

Nuclear Transparency and Safety Act: What Changes for French Nuclear Law?

by Marc Léger and Laetitia Grammatico*

1. The long-promised Act No. 2006-686 of 13 June 2006 on nuclear transparency and safety¹ (hereinafter referred to as the TSN Act) is the result of a long process, begun in the 1990s, reflecting the (more or less general) desire to promulgate a comprehensive nuclear legislative framework.

For in France, there was no all-embracing nuclear act containing all the legislation governing the use of nuclear energy,² although many countries had adopted such acts (United States, Germany, Italy) with the purpose of ensuring the coherence of the regime, at least as regards the principles involved.³

French nuclear legislation was in fact based on an old Act of 2 August 1961 on Measures to Combat Atmospheric Pollution and Odours,⁴ Section 8 of which provided that the provisions of the act applied to “any kind of pollution caused by radioactive substances”.⁵ Thus, while the most polluting industrial activities were regulated as early as 1917 under an Act of 19 December on Hazardous, Unsanitary and Incommodious Establishments, replaced by Act No. 76-663 of 19 July 1976 on Installations Classified for Environmental Protection Purposes (ICPE), the construction and operation of nuclear installations were essentially regulated by a truncated act and a regulation dating from 1963.⁶

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1. Official Journal of 14 June 2006, p. 8946.
2. See for example Henri Pac, *Droit et politiques nucléaires*, PUF, 1994; Jean-Philippe Colson, *Le nucléaire sans les français*, Maspero, 1977.
3. Furthermore, the International Atomic Energy Agency (IAEA) has prepared a manual to help states draft their national nuclear legislation, see Carlton Stoiber, Alec Jean Baer, Norbert Pelzer, Wolfram Tonhauser, *Handbook on Nuclear Law*, IAEA, 2003.
4. Act No. 61-842 of 2 August 1961 on measures to combat atmospheric pollution and odours, amending the Act of 19 December 1917, Official Journal of 3 August 1961, p. 7195.
5. This became Article L.227-1 of the Environment Code.
6. Decree No. 63-1228 of 11 December 1963 on nuclear installations, Official Journal of 14 December 1963, p. 11092.

The absence of a nuclear act,⁷ however, did not mean the absence of a legal framework, which, although disparate and consisting essentially of regulations, could be considered as being complete, and has enabled dozens of nuclear installations, including power plants, to operate safely in France since 1945. Indeed, French nuclear law is one of the best adapted and structured systems in the world, and it has enabled the development of an extremely competitive nuclear industry while meeting strict safety and security requirements, thus constituting a model for nuclear countries.

The fact remains, however, that the absence of a nuclear act meant that there was no parliamentary debate on these issues which raised many economic, social and environmental questions of an importance which merited at least some consideration on the part of the country's representatives.⁸ Supporters of a comprehensive nuclear act also pointed out that nuclear law, which had become particularly complex with entangled procedures, was fragmentary in nature and lacking coherence, something which the new TSN Act is endeavouring to correct.

The TSN Act is thus the first legislative text which is intended to give a general legal framework to "nuclear activities", thus answering the criticisms about the "democratic deficit" in this field. It is a particularly important text, which guarantees legal certainty in the nuclear sector and one of the objectives of which (nuclear transparency) is presented as a guarantee of improved nuclear safety, defined in Section 1(1) of the act as "nuclear safety, radiation protection, the prevention of malicious acts and measures to combat them, and measures to protect the public in the event of an accident."

The concept of safety, a major concern of our times, includes an objective element – the absence of danger or threat for an individual – but also a subjective element which is even more important: the feeling, on the part of the public, of being safe.⁹ The second aspect of the above definition is implemented by the act by virtue of nuclear transparency.

The drafting of this bill, submitted to the Senate on 18 June 2002,¹⁰ follows on from the text presented in 2001 to the National Assembly by Dominique Voynet¹¹ and from the task conferred in March 1998 by the prime minister on Jean-Yves Le Déaut (member for Meurthe-et-Moselle), namely to examine the system of control and expertise in the fields of nuclear safety and radiation protection, and to make suitable proposals. This mission gave rise to a report,¹² in which the author discussed the content of a nuclear act. The bill which resulted from this was rejected in total in June 1999 by the *Conseil d'État* before even being submitted to parliament. In May 2000, a new text was submitted to the *Conseil d'État* for opinion and resulted in the bill submitted in July 2001 by Mrs. Voynet. This bill, which would have become void and of no effect on the expiry of the mandate of the preceding

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7. An act was, however, passed in 1980 on the protection and control of nuclear materials (Act No. 80-572 of 25 July 1980, Official Journal of 26 July 1980, p. 1882). This has now been codified as Articles L.1333-1 et seq. of the Defence Code.
 8. All the relevant decisions were thus taken at executive level, as pointed out by Professor Jean-Philippe Colson in 1977: "*Le monopole gouvernemental sur la définition de la politique électronucléaire est total*", in "*Aspects juridiques de la politique nucléaire de la Vème République*", AJDA, 1977, p. 290.
 9. See Professor Jean-Marie Pontier "*De la sécurité*", AJDA, 22 May 2006, p. 1009.
 10. Bill No. 326 (2001-2002) on nuclear transparency and safety.
 11. Bill No. 3217, submitted to the National Assembly on 4 July 2001.
 12. Report to the prime minister, "*Le système français de radioprotection, de contrôle et de sécurité nucléaire : la longue marche vers l'indépendance et la transparence*", *La Documentation française*, 1998, p. 163.

assembly, was withdrawn from the assembly bureau in June 2002 before being submitted to the Senate under the name of the new minister responsible for the environment, Roselyne Bachelot.

This is the same bill that was resubmitted in 2005 to the Senate for a first reading, after an unsuccessful attempt to insert it in Title V of the 2004 Energy Orientation Act. Unsuccessful, because of the political scope of the act,¹³ which was not the best legislative vector for the law governing nuclear activities.

It is interesting to note that the text finally submitted to the Senate was amended yet again by a letter from the prime minister, deposited with the Senate on 22 February 2006, the purpose of which was to insert an additional title, within the bill deposited, setting up an independent administrative authority responsible for controlling nuclear safety and radiation protection.

This customary procedure, not provided for under any text, derives from the right of legislative initiative and has been maintained although the 1958 Constitution recognised that the government has a right of amendment. As confirmed by the decisions of the Constitutional Council,¹⁴ however, the latter right is not the same as the procedure used, since a letter from the prime minister directly amending the content of a bill already submitted has the effect of changing the text serving as the basis for parliamentary discussion. The procedure followed is therefore identical to that laid down in Articles 39 and 42 of the Constitution for the drafting, examination and voting of bills. In practice, the debate about the contents of a correcting letter takes place in the same conditions as for the initial bill, which means in particular that amendments can be made.¹⁵ The difference is that it is not countersigned, which in no way affects its legality.

The bill was finally adopted on first reading by the Senate on 8 March 2006 after a declaration of urgency, and by the National Assembly on 29 March. In the meantime, the urgency was lifted and the second reading before the Senate took place in record time, ending with a vote in favour. This procedure did not fail to cause surprise and in particular to give rise to comments about the much anticipated parliamentary democracy and the type of transparency involved. Indeed, a debate which was shortened on second reading before the Senate and inexistent before the National Assembly is in contradiction with the withdrawal of the declaration of urgency, which led certain members of Parliament to speak of Parliament's role being denied, and does nothing to rectify the much criticised democratic deficit.

In addition to setting up a legislative framework for nuclear activities, the objectives of the new act are to establish important definitions at legislative level¹⁶ and lay down the main principles to

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13. Act No. 2005-781 of 13 July 2005 programming the orientations of energy policy, Official Journal of 14 July 2005.
 14. "A corrective letter, signed by the prime minister, does not constitute an amendment made by the government to a bill under Article 44(1) of the Constitution, but an application of the power of legislative initiative which the prime minister enjoys under Article 39(1) of the Constitution". See Decisions No. 78-100 DC of 29 December 1978, No. 90-285 DC of 28 December 1990 and No. 2000-433 DC of 27 July 2000.
 15. For an example of the discussion of a bill involving a correcting letter, Official Journal Débats A.N., Debate of 4 June 1996, p. 3776 *et seq.*
 16. Such as nuclear security, nuclear safety, protection against ionising radiation and nuclear transparency. "Nuclear safety consists of all the technical provisions and organisational measures relating to the design, construction, operation, shutdown and disassembly of installations in which a source of ionising radiation is located, and to the transport of radioactive materials, adopted with a view to preventing accidents and mitigating their effects".

which nuclear activities are subject,¹⁷ to organise nuclear information, to review the administrative framework for civilian basic nuclear installations, and to clarify and strengthen the control system and sanctions applicable.

2. It is also interesting to consider the consequences of this act as regards nuclear law inasmuch as, far from enshrining its distinctive nature, the act tends to standardise and put it on an equal footing with other branches of the law, as pointed out by the rapporteur to the national assembly in the report of 20 March 2006 which asserted that nuclear activities “are now fully governed by the ordinary law”.¹⁸

This development – born of the need to take account of new issues such as environmental concerns and the democratisation of industrial and technological choices, the increase in the number of public and also private players, and European integration – raises questions about the identity, even the very existence, of nuclear law. It was indeed clear, as from 1994, that a general nuclear act was not justified in a legal context characterised by the existence of cross-cutting environmental law provisions and other procedures of the ordinary law applicable to nuclear activities.¹⁹ Paradoxically, although presenting itself as an act specific to the nuclear field, and more especially that of nuclear installations, the TSN Act in fact leads to nuclear law being absorbed by other branches, notably environmental law, and to the application of environmental principles and/or principles applying to installations classified for environmental protection purposes, considered as being general principles from which nuclear installations, no matter how special a case, cannot escape.

The desire for nuclear “transparency” has therefore given rise to an act by virtue of which nuclear law in general (I) and nuclear administrative control in particular, have lost their distinctive nature, the only particular features remaining being the administrative reorganisation of the monitoring of nuclear safety and radiation protection by the setting up of a nuclear safety authority (III) and the enshrinement in law of a legal regime applying to nuclear installations which is increasingly based on the model of installations classified for environmental protection purposes (II).

I. The loss of the distinctive nature of nuclear law in the concept of transparency

The title of the act uses the concept of “transparency” which the *Conseil d’État* had rejected when examining the previous bill in June 1999. One possible reason for this is that the Conseil had simply noted that this word had no legal meaning and was more of a political term.

The reason for maintaining the reference to this concept seems to be to show the government’s desire to broaden the information to the public. It may be noted, however, that the Act of 17 July 1978

“Protection against ionising radiation, hereinafter referred to as radiation protection, consists of all the rules, procedures and means of prevention and surveillance aimed at preventing or reducing the direct or indirect adverse effects on persons of ionising radiation, including damage to the environment”.

17. Principles of prevention, polluter-pays or participation but also radiation protection principles included in the Public Health Code.
18. Report No. 2976 of Mr. Alain Venot, member of Parliament, prepared for the Economic Affairs Commission, submitted on 20 March 2006, p. 11.
19. Report on “*Les enjeux d’une loi nucléaire en France*”, Jean-Philippe Colson et Jean-Paul Schapira, October 1994, p. 85.

which introduced a right of access to administrative documents²⁰ does not refer to the concept of “transparency”. It would, therefore, have been better to use the simple and non-contentious concept of information, but such was not the will of parliament.

The concept of transparency is based on the idea that administrative action should be public and that, in order to be applied, administrative decisions cannot remain secret. However, the call for a right of access to information and documents is more recent and originates in the idea that the public is entitled to know about decisions concerning it as well as their motives, and that the government has an interest in improving its image by opening up its files. It should be pointed out that giving access to information is also a way of garnering support for public projects.

It is, however, difficult properly to delimit this concept,²¹ defined in the dictionary as “the condition of allowing full reality to appear”. It is not easy to require the government or any individual to apply such a definition strictly since it necessarily encounters the problem of various items of information or documents which cannot be divulged (national external or internal security, industrial secrets, etc.).

Transparency can therefore only be relative and it would be better to speak rather of a right to information and the administration’s corresponding obligation to provide information.

The TSN Act defines nuclear transparency as “all the provisions taken to guarantee the public’s right to reliable and accessible information about nuclear safety”.²² Section 18 of the act confirms this approach by laying down the principle that the government is responsible for informing the public about monitoring procedures and results with regard to nuclear safety and radiation protection.

A number of provisions are designed to ensure this. They are not really innovative inasmuch as they existed already in environmental law: the right of access to information (A) and the reorganisation of information bodies (B), which have led to the drafting of legislation incorporating environmental provisions which, by their nature, are cross-cutting and therefore directly applicable, and remove the distinctive and special aspect of nuclear law.

A. *Right of access to nuclear information*

The act lays down the main principles applicable to nuclear activities, principles which are well known and enshrined in environmental law. It is not, however, customary to repeat in every legislative text, albeit an act of general scope, the legal principles applicable, especially when they are not specific to it. The information principle, which the TSN Act develops more particularly, devoting

20. Act No. 78-753 of 17 July 1978 introducing various measures for improving relations between the administration and the public, and various administrative, social and fiscal provisions, Official Journal of 17 July 1978, p. 2851.

21. See Mr. Renaud Denoix de Saint-Marc, Vice-President of the *Conseil d’État*, “*La transparence, vertus et limites*” Colloquium for the XXVth anniversary of the Act of 17 July 1978 on access to administrative documents, p. 11, available on the Internet site www.cada.fr.

22. Section 1(I)(4).

title III to it, is given two aspects: the right to be informed, included in Section 2 of the act,²³ and the right to obtain information (Sections 19 and *et seq.*).

Enshrining the public's right to nuclear information in the act in this way is a response to the widely perceived notion that secrecy, and therefore lack of transparency, is the rule in nuclear matters. For, although the public authorities had responded to the Chernobyl accident by creating the Higher Council for Nuclear Safety and Information,²⁴ more was needed in order to address the criticisms born of the "affair of the Chernobyl cloud".

Thus, anyone, i.e. without any need for a special interest, is entitled to be informed about the risks related to nuclear activities and their impact on the health and safety of persons as well as on the environment, and releases from nuclear installations.

The distinction made between the environmental impact of such activities and of releases from installations may appear surprising. Apparently, the lawmaker wished the text to be exhaustive at the risk of its containing redundancies. It may be noted that the act lays down the principle of this right, but leaves it to implementing decrees to specify arrangements for its application.

If the principle of participation is to have any meaning, there must also be a right to obtain information. Section 19(I) of the act refers to the Environment Code as regards the procedures for obtaining information.

The only difference between this right and the one given by the Environment Code relates to the possessor of information, who may be any person, public or private, who operates a nuclear installation or transports radioactive substances, whereas the Environment Code refers only to public authorities²⁵ and not to private persons.²⁶ Thus, while the government remains responsible for informing the public about the risks related to nuclear activities and their impact,²⁷ all operators and persons in charge of transport now have obligations to disclose information too, which considerably broadens the range of enterprises concerned.²⁸

23. "Every person shall be entitled, on the conditions laid down by the present act and its implementing decrees, to be informed about the risks related to nuclear activities and their impact on the health and safety of persons and on the environment, and on the release of effluents from installations".

24. Decree No. 87-137 of 2 March 1987 on the Higher Council for Nuclear Safety and Information, Official Journal of 3 March 1987, p. 2385.

25. These are listed in Article L.121-3 of the Environment Code: they are the government, territorial authorities and their groupings, statutory bodies, and persons entrusted with a public service mission relating to the environment inasmuch as the information concerns the performance of the tasks involved with this mission.

26. One of the bill's rapporteurs considers the extension to information held by all operators of nuclear activities as the essential contribution of this title, see A. Venot, *Rapport fait au nom de la commission des affaires économiques, de l'environnement et du territoire sur le projet de loi relatif à la transparence et à la sécurité en matière nucléaire*, No. 2976, p. 55.

27. Section 18 of the act provides: "The government shall be responsible for informing the public about monitoring procedures and results with regard to nuclear safety and radiation protection. It shall inform the public about the consequences, on the national territory, of nuclear activities performed outside such territory, notably in the event of an incident or accident".

28. In the nuclear field, the CEA and EDF (the French national electricity company) were already concerned by the right to obtain information under the Environment Code, the former as a statutory body and the

Such a broadening is understandable given that the act gives no indication about the type of format containing the “information”, unlike the Act of 17 July 1978²⁹ which created a right of access to administrative “documents”. Here again, it imitates the Environment Code which provides that “all information available, in whatever format, shall be considered as information relating to the environment”, in speaking about information only, a term which it is not easy to define in law so as to know what types of acts are concerned by the provision.

Thus, use of the term “information” seems broad and unclear, and risks presenting difficulties of interpretation. The dictionary definition of the term, as used in the above provision, is “facts or knowledge provided or learned as a result of research or study”, without any indication as to what form this information must take (verbal, written, official, unofficial, electronic, etc.).

It may be supposed that any document, note or report containing information falling within the scope of Section 4 of the act, should be communicated irrespective of whether it is a private document or not. For, the result achieved by the new legislation, by adapting the 1978 Act by means of a few essential amendments and clarifications, is that all documents are now to be communicated. Section 19(II) of the act provides that any disputes about a refusal to communicate information shall be referred to the administrative courts in accordance with the procedures laid down by the 1978 Act on access to administrative documents, and Section 20 provides that the Commission for Access to Administrative Documents (CADA) which, as its name indicates, had jurisdiction over administrative documents only, is now also competent to rule on questions relating to access to information in the possession of nuclear operators.

This application of administrative law and administrative dispute procedures to private documents seems totally contrary to the principle of the separation of powers, and subjects private law persons to principles resulting from prerogatives which are outside the scope of the ordinary law.

However, if only public operators were concerned by these provisions, this would be contrary to the constitutional principle of equal treatment by the law. If this is not the case, it results from the act that employers with a private law status would be taking administrative decisions by refusing to communicate nuclear information and would thus be subject to the administrative courts.

This is all the more surprising in that nuclear operators are obliged to communicate information which they have established themselves but also which they have received, i.e. which they got from somewhere else.

It is, however, difficult for the public to know what information nuclear operators have received and, should the latter deny possessing any, to check whether they received it or not, when the information does not concern the enterprise directly.

The information to be communicated is nevertheless limited by subject matter, since it must concern:

- the risks related to the exposure to ionising radiation which could result from the activity,

latter as a public person responsible for providing a public service. However, the transformation of EDF into a limited company could have given rise to doubts which are now no longer relevant.

29. The above-mentioned Act No. 78-753 of 17 July 1978 introducing various measures for improving relations between the administration and the public, and various administrative, social and fiscal provisions.

- the safety and radiation protection measures taken to prevent or reduce these risks or exposures.

The scope of application of the act with regard to information addresses the numerous expectations of environmentalists inasmuch as it also concerns nuclear installations and activities relating to defence. For, with the exception of Sections 1 (definitions) and 2 (right to information) the provisions of the TSN Act do not apply to such installations and activities, contrary to the “culture of secrecy” which was recently mentioned by the working party set up in the context of the EPR “*tête de série*” public debate in Flamanville.³⁰ However, an important first step was taken by Decree No. 2001-592 of 5 July 2001 relating to these activities and installations, Part 2 of which concerns information and sets up “information commissions” at the sites of basic nuclear installations classified as secret, and for the home ports of nuclear-powered military vessels.

Thus, we feel there was no need for a reference to the fact that environmental principles such as participation and information apply to nuclear law, or such reference should at least have been limited to an indication of the relevant provisions of the Environment Code.³¹ As it is, the result is the continued integration of environmental law into other branches of the law while removing the distinctive nature of nuclear law.

B. The reorganisation of information bodies

Title III of the act on public information with regard to nuclear safety includes two chapters reshaping certain nuclear information players through the creation of the High Committee for Nuclear Safety Transparency, which is to replace the Higher Nuclear Safety and Information Council,³² and the task of which is to help inform the public about nuclear activities and issue opinions on reforms intended to improve nuclear safety and radiation protection,³³ and the establishment of local information commissions (CLI).

The High Committee for Nuclear Safety Transparency is a body for information, consultation and debate about the risks related to nuclear activities and the impact of these activities on the health of persons, the environment and nuclear safety. Its task is to give opinions on any question within its field of competence and any monitoring and information relating thereto. Referrals may also be made to it with regard to information concerning nuclear safety and its supervision by the ministers responsible, the chairperson of the Parliamentary Office for assessing scientific and technological options, the chairperson of CLIs, the operators of basic nuclear installations (INB) and the chairperson of Parliamentary Commissions.

30. See the “Access to information” report of the working group, October 2005-February 2006, which can be consulted on the Internet site www.debatpublic-epr.org.

31. The right of access to environmental information is laid down in Chapter IV of Title II of Book I of the Environment Code, the scope of which was considerably broadened by Act No. 2005-1319 of 26 October 2005 containing various provisions to bring it into line with Community law in the field of environment.

32. The decree creating this Council is to be repealed.

33. Given its composition, it may be wondered whether the High Committee has the expertise needed to give an opinion on such technical subjects as the improvement and monitoring of nuclear safety, how to control the risks of irradiation, contamination and criticality presented by nuclear installations and transport, or the improvement and monitoring of radiation protection.

The act gives this body a significant role inasmuch as nuclear safety covers not only questions of security and criminal intent but also radiation protection and the safety of the population.

The importance of its role can also be seen by the fact that it must publish its opinions and prepare an annual activity report which is also made public. Moreover, under the principle of transparency in nuclear matters, persons responsible for nuclear activities as well as the administrative authorities concerned are obliged to communicate to the High Committee any information and documents which would help it accomplish its tasks.³⁴

It is also empowered to commission expert reports and organise debates. Doubts may be had about the type of debates in question and about the relevance of this task given what already exists in the way of public debate and modes of participation under environmental law.

Moreover, the TSN Act merely enshrines in law the existence of local information commissions.

Here again, its provisions are not innovative³⁵ but enhance the status of these commissions and confirm their role. They have a general monitoring, information and consultation mission with regard to nuclear safety, radiation protection and the impact of nuclear activities on persons and the environment.

The addition of an evaluation task in the bill had introduced a strong risk of ambiguity since evaluation should remain the exclusive responsibility of the safety authority and its inspectorates; that is why Parliament decided to withdraw this task.

The drafting of Section 22 on the CLIs confirms that there is today in French law no precise and standardised terminology concerning the information commissions or even a definition of their role, competencies and mode of financing.

Use is therefore made of what exists already for large energy installations in general and, in particular, for basic nuclear installations classified as secret (INBS), waste processing facilities on the site of each radioactive waste underground laboratory or high-risk installations.

The act simply says that CLIs must have a legal personality and be incorporated as an association but, as for the High Committee, leaves the arrangements for implementing these provisions to be dealt with by a decree of the *Conseil d'État*.

34. Section 25 of the act.

35. It is the Prime Ministerial Circular of 15 December 1981 on the conditions for the creation and functioning of local information commissions for large energy installations (the "Mauroy Circular") which set up the CLIs, created at the initiative of the *conseils généraux*. To these general CLIs were added various specific CLIs: Article L.542-13 of the Environment Code sets up Local Information and Monitoring Committees, provided for under the Act of 30 December 1991 on radioactive waste. The local information and monitoring commissions for radioactive waste facilities (CLISs) are provided for in Article L.125-I-II.2 of the Environment Code in application of Decree No. 93-1410 of 29 December 1993 laying down the procedures for exercising the right to information, and the local information and consultation committees (CLICs) for high-risk installations were set up by Section 2 of Act No. 2003-699 of 3 July 2003 for any industrial complex including one or more Seveso ICPEs.

The act also introduces an additional obligation for the administrative authorities, namely the mandatory consultation of the CLI, if one exists, for any project about which a public enquiry is being held.

Lastly, Section 22.VII enshrines in law the possibility for CLIs to constitute a federation to represent them, although in fact existing CLIs had already created a national association of local information commissions (ANCLI) in 2000. This association meets annually, facilitating the creation of a network of relationships between CLIs and helping information to circulate more easily.

These provisions show that while nuclear transparency has led to the right to information being enshrined in law and the creation of special information bodies, the regulatory authorities did not wait for a comprehensive nuclear act to make these activities subject to particular obligations with regard to information. The principal impact of the application of the concept of transparency has therefore been the absorption of nuclear law by the branch of law closest to it, environmental law. This is equally valid with respect to the special administrative provisions applicable to nuclear activities.

II. Watering down administrative law on nuclear activities into law applicable to installations classified for environmental protection purposes (ICPE)

The administrative law relating specifically to nuclear activities, and providing a legal framework for the design, operation and shutdown of nuclear facilities, is set out in Title IV of the TSN Act, which has 24 articles and whose only real innovation in relation to existing regulations is to enshrine them in law.

Accordingly, while the *status quo* with regard to the legal regime applicable to basic nuclear installations since 1963 has been maintained bar one or two amendments, the latter appear to simply restate the regulations applicable to classified installations and therefore raise doubts over the added value they bring to the act.

As noted above, while environmental law, which incorporates regulations applicable to installations classified for environmental protection purposes, addresses cross-cutting issues covering different branches of law, it also deals with interactions that automatically fall within the scope of all areas of law in accordance with the principle of integration set out in Article 130-R-2 of the Treaty of Maastricht.³⁶ Because environmental law is designed to protect public order, it applies to all installations, civil works, operations or activities that have an impact on open spaces, natural resources and habitats, sites and landscapes, air quality, animal and plant species, as well as the diversity of ecosystems which are defined as being part of the common heritage of the nation under Article L. 110-1 I. of the Environment Code and whose protection, development, restoration, rehabilitation and management are of general interest and help to meet the goal of sustainable development (Art. L. 110-1.II of the Environment Code).

There would therefore seem to have been no need to explicitly incorporate the above provisions into nuclear law or to merge two hitherto separate regimes. However, the extraordinary nature of nuclear activities is such that, in view of the environmental constraints, it was no longer possible at present to keep in place a legal regime that was considered to be a special regime for classified installations, even though there was no real intention to make them subject purely and simply to the

36. On the concept of integration in environmental law, see Sylvie Caudal-Sizaret, *La protection intégrée de l'environnement en droit public français*, thesis submitted at Lyon III, 1993.

ordinary law for such installations. This special regime did seem to be criticised for its peculiarities, lack of a solid basis and so-called omissions.

In addition, changes in the administrative law applicable to classified installations have led to improvements in existing procedures in other areas of the law (town planning, criminal law, etc.) that had not been taken into account in nuclear law, which continued to apply the principle of independent legislations.

The TSN Act therefore provides a response to such criticism by rationalising administrative law on nuclear activities and by bringing the legal regime governing nuclear controls and disputes into line with that applicable to installations classified for environmental protection purposes (ICPE).

A. *Rationalisation of administrative law on nuclear activities*

Title IV of the act on basic nuclear installations and carriage of radioactive substances does in fact provide a definition of basic nuclear installations and the legal regime that applies to them by giving legislative force to the regime arising from amended Decree No. 63-1228 of 11 December 1963 based on Act No. 61_842 of 2 August on the control of atmospheric pollution and odours.

In general, the legal regime applicable to nuclear installations has been maintained and simply restated.

However, the licensing procedure for the creation of a basic nuclear installation will be amended as a result of the division of competences between the state and the Nuclear Safety Authority (ASN) (see section III below). Licences will henceforth be issued by decree issued once the Nuclear Safety Authority has given its opinion, and will determine solely the characteristics and perimeter of the installation as well as the deadline for commissioning. Requirements relating to the design, construction and operation of the facility, water abstraction and maximum release levels will therefore no longer be specified in the decree authorising creation but in a decision issued by the Nuclear Safety Authority and subject to the approval of discharge levels. Once these stages have been completed, the Nuclear Safety Authority will authorise the commissioning of the installation.³⁷

Accordingly, although the procedure has been retained, it is no longer seamless but broken down into stages subject to different authorities. The same applies to the procedure for the final shutdown and dismantling of a basic nuclear installation.

It should first be noted that the wording of this title is modelled on ICPE law, whereby nuclear activities are made subject to the provisions of the act “due to the risks or inconveniences they may present to public health and safety and protection of the natural environment”.

This similarity of scope between the TSN Act and ICPE regulations required further details to be given regarding the application of different regulatory regimes (ICPE, IOTA), duly provided in Article 28 IV and V. Accordingly, the act specifies that basic nuclear installations are not subject to the provisions of Articles L. 214-1 to L.214-6 of the Environment Code, nor are they subject to the provisions relating to installations classified for environmental protection purposes.³⁸

37. Articles 29 and following of the act.

38. Section I of Book V of the Environment Code. In addition, these classified installations are not subject to licensing or to declaration under Article L. 1333-4 of the Public Health Code.

In addition, facilities and installations required for the operation of a basic nuclear installation and located within its perimeter, including those listed in one of the categories included in the water³⁹ or ICPE⁴⁰ classification, are deemed to be part of that installation and therefore subject to the legal regime applicable to basic nuclear installations arising from the act. In contrast, other facilities and installations, that is to say those which are not required for the operation of the basic nuclear installation but which are subject to water or ICPE regulations and located within its perimeter, remain subject to the provisions of the Environment Code, although the Nuclear Safety Authority replaces the competent administrative authority with regard to individual decisions concerning them (in principle the prefect).

Until now, under Article 6 *bis* of the Decree of 11 December 1963 and in conformity with an opinion issued by the State Council on 4 October 1983, solely facilities that are part of a basic nuclear installation and that constitute an element necessary for its operation, as well as installations classified for environmental protection purposes (ICPE) that have a “compelling link” with the basic nuclear installation were subject to the nuclear installations regime and to the authority in charge of nuclear safety. The purpose of the above-mentioned provision of the act is therefore to maintain this distinction while at the same time extending the jurisdiction of the Nuclear Safety Authority to all facilities and equipment located within the perimeter of a basic nuclear installation.

This change clearly obeys a certain form of legal and administrative logic and it would be reasonable to think that it will avoid potential conflicts of jurisdiction between safety authorities and inspection authorities. However, it would also be pertinent to ask why the legislator only went part-way and failed to take the bolder step of extending the basic nuclear installation regime to all facilities and installations within the perimeter of a basic nuclear installation.

With regard to the provisions of environmental law, while it is important to specify those which do not apply to basic nuclear installations, in contrast there is no point in stating those which do apply given that, unless otherwise specified, they must necessarily apply. Consequently, the act recalls, in Article 29, that the licence to create a basic nuclear installation is issued by decree following a public enquiry; the latter, however, is an instrument of environmental law that necessarily applies under the conditions set out in the Environment Code.

Moreover, administrative law relating to nuclear activities is also subject to the provisions of town planning law, according to the ICPE model, in that Article 32 of the act establishes a link between the issuing of a licence for creation of a basic nuclear installation and performance of the corresponding work, despite the principle of the independence of different legislations.

This provision is exactly the same as that applicable to installations classified for environmental protection purposes. Article L. 425-10 of the Town Planning Code states that work on a project relating to an ICPE subject to licensing cannot begin until the public enquiry has been completed, a provision recently added to the Town Planning Code under Order No. 2005-1527 of 8 December 2005 on building and planning permits.

39. See Decree No. 93-743 of 29 March 1993, as amended, relating to the nomenclature of operations requiring a licence or declaration in accordance with Article 10 of Act No. 92-3 of 3 January 1992 on water.

40. See Decree No. 53-578 of 20 May 1953, as amended, relating to the nomenclature of establishments classed as dangerous, insalubrious or noxious establishments.

The innovation lies in the new Article L. 425-12 which states that “work” cannot be performed until the public enquiry into the application to build a basic nuclear installation has been completed. However, in our opinion, this does not mean to say that building or redevelopment permits or prior declarations of work cannot be issued before the public enquiry has been completed.

It is also worth noting that nuclear law follows the so-called high-level Seveso provisions relating to classified installations (that is to say licensed and subject to public utility requirements) with regard to the health and safety of workers.

Title IV chapter II of the act does in fact enhance the role of employees in basic nuclear installations, firstly by applying the existing preventive measures in Seveso classified installations to basic nuclear installations⁴¹ and secondly by enhancing the role of the CHSWC⁴² in basic nuclear installations by transposing existing provisions with regard to Seveso classified installations. Accordingly, the extension of the competence of the CHSWC, which until now had been restricted solely to safety in the workplace (and working conditions), to encompass nuclear safety is now enshrined in law.

This watering-down of special administrative law relating to nuclear activities into regulations applicable to installations classified for environmental protection purposes can also be seen in the monitoring and dispute-settlement procedures applicable to basic nuclear installations.

B. Basing inspection and dispute-settlement regimes for basic nuclear installations on the regime applicable to installations classified for environmental protection purposes

Until now, decisions relating to basic nuclear installations, and in particular decrees authorising their creation, were subject to a dispute-settlement procedure known as an annulment or appeal on the grounds of *ultra vires* action, in accordance with earlier case history of the *Conseil d'État*,⁴³ for which

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41. Such as the obligation on the head of the establishment to immediately notify the labour inspectorate and nuclear safety authority of any serious and imminent danger and to specify how he intends to respond to that danger, the obligation that basic nuclear installations have appropriate accident prevention, fire-fighting and emergency service resources at their disposal, by improving relations between the user firm and outside firms – Joint specification of preventive measures by the head of the user firm’s establishment and the head of the external firm, obligation that the head of the user firm’s establishment ensure the external firm complies with the measures that the former is responsible for applying
 42. Enlargement of CHSWC meetings held to draw up safety regulations for the establishment to include representatives of the heads of external firms and their employees (this obligation is not enforced in cases where there is a similar arrangement in the form of inter-firm committees on safety and working conditions, as is the case of EDF’s nuclear power plants), an increase in the number of members of the staff delegation and in the time for which staff representatives are assigned to the CHSWC, provision of special training for staff representatives on the CHSWC, notification of staff representatives on the CHSWC when the authority responsible for regulating installations is present so that the former can present their observations to the latter, notification of the dates of CHSWC meetings on safety to the authority responsible for regulating installations, obligation to inform the SCST of the firm’s safety policy and the follow-up given to incidents that might have had serious consequences and possibility given to the CHSWC to analyse the incident and propose measures, obligation to consult the CHSWC before deciding to sub-contract and also in relation to the internal emergency plan (PUI) and requirement that the CHSWC meet at periodic intervals and also after any accident involving an external employee.
 43. *Assemblée du Conseil d'État*, “Herr c/EdF”, 28 February 1978.

the deadline is two months following publication of the decisions or decrees in the Official Journal or their notification.

However, Article 45 of the TSN Act extends the full jurisdiction regime already applicable to classified installations to basic nuclear installations. Henceforth, the judge will be able to cancel a disputed administrative decision, amend that decision, request the addition of stricter measures or impose fines.

Besides the inherent risks in such powers arising from the complexity of the issue addressed, the constraint in using full jurisdiction is the time it takes for it to take effect.

Thus, as provided for in Article 45, decrees authorising the creation of basic nuclear installations, as well as those relating to a change of operator, modification of the boundaries of the installation or significant modification of those boundaries, as well as decrees authorising the final shutdown and dismantling of a basic nuclear installation or the changeover to the monitoring phase of a radioactive water storage facility could be challenged by a third party for a period of up to two years of their publication.

Other administrative decisions could be referred to administrative jurisdiction during a four-year period which, if necessary, can be extended to up to two years after the commissioning of the installation.

The difficulty in transposing the disputes regime for installations classified for environmental protection purposes to basic nuclear installations results in a special-rules regime in ordinary law and also in ICPE law. Consequently, the deadlines are no longer either two months or four years, but two months or two years, four years, or even six years. In addition, since the procedure has been “broken down” into several stages (decree authorising creation, Nuclear Safety Authority requirements and commissioning licence) that are to be performed at different times, the period during which the procedure could be disputed could extend over many years

These provisions could result in a loss of legal security for the firms concerned and constitute a very real threat, given that construction of a nuclear installation requires a major investment in terms of financial, material and human resources. Paradoxically, it might well be asked whether extending the rights of third parties in this way, given the complexity of the process, is genuinely capable of facilitating appeals against decisions relating to basic nuclear installations.

In terms of criminal law, the TSN Act remedies a de facto situation that is often criticised by the opponents of nuclear power, namely that the lack of legislation made it impossible to treat infringements of regulations as offences, unlike the situation with regard to classified installations (the Act of 19 July 1976 contains such provisions, subsequently incorporated into Articles L. 512-1 and following of the Environment Code).

Under Article 48 of the act, the severity of criminal penalties has been considerably increased.

The unlicensed creation or operation of a basic nuclear installation or continued operation of such an installation in violation of an administrative measure or jurisdictional decision is now punishable by three years' imprisonment and a EUR 150 000 fine. Operating a basic nuclear installation in violation of a summons issued by the administrative authority to respect a requirement or decision regarding the conditions for rehabilitation of the site is also punishable by two years' imprisonment and a EUR 75 000 fine.

Article 48 also provides for special penalties for the carriage of radioactive substances without the authorisation or approval required by the legislation in force or in violation of regulatory provisions.⁴⁴ While the legitimacy of such a penalty cannot be disputed in principle, it should be noted that Act No. 75-1335 of 31 December 1975 on transport and Decree No. 77-1331 of 30 November 1977 on the carriage of dangerous materials punishes the same offences. Following adoption of the TSN Act, the same offence is now punished twice

Article 48 also punishes with a fine of EUR 7 500 any refusal to provide the administrative authority with information relating to nuclear safety⁴⁵ or failure to publish the annual report provided for under Article 21 of the act, not allowing the public to have access to the report or using it to provide false information.

While the basic trend in French law is to punish failure to comply with the requirements it puts in place, in practice it can be seen that most of the reports that have to be drawn up with regard to the environment, notably the annual report by listed companies (report containing information on the way in which those companies take account of the social and environmental consequences of their activities)⁴⁶ are not subject to any legal requirement to make the report available to the general public and, in particular, that the non-disclosure of these documents (to the persons concerned and in particular the shareholders of listed companies) is not a criminal offence.

In addition, because the report must describe “the measures taken with regard to nuclear safety and radiation protection, incidents and accidents relating to nuclear safety and radiation protection, as well as the measures taken to limit growth in such events and their impacts on public health and the environment, the nature and results of measurements of radioactive and non-radioactive discharges from the installation to the environment”, the risk of an operator proving unable to fully comply with this new requirement, whose scope is fairly unclear, is particularly high.

Moreover, if provisions in criminal law are to be interpreted strictly, then there is also a risk that the format of the annual report may become set in stone as no more than an inventory serving simply as a cover with no additional analysis or discussion, thereby losing sight of its initial purpose.

Accordingly, the TSN Act does not challenge the legal regime that has applied to basic nuclear installations since 1963, but simply renews it and enshrines the integration of environmental provisions in this law, thereby undoubtedly causing it to lose its distinctive nature.

The only genuine innovation in this act is the creation of an independent administrative authority (AAI) to monitor the activities of nuclear installations, thereby responding to the desire expressed by the president of the republic,⁴⁷ the aim being to try and strengthen the confidence of the French people in this sector.

44. One year’s imprisonment and a EUR 30 000 fine.

45. One year’s imprisonment and a EUR 15 000 fine.

46. Article L. 225-102-1 al. 4 of the Commercial Code.

47. “I asked the government to create, under the act on nuclear transparency, an independent authority, by as early as this year, with the task of overseeing nuclear safety, radiation protection and information”, Jacques Chirac, President of the French Republic, New Year’s speech to the Nation, 5 January 2006.

III. Adapting nuclear law through the institutional reorganisation of nuclear monitoring

The independent administrative authority set up under Article 4 of the act, arising from the letter of amendment, is the French Nuclear Safety Authority which replaces the Directorate-General of Nuclear Safety and Radiation Protection (DHSNR) and which now shares, with the ministers responsible for nuclear safety and radiation protection, regulatory and inspection powers in the area of nuclear safety, radiation protection and public information.

This authority is modelled on existing regulatory authorities⁴⁸ which had been set up to regulate competing sectors or economic markets, as a result of mistrust and suspicion with regard to the traditional state whose power was contested and whose impartiality and effectiveness were challenged. In this respect, we did not feel it appropriate to compare the introduction of competition in the electricity and gas sector, which had given rise to the creation of the Energy Regulation Commission, to competition in the nuclear sector.

The institutional reorganisation of nuclear monitoring on the basis of this model therefore led to a transfer of regulatory and monitoring powers from the state to the new authority.

Accordingly, Articles 4 to 17 of the act set out the working procedures for the board of the Nuclear Safety Authority, which consists of 5 members appointed by decree,⁴⁹ for a six-year non-renewable term, as well as its obligations, although it is primarily the division of competences between the independent administrative authority and the government that interests us here.

Article 3 of the act, added by the national assembly as an amendment during the first reading, is fairly original in that acts seldom provide a detailed list, in a specific article, of the powers of administrative authorities, which confirms the unusual nature of this division of competences in the nuclear sector. Decisions regarding the procedures for implementing the TSN Act, the issuing of licences for the creation, final shutdown and dismantling of a basic nuclear installation are taken by decree issued by the *Conseil d'État*. Subsequently, the ministers responsible for nuclear safety and radiation protection set out, each within their own field of responsibility, the general technical regulations; in contrast, the Nuclear Safety Authority can take regulatory decisions of a technical nature to supplement the procedures for implementing decrees and orders relating to nuclear and radiation protection.

Article 4, on the other hand, defines the scope of the powers of the Nuclear Safety Authority. This covers the Authority's participation in the monitoring of nuclear safety and radiation protection inspections and the provision of information to the public in these areas. However, it should be noted that the article states that this Authority is to be consulted on the drafts of ministerial decrees and order of a regulatory nature relating to nuclear safety, which in principle lies outside its scope of competence. This wording therefore extends the competence of the Nuclear Safety Authority to nuclear safety and will pose problems regarding the division of powers between the ASN and the other administrative authorities (such as the Senior Civil Defence Official [*Haut fonctionnaire de la défense*] assigned to the Minister for Industry).

48. For a study on independent administrative authorities, see the 2001 Report by the *Conseil d'État*, *La Documentation française, Études et documents* No. 52, p. 253 to 462.

49. Three members, including the chairperson, are chosen by the president of the republic and the two others by the president of the National Assembly and president of the Senate respectively, Article 10, paragraph 1.

Accordingly, although the Authority's regulatory competence has been restricted by the ministerial approval procedure, this division of competences may well lead to difficulties of interpretation and, as a result, extension of the powers of the Nuclear Safety Authority for which no provision had been made in the act.

While applying rules of economic public law, such as regulatory law, is more traditional in the nuclear sector, inasmuch that the rules applicable to state intervention that have always applied in the sector are based on economic public law,⁵⁰ the application of regulatory law that has recently emerged is a new development and raises a number of questions regarding the relevance of the application of such rules to the nuclear industry.

Indeed, the creation of an independent administrative authority in the nuclear sector which participates in the monitoring of nuclear safety and radiation protection raises questions over the creation of such an authority in an area covered by special regulatory regimes such as nuclear safety and radiation protection and even nuclear security.

It is scarcely conceivable that such an independent authority could be granted some of the sovereign powers of the state. The latter has sovereign powers that cannot be taken from it without diminishing its substance, namely those of the "minimal state" (or "state as policeman") needed to guarantee the safety of citizens in the broad sense of the term, which is consistent with a liberal vision of the role of the state whereby the state has only limited prerogatives (police, army, foreign relations and justice).

These powers necessarily belong to government or, by delegation, a central administration.

It should also be recalled that the *Conseil d'État* has issued unfavourable opinions regarding the creation of such authorities whenever it felt that certain basic principles of our administrative and constitutional organisation were at stake.⁵¹

One of the characteristics of the French institutional system is the principle whereby all state administrations are subordinated to the government, which itself is answerable to Parliament. This system is the direct outcome of the principle of national sovereignty defined in Article 3 of the 1958 Declaration of man and of the citizen, and in the Constitution which states that "The government ... shall have at its disposal the civil service".

The proposal to create an independent administrative authority in the first draft of the TSN Act was rejected out of hand in 1999 by the *Conseil d'État* on the grounds that an independent authority could not reasonably wield decision-making and monitoring powers in the areas of nuclear safety and radiation protection which are subject to special regulations, particularly if the draft legislation were to lead to a division of uncertain and inconsistent competences between the government and the authority.

Furthermore, the outcome of creation these authorities would be to remove certain sectors from the control of government in order to entrust them to so-called neutral bodies, which would contravene

50. Energy law, which comprises nuclear law, was until now included in public law on the economy and was independent of environmental law, see in this respect Laetitia Grammatico, *Les moyens juridiques du développement énergétique dans le respect de l'environnement en droit français*, P.U.F., 2003.

51. 2001 Report by the *Conseil d'État*, p. 258.

the democratic principles whereby the civil service can only take action under the direct responsibility of elected politicians.

Lastly, the Constitutional Council, despite having validated the existence of these authorities, nonetheless provided a framework for their use of regulatory power nonetheless did not hesitate to censure legislative approvals deemed to be excessive, such as those giving the Higher Audiovisual Council (CSA) the power to lay down, by regulatory means, [...] all rules relating to institutional communication.⁵²

There are therefore doubts over the relevance of this reorganisation. It is clearly not the independence of inspection authorities with regard to the state that is either sought or desired by citizens, but rather that of these authorities with regard to firms in the nuclear sector. Article 8, point 2, of the Nuclear Safety Convention of 20 September 1994 states that “Each Contracting Party shall take the appropriate steps to ensure an effective separation between the functions of the regulatory body and those of any other body or organization concerned with the promotion or utilization of nuclear energy.”⁵³

While the creation of an independent authority in the nuclear sector would appear to be the outcome of the analysis of the separation of the IPSN (Institute of Nuclear Protection and Safety) and the CEA, which gave rise to creation of the IRSN (Institute of Radiation Protection and Nuclear Safety), due to the situation of the IPSN within the CEA which was criticised in 1998⁵⁴ for being contrary to the principle of independence of the monitoring authority vis-à-vis the parties monitored, there would seem to have been a misunderstanding in that the two situations are extremely different. The IPSN had indeed been set up within the CEA⁵⁵ and the criticisms voiced in this regard related to the lack of independence between the monitoring authority and an operator being inspected and not between the latter and the state.

Lastly, the creation of an independent administrative authority for monitoring purposes in the nuclear sector seems to be an attempt to adapt the law to the reality of the situation, due to the decline in state intervention which had characterised nuclear law since 1945 as a result of the privatisation of certain firms in the sector.

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The decline in the distinctive nature of nuclear law began with the accident at Chernobyl in 1986 and the shift in public life towards a democratisation of scientific and technological choices. However, nuclear law has always been a case apart in view of the activities to which it applies (considered to be of strategic importance), a situation outside ordinary law that is only partially maintained by the TSN Act.

52. Decision No 88-248 DC of 17 January 1989 for the CSA, Rec., p. 18.

53. Namely the operators of all types of nuclear facility.

54. Report to the prime minister, *Le système français de radioprotection, de contrôle et de sécurité nucléaire : la longue marche vers l'indépendance et la transparence*, by Jean-Yves Le Déaut, *La Documentation française*, 1998.

55. Under the Order of 2 November 1976, Official Journal of 4 November 1976, p. 6408.

Since nuclear regulations appear to take second place to environmental law, the necessary account taken of environmental concerns is tending to water down nuclear law into environmental law instead of preserving its own distinctive nature. The danger here is that environmental administrative authorities will take control of nuclear law, which may well lead to an approach whose ultimate objective would be non-renewal of the nuclear option in the long term.

So the development of nuclear law, which has always been in advance of law in other sectors, might find itself stopped in its tracks, despite the fact that right from the outset it has addressed the protection of persons and the environment against the intrinsic risks in activities in the sector. The concept of sustainable development has also led to the incorporation of environmental concerns into nuclear law, through the concepts of precaution, irreversibility and sustainability.

It should nonetheless be noted that nuclear law is fighting back against its watering-down in other areas of law on the grounds of the particularities of the activities it regulates, which the development of special nuclear law would seem to confirm.

Besides use of the concept of “transparency”, which is more of a media term than a legal concept and which implies that earlier practices were highly opaque, it is astonishing to see the number of repressive measures that have been put in place, clearly driven by a highly focused and discriminatory desire for severity towards nuclear activities as opposed to other high-risk industrial activities, despite the fact that nuclear energy has ensured the energy independence of France for over thirty years and that its relevance has been enshrined in the Planning Act No. 2005-781 of 13 July 2005 on the future directions for energy policy.

If the provisions of the TSN Act really are relevant to the risks posed by nuclear activities, then there are very good grounds for asking why equivalent risks (chemical, biological, etc.) should not be treated in the same way. In which case, nuclear law could be viewed as the “mother law” for environmental law and more generally law on industrial activities.