract, which falls under the notification procedure of Article 75, the Community is not owner of the material in transit, whereas if such contracts are supply contracts, subject to the Agency's conclusion under Article 52, the Community automatically becomes owner, following production in the Community. Furthermore, exports of Community production are subject to Commission authorisation under Articles 59 and 62 of the Treaty. If enrichment is a supply, exports of uranium enriched in the Community are subject to such authorisation. As enrichment contracts have as their principal aim to supply enrichment, Article 73 cannot be applicable because this provision would only apply to agreements, which accessorially provide for the supply of materials subject to the Agency (e.g. a research co-operation agreement where nuclear materials are supplied by one of the partners).

It is the position of the European Commission and of the Supply Agency that enrichment is a supply operation, but some Member States are of a different opinion and consider that enrichment contracts are only transformation and processing contracts,¹¹² in the same manner as conversion and reprocessing contracts.

111. Ruling of 23 December 1999 of the United States District Court for the District of Columbia, in the case ENEA vs. United States DOE, mentioned in *Nuclear Fuel*, 10 January 2000, p. 11-12; for arguments in the case see *Nuclear Fuel*, 18 October 1999, p. 3-4.

112. On this controversy, see some partial elements in PIROTTE, O., and GIRERD, P., "*Données de base introductives au régime d'approvisionnement communautaire en matière nucléaire*" in *Euratom*,

The argument of those who defend the latter opinion is that under toll enrichment contracts, the customer is the owner of the natural uranium feed material and puts it at the disposal of the enricher for the process. The customer will recover the enriched uranium product (which is chemically identical to the feed material) and retain its property. There is no sale of material but provision of a service. The customer remains owner of the materials during and after the process. Should the property of enriched uranium resulting from the process of enrichment be transferred to Euratom, the customer outside the Community would be deprived of its ownership.

It is the Commission's opinion that the latter opinion is not a correct interpretation of the Treaty, essentially because the primary aim of toll enrichment contracts is the supply of enriched uranium product, and because this process is a strategic step in the nuclear fuel cycle, and, hence, a key to the supply of enriched uranium fuels. In terms of added value, the enrichment more than doubles the value of the product. Such contracts can therefore not be exempted as less important routine operations of the nuclear fuel cycle. It is indeed obvious that Article 75 aims to exempt less important operations from the Agency's right to conclude, as a kind of *de minimis* rule. As with any exception, the exception established in Article 75 must be interpreted in a strict sense, and the general aims of Chapter 6, i.e. a common supply system, have to be taken into account; a broad interpretation of Article 75 would jeopardise these objectives, because, in effect, it would deprive the Community of its intervention in the supply of enriched uranium. It is absolutely clear that enrichment can not be considered as minor, on the contrary. Furthermore, in a majority of cases, the customer will contractually transfer the ownership of the depleted uranium tails (a source material, by-product of the enrichment by isotopic separation) to the ownership of the enricher. Finally, enrichment changes the category of the material because source material (natural uranium hexafluoride), is changed into special fissile material (enriched uranium hexafluoride) and a source material by-product (depleted uranium hexafluoride). In other words the enrichment process *produces* (see however next paragraph as to the use of this term in other areas) a certain amount of special fissile materials from source materials. As over the years discussions have been ongoing to amend the Euratom Treaty provisions or (more recently) to find, without prejudice to the legal situation, an acceptable pragmatic solution and procedure, this dispute has not been submitted to the Court of Justice.

It is very important to note that this distinction between enrichment as a supply under Article 52 or as a transformation under Article 75, is not the same as the question debated, in another framework, between enrichment as the provision of a service or as the production of goods for the applicability of anti-dumping¹¹³ or other commercial rules. There is case law¹¹⁴ in the United States which decided this

l'approvisionnement en question, 1982, p. 30, PIROTTE, O., *et al*, *Trente ans d'expérience Euratom*, p. 94-96, OBOUSSIER, F., "Die Sicherstellung des Brennstoffkreislaufes, Eine europäische Aufgabe ?", in Arbeitskreis Europäische Integration, *Die Kernenergie als Problem europäischer Politik*, Baden, Nomos, p. 41-42, and SIMMONDS, K., *Encyclopaedia of European Community Law*, Vol. B, No. B5-159.

113. Pending investigations: United States DOC Countervailing Duty (CVD) investigations C-427-819, C-428-829, C-421-809 and C-412-821 and Anti-dumping (AD) investigations A-427-818, A-428-828, A-421-808 and A-412-820 and related United States ITC Injury investigations 701-TA-409-412 and 731-TA-909-912. For the procedure so far see DOC Notices of Initiation, Federal Register, 5 January 2001, p. 1080 (AD) and p. 1085 (CVD), ITC initial determination of injury, Federal Register, 31 January 2001, p. 8424, with Opinions in published in Publication 3388, DOC Notices of Preliminary Affirmative CVD Determination, Federal Register, 14 May 2001, p. 24325 (F) and 24329 (UK-N-G). Preliminary determinations in the anti-dumping investigations are due for 5 July 2001. The service/goods issue has so far only briefly been dealt with by the DOC in a manner which was inconsistent with the case law of the Court of Federal Claims (Federal Register, 5 January 2001, p. 1080-81 and 1086-87, and Federal Register, 14 May 2001, p. 24327, footnote) (see next footnote).

issue in the framework of the applicability of the Uniform Commerce Code (UCC). In this case, enrichment customers claimed that USEC had charged excessive prices for enrichment, in violation of several provisions, including the “good faith” provisions of the UCC. The UCC only applies to the sale of goods, not to services. Thus the Court had first to determine whether enrichment is a service or a good, and it concluded that enrichment is a service. Hence the Court decided that the good faith provision of this Code is not applicable to enrichers providing enrichment services!

5.2. *The right of option*

The exact extent of the Agency’s right of option is determined by the Community’s right of ownership. For source materials and ores, where the Community is not owner, the right of option applies to the full ownership rights, including the economic aspects. For special fissile materials, where the Community is owner, the right of option only applies to the right of use and consumption. In the (theoretical) case of exercise of the right of option the Community would remain owner, and the Agency would have the right of use and consumption. This situation is reflected in Article 89 where it is provided that for the accounting under the Special Fissile Materials Special Account the Agency is treated as any other user if it has exercised its option, until it has supplied this right further on to a final user.

5.3. *The conditionality of transfers of the right of use*

Article 87 subjects the benefit of the right of use and consumption to the respect of obligations in the field of supply, safeguards and safety. Consequently, it can be argued that a transfer of the right of use and consumption of special fissile materials imported or produced in the Community, without the conclusion of the contract with the Agency’s co-signature under the simplified procedure, would not provide the user with these rights. If this intervention is a condition for the benefit of the right of use and consumption, as the language of Article 87 seems to imply, it would result that as long as this condition is not fulfilled, i.e. as long as the contract is signed by the commercial parties only (buyer and seller), there is a certain risk for the buyer that the right of use is still in the hands of the seller. Regularisation afterwards could, however, be possible.

6. Conclusion

In conclusion to this overview of Chapters 6 and 8 of the Euratom Treaty, it can be stated that the Euratom supply system, which was designed to be a monopolistic system, has been implemented in a simplified fashion, without abandoning any of its objectives or main tools. Therefore it was possible to deal with new market difficulties in a flexible way, without undue rigidity. With the accession of new Member States to the Communities, a generous transitional regime permitting the continuation of existing supply arrangements should avoid major disruptions of traditional supply patterns.

Euratom’s ownership right, as such, will not noticeably limit the rights of the holders of nuclear materials: they will retain full economic benefit and liability for the materials under their control. In view of the purely non-patrimonial effects of Euratom ownership, its entry into force upon accession

114. Judgement of 2 August 1996 of the United States Court of Federal Claims, in the case BKAB and ENUSA vs. USEC, 36 Fed. Cl. 691 (1996), appeal rejected.

of new Member States should not generate any problems. To ensure full benefit of this right of use, operators would be well advised to make sure the supply provisions are fully respected.

In other words, to answer the question raised by the title of this article, it could be stated that Euratom supply and ownership provisions are still quite current and relevant for Candidate countries, but that they normally should not generate problems.