

The Financing of Decommissioning – A View on Legal Aspects in the European Union

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ABSTRACT

In the future, an increasing number of nuclear power plants will be definitively closed and undergoing decommissioning. Realising the inseparable connection between the safe performance of decommissioning activities and its financing, the European Union is concerned about the availability of sufficient financial means for carrying out the decommissioning process by the time they are needed. Analysing which measures have been taken by the EU to ensure and harmonise the financing of decommissioning, the author illustrates the draft directives of the European Commission known as the "nuclear package", which contain rules regarding the funding of decommissioning. In this context, he also descends to the envisaged Commission's analysis about the various concepts established in the Member States with respect to financing the decommissioning of nuclear facilities. The author comes to the conclusion that the EU has taken first initiatives to promote a transparent and harmonised system of regulations and standards concerning the financing of decommissioning across the Union.

INTRODUCTION

The decommissioning of nuclear power plants is a very complex operation that requires considerable funding. The financing of the decommissioning of nuclear power plants is therefore set to become an increasingly important issue in the years ahead. Yet, approaches to the regulation of financial resources for decommissioning vary significantly between EU Member States. This paper analyses which measures have been taken by the EU to ensure and harmonise the financing of decommissioning. For this purpose, this presentation will start with a brief overview of the Community's legal instruments before turning to the European Commission's "nuclear package". Finally, the Commission's latest activities in the field of nuclear decommissioning will be illustrated and then the author's conclusions will be drawn.

OVERVIEW OF THE COMMUNITY'S LEGAL INSTRUMENTS

With regard to our audience not coming from the European Union, a short introduction to the sources of European law and the European process of lawmaking should be given before going into details of the European Union's legislative and preparatory activities in the field of financing of decommissioning.

Sources of European Law

European law is made up of three major sources: primary legislation, secondary legislation and case law.

Primary legislation consists of the fundamental treaties of the European Union on which the European Union and the European Communities are founded. These are negotiated at intergovernmental level by the Member States.

Secondary legislation takes several forms: *Regulations* are directly applicable and binding in all Member States without the need for any national implementing legislation. *Directives* set legislative objectives, with a time limit for Member States. It is up to each State to decide how a directive will be implemented into national law; they are binding in the result to be achieved but the members may choose the form and methods for adaptation into their national legal systems. The directive is, by the way, the instrument that was chosen for the adoption of the EU's "nuclear package", which will be dealt with in detail later. A further instrument in the field of secondary legislation is the *Decision*; decisions are binding on those to whom they are addressed. Besides, the European Legislator may have recourse to *Recommendations and Opinions* which are not legally binding, though.

The third major source of European law is made up of *case law*, which includes judgements of the European Court of Justice and the European Court of First Instance.

Legislative Process on the EU-Level

Since the EU's "nuclear package", which this presentation will inform about in its further course, was adopted as a directive, the legislative process leading to the adoption of a directive shall be explained shortly:

This process involves the three main European institutions: The Commission, being the European Union's executive body which formulates policy and proposes legislation, as well as the Parliament and the Council consisting of ministers and heads of government.

In most areas only the Commission has the right to draft and propose legislation, but only the Parliament and the Council have the right to amend and adopt it. The legislation process begins with Commission proposals for Directives or Regulations. The further legal procedure depends on the legal basis of the Commission's initiative; it determines which procedure applies. According to Title II, Chapter 3, Article 31 of the Euratom Treaty, basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation are subject to the so-called consulting process. Yet, there is a controversy as to whether or not this provision constitutes an adequate legal basis for the adoption of directives in the field of nuclear decommissioning.

A European Court of Justice ruling of 10 December 2002, which will be quoted later, deals with this problem. In case one affirms the EU's competence on the basis of Art. 31 of the Euratom Treaty, this means the European Parliament has to be consulted before the Council of Ministers can adopt a legislative proposal. Neither the Commission nor the Council is obliged to accept the amendments contained in the Parliament's opinion. Once the Opinion has been produced, the Council can adopt the proposal with or without the amendments.

THE EUROPEAN COMMISSION'S NUCLEAR PACKAGE

It is now time to turn to the key issue of this paper:

History and background of the nuclear package

In recent years, the European Commission has repeatedly pointed out the necessity of ensuring that the financial resources set aside for nuclear plant decommissioning will actually be available by the time they are needed. Furthermore, it has stressed the need for a transparent management of these resources. The Commission has emphasised that only by fulfilling these requirements, decommissioning work may be carried out to a high level of nuclear safety. In this context, the European Commission has also taken up the position that it is no longer possible to consider nuclear safety from a purely national perspective. Taking into account that in Europe nuclear power plants have been producing electricity for half a century, the European Commission obviously felt impelled to take action on this field.

This is why the funding of decommissioning and dismantling nuclear facilities has been one subject of the draft directives of the European Commission known as the "nuclear package", which are presently under discussion between the Commission and the Member States. The objective of these Directives was to establish uniform standards, especially for the surveillance of nuclear facilities and the disposal of radioactive waste in an enlarged European Union. In order to attain the abovementioned goals – availability of financial means, transparency of their management and harmonisation of rules regarding the financing of decommissioning - the Commission added rules into the package on very important but rather sensitive issues, which led to a strong opposition and – as will be seen later on - finally to a revision of the draft.

As already mentioned, the nuclear package was adopted as a directive. It therefore set objections binding for Member States, not the individuals and fixed time limits within which the objections had to be implemented into national law.

The 2003 draft

In the 2002 Commission's Communication on nuclear safety in the European Union, the Commission emphasised that specific regulations should apply to the creation, calculation and management of financial resources for decommissioning to ensure that they could not be used for other purposes. Accordingly, the Commission proposed a first package of directives by the end of 2002, a revised version of which was published in January 2003. The Commission's "nuclear package" consists of different legislative proposals. Apart from a proposal for a directive on radioactive waste, the Commission launched a proposal for a directive on the safety of nuclear installations. The latter defines the basic obligations and general principles during operation and decommissioning, including, amongst other aspects, community rules for the constitution, management and use of decommissioning funds. The directive's aim was, above all, to ensure that sufficient funds will be available to carry out decommissioning operations under conditions protecting the general public and the environment from ionising radiation.

According to Article 9 of the proposed Directive "the Member States shall take the appropriate steps to ensure that adequate financial resources are available to support the safety of nuclear installations and ensure that financial resources sufficient to cover decommissioning costs of each nuclear installation, taking into account the length of time required, are available as

decommissioning funds at the time envisaged". As to the management of the (envisaged) decommissioning funds, referring to Article 9, paragraph 2, sentence 2, the funds must meet minimum criteria that are set out in an annex to the Directive:

- the funds shall be created from contributions by operators of nuclear installations during their operation (annex, no. 1);
- the assets of the funds have to be used only to cover the costs for decommissioning of the installation, the safe, long-term management of the conventional and radioactive wastes from decommissioning of the installation and the safe, long-term management of the spent fuel from nuclear power stations and of the wastes from reprocessing operations (annex, no. 2);
- explicitly, they may not be used for other purposes (annex, no. 4, sentence 1);
- to this end, the decommissioning funds shall be duly established with their own legal personality, separate from the operator of the installation (annex, no. 4, sentence 2);
- yet: if exceptional and duly justified reasons make such legal separation impossible, the fund could continue to be managed by the operator, provided that the availability of assets to meet the costs for decommissioning is guaranteed (annex, no. 4, sentence 3).

The 2003 proposals led to a strong opposition. Several issues contained in the Commission's proposals concerning the decommissioning funds were extensively criticised by Member States, the European Parliament, and the nuclear sector that - as far as pursuable - unanimously expressed at least concerns about the draft legislation. So the question emerges: What were the reasons for the nuclear package's failure at this first attempt and what can be expected at the end of the wide-ranging consultation process demanded by the Council?

Member State's reactions to the Commission's 2003 proposals

Certain elements of the package ran into firm opposition from a coalition of Member States that rejected the idea of binding legislation:

When it comes to a statement on the nuclear package it has to be stressed that the author is German but not representing the German Government. So what this presentation can provide is an outside view of the positions expressed. Germany is one of the countries strongly opposing the package. The German view on this issue was especially articulated in a letter former Chancellor Gerhard Schröder and British Prime Minister Tony Blair set out to the then-Commission President Romano Prodi on 29 September 2003. In this letter the heads of state expressed their serious concerns about the proposal and urged the Commission to be flexible in its approach as to how these concerns might be overcome. Their position was marked very clearly through the statement that:

quote-

"...the draft directives submitted by the Commission do not represent a suitable approach. On the one hand, they cannot be expected to produce any actual improvement in the safety of European nuclear installations and, on the other hand, they contain detailed rules on the management of decommissioning funds that appear inappropriate for legislation on the field of nuclear safety and are incompatible with the principle of subsidiarity".

end of quote!

The two basic points of criticism revealed by this statement should be looked at a little closer:

One of the most disputed issues of the nuclear package was and still is the competence of the European Union to set out Directives with the aforementioned content. Accordingly, it is being alleged that the proposals are an unwarranted extension of EU powers.

In this context, it is important to be aware of the fact that any new European legislation must have a legal base in one of the Treaties establishing the Community. Yet, the Euratom Treaty does not contain a title relating to installations for the production of nuclear energy. Title II, Chapter 3 of the Euratom Treaty deals with Health and Security. Meanwhile, a European Court of Justice ruling of 10 December 2002 deals with the Communities' legislative powers with regard to the safety of nuclear facilities. The European Court of Justice, being the authoritative interpreter of the Union's fundamental treaties, was engaged in the issue and decided on 10 December 2002 that it is not appropriate to draw an artificial distinction between the protection of the health of the general public and the safety of sources of ionising radiation. After extensive interpretation of the provisions in Title II, Chapter 3 of the Euratom Treaty – dealing with Health and Security – the Court came to the conclusion that there is Community competence in the following areas:

- the establishment of a legislative and regulatory framework to govern the safety of nuclear installations,
- measures relating to the assessment and verification of safety,
- emergency preparedness,
- the site of a nuclear installation and
- the design, construction and operation of nuclear installations.

Certainly, the Court's findings do not fully support the Commission's stand on its legislative competencies. Nevertheless, it seems to be likely that in consequence of this decision it must be held that there is a scope for Community competence to adopt legislation in the field of nuclear installations. However, the competence is limited: The purpose of the legislative act must be to give effect to the provisions in the Euratom Treaty on the health and safety of workers and the general public. Apart from this, the Community legislation adopted on the basis of Articles 30 to 32 of the Euratom Treaty must not be so detailed as to leave no scope for implementation by Member States.

Another reason for the rejection of the package within the Council was that it has been viewed as an unnecessary addition to the existing international framework and proclaims that it failed to include any substantial measure to increase nuclear safety. Indeed, considering the directives' content, the similarity to the conventions negotiated and agreed on under the auspices of the IAEA is undeniable. Both directives were pretty much inspired by the Convention on Nuclear Safety and the Joint Convention on the Safety of Spent Nuclear Fuel and Radioactive Waste Management. Almost all EU-Member States and the European Atomic Energy Community are Parties to these Conventions. In addition, the more detailed IAEA Safety Standards are widely

applied in the Community. Since most of the countries represented here are also members of these Conventions, most of the audience will be familiar with the Conventions' wording and regulations.

The European Parliament's reactions to the Commission's 2003 proposals

The European Parliament, in principle, supported the idea of setting up such directives. Yet, after the proposal of the 2003 draft, the Parliament clarified that the responsibility for the safety of nuclear installations should remain with the national safety authorities. Moreover the Parliament suggested to establish a "Regulatory Authorities Committee", on which national regulatory bodies would be represented, to carry out reviews and horizontal control in accordance with the proposed directive. Both suggestions entered the 2004 draft (see Art. 4 and 12).

Industry's and NGO's reactions to the Commission's 2003 proposals

The reception the "nuclear package" has met with on part of both pro- and anti-nuclear groups was rather hostile. The nuclear industry, whose position is expressed by a FORATOM position paper, says that a European directive would merely lead to an additional burden on the industry without having any positive effects on public safety. In their view, further harmonisation could better be achieved by encouraging national authorities to base their legislation on IAEA standards and by promoting the exchange of information between safety authorities and operators as well as international co-operation aiming at implementing best practices. The industry also points out that any new legislation should reveal that primary responsibility for nuclear safety lies with the plant operators. Accordingly, FORATOM stresses that as far as the creation and management of decommissioning funds is concerned, Member States and plant operators should be free to reach their own national agreements. It is also being stated that only the organisation being legally responsible for the decommissioning process should be responsible of the financial resources accumulated. Looking at environmental, anti-nuclear organisations we can find stronger criticism, but of course for different reasons: A Green Member of Parliament from Luxembourg commented: quote: "The only purpose of the package is to revitalise the nuclear industry in an enlarged EU" end of quote. *Greenpeace* described it as a "nuclear survival package" and reacted with disappointment saying that the proposals are misleading. *Friends of Earth* also called for a suspension of the nuclear package, saying that it represents a co-ordinated effort to prepare the ground for the further development of atomic power in an enlarged EU.

The 2004 draft

In the following, the revised 2004 draft of the nuclear package ("new package") shall be illustrated, which the Commission launched in reaction to the strong opposition the 2003 version had met.

The new proposals present a watered-down version of the former draft, under which the Commission would take a much less powerful role on nuclear safety issues than initially envisaged. The 2004 proposal of the Nuclear Safety Directive, on the one hand, responds to Member States' concerns over interference from the Commission in national legislation by stating that the responsibility for nuclear safety rests with the national authorities and the operators (Art. 4). Further, the highly disputed Article 9 of the former draft has been changed decisively: Member States are no longer required to provide securely ring-fenced funds for

dismantling nuclear power stations. However, there is still an obligation to “ensure that adequate financial resources are available from the regulatory body and the operators to support the safety of nuclear installations throughout their life”. Thus, the new proposal obliges the Member States merely to ensure that adequate financial resources are available. The 2004-version furthermore proposes to set up a so-called “Committee of Regulatory Authorities”, composed of national regulatory bodies. This committee should among other things encourage the exchange of best practice among regulatory authorities and advise the Commission on all matters concerning nuclear safety and define guidelines for national reports and assess them (Art. 12). Although the Commission has not clarified what the envisaged competences of such a committee should be, it seems at least possible that a committee of the suggested kind is also intended to play a role with respect to the financing of decommissioning on the basis of the revised Art. 9.

Status Quo of the Nuclear Package

The new proposals have been forwarded to the Parliament and to the Council for further discussion. At this stage the proposal is not being negotiated in the Council. The Council rather adopted resolutions, which urges Member States and the European Commission to engage in a wide-ranging consultation process. First comments on the 2004 proposals, though, do not reveal that the position of the Member States has changed significantly compared to the criticism uttered after the adoption of the 2003 proposals. According to the so-called “interinstitutional statement” agreed upon by the European Parliament, the Council and the Commission, there is no controversy amongst these institutions as to the necessity to ensure the availability of “adequate financial resources for decommissioning and waste management activities”, and their management “in a transparent way, thus avoiding obstacles to fair competition in the energy market”.

Future of the Nuclear Package

Finally, a perspective of the nuclear package shall be drawn. This obviously is not easy with regard to the fact that Member States are still deeply divided over the Commission’s proposals, and a clear majority which might prevail cannot be identified.

One of the main objections concerning the nuclear package was that the Commission worked without any kind of consultation or participation with the parties impacted by such a proposal. The European Commission is still being criticised for taking the initiative on such a sensitive subject without entering into a preliminary dialogue with the stakeholders. This is now being compensated by a broad consultation process in several working groups under the auspices of the Council and with participation of all committed Member States and the Commission.

Such a broad consultation process seems appropriate because even the opposition countries support “the Commission’s aim to ensure that high standards for the safe operation of nuclear installations are established and maintained in an enlarged European Union” (Schröder-Blair-letter). The point of dispute is therefore not the aim but the way to attain the commonly accepted goals. The opposition finds it essential that the Council should consider an alternative to the proposed nuclear package as binding directives since according to this position a “better option would be a voluntary, non-binding harmonisation process which respects the national responsibility of the Member States for nuclear safety and takes into account existing international co-operation” (Schröder-Blair-letter).

The instrument of implementation of the results of the extensive consultation process has not yet been decided, and the most controversial question will remain whether the framework is issued as binding or non-binding legislation.

The discussion between the Member States and the Commission will therefore remain exciting as the positions seem to be deadlocked and a compromise in this point is barred: the European Commission refuses to consider anything short of binding legislation while a crucial number of Member States keep insisting that both drafts should be downgraded into non-binding instruments.

Since the consultation process is still carried out in the Council's Working Party on Nuclear Safety (WPNS) and its three subgroups, the controversial issues they try to balance shall be pointed out in the following.

On the one hand they have to consider, that

- the European Union is the world's leading nuclear generator; the enlarged EU operates 156 reactors that produce 32 per cent of its electricity, so high standards for the safe operation of nuclear installations are necessary in an enlarged European Union.

Having said that they have to regard, that

- every nuclear-power-plant-operating country has generated its own safety culture,
- the attitudes towards nuclear energy vary from Member State to Member State (while France and Finland are considering or building new reactors, Germany, Sweden, Belgium, the Netherlands and Spain are planning to end their existing reactor programmes),
- the effective supervision of nuclear power plants needs clear responsibilities,
- we already dispose of an international framework, e.g. the provisions of the Nuclear Safety Convention, the IAEA safety standards, which ensure nuclear safety on a worldwide basis. And WENRA reference levels; the European Commission's proposals therefore need to provide an additional security system.

The results of the WPNS consulting process will be given in a report to the Council by the end of 2006. The outcome of the Council's initiative seems to be unpredictable: Europeans know that political bargaining is on the agenda of European policy.

CONCLUSIONS

The EU has taken first initiatives to promote a transparent and harmonised system of regulations and standards across the Union, as far as the financing of decommissioning is concerned. It remains to be seen what the result of the ongoing consulting process concerning the respective provisions of the nuclear package will be.

As its latest step, the Commission has initiated an in-depth analysis about the various concepts established in the Member States with respect to financing the decommissioning of nuclear facilities. The information gathered by the Commission so far shows that there are considerable

differences between Member States. This concerns both decommissioning strategies and the way the financial resources are managed. The Commission's aim is to obtain more detailed information, giving a clearer picture of such key factors as the way decommissioning costs are calculated, the adequacy of the assembled resources, the guarantee that resources will be available when the time comes, and the way they are managed. The results of this analysis are meant to provide the basis for future legislative measures envisaged on the European level and thus result in the harmonisation of the methods of funding decommissioning in the EU.

The European Parliament recently adopted conclusions based on the own-initiative report by Rebecca HARMS (Greens/EFA, DE) on the use of financial resources earmarked for the decommissioning of nuclear power plants. Herein the Parliament states that in all Member States, all nuclear undertakings must have sufficient financial resources available when needed to cover all the costs of decommissioning, including waste management in order to uphold the polluter pays principle and avoid any recourse to State aid. Parliament called on the Commission, with due regard for the principle of subsidiarity, to draw up precise definitions concerning the use of financial resources earmarked for decommissioning in each Member State, taking into account decommissioning as well as the management, conditioning and final disposal of the resultant radioactive waste. The approach to the management of such financial resources differs from one Member State to another. Parliament stated that these financial resources to be used for fair investments are fully in line with Community competition law, thereby avoiding distortions (2005/2027 (INI)).

The European Union's efforts outlined in this paper are to be welcomed in principle. The establishment of a European standard may contribute to the development of a uniform, efficient system of financing the decommissioning of nuclear facilities and at the same time ensure the safe management of the decommissioning process.