

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 1 December 2005 ¹

I — Introduction

1. In the present case, brought pursuant to Article 141 of the Treaty establishing the European Atomic Energy Community (the 'EAEC Treaty'), the Commission seeks a declaration that, by failing to give the Gibraltar general public prior information on the health protection measures to be taken in the event of a radiological emergency in connection with a Royal Navy nuclear submarine berthed in Gibraltar harbour, the United Kingdom has failed to fulfil its obligations under Article 5(3) of Council Directive 89/618/Euratom ('Directive 89/618').²
2. The central issue here is, quite simply, whether the result of this case is decided by the principles set out by the Court recently in Case C-61/03 *Commission v United Kingdom*.³ In that case, the Court rejected the Commission's arguments that the United Kingdom had failed to fulfil its obligations under Article 37 EA in failing to provide it with general data relating to a plan for the disposal of radioactive waste from the decommissioning of a nuclear reactor formerly used for military purposes. The core of the Court's reasoning was that,

'... the absence in the Treaty of any derogation laying down the detailed rules according to which the Member States would be authorised to rely on and protect [their essential national defence interests] leads to the conclusion that activities falling within the military sphere are outside the scope of that Treaty.'

¹ — Original language: English.

² — Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency, OJ 1989 L 357, p. 31.

³ — Judgment of 12 April 2005 in Case C-61/03 *Commission v United Kingdom* [2005] ECR I-2477.

3. The question here is thus: Does this conclusion leave room for distinguishing the present case?

II — Legal framework

4. Article 30 EA, which forms part of Title II, Chapter 3, EA, entitled 'Health and Safety', provides that 'basic standards shall be laid down within the Community for the protection of the health of workers and the general public against the dangers arising from ionizing radiations ... '.

5. Article 31 EA provides that, '... after consulting the European Parliament the Council shall, on a proposal from the Commission, which shall forward to it the opinions obtained from these Committees, establish the basic standards; the Council shall act by a qualified majority.' This article formed the legal basis for Directive 89/618, the aim of which was to 'define, at Community level, common objectives with regard to measures and procedures for informing the general public for the purpose of improving the operational health protection provided in the event of a radiological emergency.'⁴

6. To this end, the Directive places three categories of information obligation upon Member States: the first concerning information to be provided to the population likely to be affected prior to any radiological

emergency (Article 5); the second concerning information to be provided to the population affected in the event of a radiological emergency (Article 6); and the third concerning information to be provided to persons who might be involved in the organisation of emergency assistance in the event of a radiological emergency (Article 7).

7. As regards the first category, Article 5 of Directive 89/618 provides,

'1. Member States shall ensure that the population likely to be affected in the event of a radiological emergency⁵ is given information about the health protection measures applicable to it and about the action it should take in the event of such an emergency.

2. The information supplied shall at least include the elements set out in Annex I.

3. This information shall be communicated to the population referred to in paragraph 1 without any request being made.

⁴ — Article 1, Directive 89/618.

⁵ — The term 'radiological emergency' is defined in Articles 2 and 3 of Directive 89/618.

4. Member States shall update the information and circulate it at regular intervals and whenever significant changes in the arrangements that it describes take place. This information shall be permanently available to the public.'

8. Article 4 of Directive 89/618 defines the 'population likely to be affected in the event of a radiological emergency' as 'any population group for which specific protection measures are taken as soon as a radiological emergency occurs.'

9. Annex I to Directive 89/618 defines the prior information to be supplied under Article 5 as: (1) Basic facts about radioactivity and its effects on human beings and on the environment; (2) The various types of radiological emergency covered and their consequences for the general public and the environment; (3) Emergency measures envisaged to alert, protect and assist the general public in the event of a radiological emergency; and (4) Appropriate information on action to be taken by the general public in the event of a radiological emergency.

harbour of Gibraltar for repair operations following a minor incident with its nuclear propulsion reactor while on the Mediterranean Sea. These repair operations lasted until May 2001. In the course of the year 2000, the Commission received six complaints relating to the repair operations, which led it to request the United Kingdom Government to provide information regarding the operations and the information given to the public about health protection measures to be taken in the event of a radiological emergency.

11. In response to this request, the United Kingdom Government stated that, in its view, the EAEC Treaty applied only to civil and commercial, and not military, uses of nuclear energy. Moreover, an intervention plan for Gibraltar, the Gibraltar Public Safety Scheme ('GIBPUBSAFE'), which provides background information and guidance on the action to be taken by the United Kingdom Ministry of Defence and the Gibraltar Government authorities in the event of a nuclear powered warship accident, is freely available in the Gibraltar public library.

III — Factual and procedural background

10. In May 2000, the nuclear-powered Royal Navy submarine *HMS Tireless* docked in the

12. Taking the view that GIBPUBSAFE was not in conformity with Directive 89/618, the

Commission issued a formal notice followed by a reasoned opinion, which culminated in the present action.

13. Written submissions were lodged in this case by the Commission, the United Kingdom and, intervening in support of the United Kingdom, the French Republic. A request for joinder with Case C-61/03 was made by the United Kingdom, upon the ground that the question whether the EAEC Treaty applied to defence uses of nuclear energy formed a common issue between the two cases. Although the Commission agreed with this request, joinder was ultimately refused due to the fact that the cases were at different procedural stages. Judgment in Case C-61/03 was handed down on 12 April 2005. A hearing was held in the present case on 13 October 2005, at which all parties made oral submissions.

IV — Arguments of the Parties

A — *The Commission*

14. In its written submissions, the Commission bases its argument on the contention that Title II, Chapter 3, EA, of which Article 31 EA forms part, applies to all sources of ionizing radiation, including radiation from military activities. The Commission recognises that this is the same issue

raised in Case C-61/03 and repeats certain of its submissions made in that case. In particular, it emphasises that the Community would not be able fully and effectively to achieve the objectives of the EAEC Treaty if the scope of its provisions on health protection did not extend to all sources of ionizing radiation, including radiation from military activities.⁶

15. In its oral submissions, however, the Commission notes the Court's holding in Case C-61/03 that activities falling within the military sphere are outside the scope of the EAEC Treaty. None the less, it seeks to distinguish that holding. In its view, the present case cannot properly be classified as falling within the 'military sphere', as the information to be provided under Article 5 (3) of Directive 89/618 simply covers general health protection measures to be taken by the public in the event of a radiological emergency, without any reference to the

6 — The Commission also refers, as in its submissions in Case C-61/03, to the Court's dictum in Case C-70/88 *Parliament v Council* on the need to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionizing radiations, 'whatever their source' (Case C-70/88 *Parliament v Council* [1991] ECR I-4529, at paragraph 14), as well as to the historical context of the EAEC Treaty, which was concluded at a time when nuclear energy was used mainly for military purposes.

(military) source of the radiation. In the Commission's view, this is a matter of civil protection rather than national defence. There is no possible way in which provision of such information to the general public could harm Member States' military interests.

16. On this basis, the Commission submits that the United Kingdom's failure to distribute prior information to the public likely to be affected in the event of a radiological emergency in Gibraltar constitutes a breach of Article 5(3) of Directive 89/618. In this regard, the Commission is of the view that the mere public availability 'upon request' of an emergency plan such as GIBPUBSAFE at the Gibraltar public library is not sufficient: Article 5(3) requires that information should be actively distributed to the public by the United Kingdom. Further, the core aim of the Directive – protection of the public likely to be affected by a radiological emergency – would not be effectively accomplished if radiation from military sources were excluded from its scope.

Court's holding in Case C-61/03 that the EAEC Treaty, including Title II, Chapter 3, EA, does not apply to radiation from military uses of nuclear energy. In this regard, the United Kingdom repeats its arguments made in that case, emphasising the absence of a general exemption or derogation comparable to Article 296 EC for Member State military interests in the EAEC Treaty. In the United Kingdom's view, there is no ground for distinguishing the scope of Article 37 EA, at issue in Case C-61/03, from that of Article 31 EA, at issue in the present case. The United Kingdom underlines that Directive 89/618, as secondary legislation, must be considered to have the same scope of application as Title II, Chapter 3, EA. It submits that, as a safety plan concerned purely with possible incidents on nuclear warships and prepared by its Ministry of Defence, GIBPUBSAFE thus falls outside the scope of the obligations imposed by Directive 89/618.

B — The United Kingdom and the French Republic

17. The United Kingdom submits that the result of the present case flows from the

18. The French Republic, maintaining its position taken in Case C-61/03 in support of the United Kingdom, argues that the present case is covered by the Court's judgment in that case, to the effect that activities in the military sphere fall outside the EAEC Treaty.

V — Analysis

19. As is clear from the above, this case turns on the question of the scope of the judgment in Case C-61/03, and in particular whether it leaves any margin for an obligation under Directive 89/618 to inform the public likely to be affected by a radiological emergency concerning a nuclear warship of health protection measures and steps to be taken in the event of such an emergency. Evidently, the answer to this question requires, to begin, careful examination of the judgment's terms and reasoning.

A — *The judgment in Case C-61/03*

20. As set out above, in this case, the Commission sought a declaration that the United Kingdom had failed to fulfil its obligations under Article 37 EA in failing to provide it with general data relating to a plan for the disposal of radioactive waste from the decommissioning of a nuclear reactor formerly used for military purposes (namely, the 'Jason' reactor at the Royal Naval College, Greenwich).

21. In rejecting the Commission's application, the Court began by delimiting what it considered to be the issue in that case. While noting that certain of the Commission's arguments were based on the specific health and safety objectives of Title II, Chapter 3, EA, of which Article 37 EA formed a part, the Court emphasised that the Commission had 'not stated that the provisions of that chapter might be afforded a field of application which differs from that of the Treaty as a whole.'⁷ Rather, the Court found it appropriate to define the question raised in a broader manner: namely, whether the military uses of nuclear energy may fall within the scope of the EAEC Treaty taken as a whole.⁸

22. In this regard, the Court noted that there was no express provision excluding defence-related activities from this scope.⁹ None the less, it went on to conclude that activities falling within the military sphere are outside the scope of the EAEC Treaty, using three main lines of reasoning.

7 — Case C-61/03 *Commission v United Kingdom*, footnote 3 above, paragraph 24.

8 — *Ibid.*, paragraph 25.

9 — *Ibid.*, paragraph 28.

23. First, the Court considered the relevance of the preamble and aims of the EAEC Treaty as set out in Articles 1 and 2 EA, concluding that its signatories 'intended to emphasise the non-military character of that Treaty' and that 'the objectives pursued by the Treaty are essentially civil and commercial.'¹⁰

24. Second, the Court looked at the relevance of the historical background to the drawing up of the Treaty, concluding that such evidence was 'not sufficient for it to be asserted that the framers of the Treaty intended to make its provisions applicable to military installations and military applications of nuclear energy', as this issue had been left 'unresolved' by the representatives of the States who took part in those negotiations.¹¹

25. Third, the Court emphasised that several provisions of the EAEC Treaty conferred on the Commission 'substantial powers which enable it to intervene actively, by means of legislation or in the form of an opinion containing individual decisions, in various spheres of activity which, in the Community,

are concerned with the use of nuclear energy'.¹² The Court referred specifically here to the provisions of Title II, Chapter 3, EA (albeit not listing Article 31 EA specifically). As the application of these provisions to military installations, research programmes and other activities 'might be such as to compromise essential national defence interests of the Member States', the absence in the EAEC Treaty of any derogation laying down detailed rules authorising Member States to protect these interests 'leads to the conclusion that activities falling within the military sphere are outside the scope of that Treaty'.¹³ In other terms, 'the Treaty is not applicable to uses of nuclear energy for military purposes'.¹⁴

26. The Court tempered this general conclusion with the observation that this did 'not by any means reduce the vital importance of the objective of protecting the health of the public and the environment against the dangers related to the use of nuclear energy, including for military purposes', because in so far as that Treaty did not provide the Community with a specific instrument to pursue that objective, 'it is possible that appropriate measures may be adopted on the basis of the relevant provisions of the EC Treaty'.¹⁵

10 — *Ibid.*, paragraphs 26 and 27.

11 — *Ibid.*, paragraph 29.

12 — *Ibid.*, paragraph 35.

13 — *Ibid.*, paragraph 36.

14 — *Ibid.*, paragraph 44.

15 — *Ibid.*

B — *Can the judgment in Case C-61/03 be distinguished from the present case?*

be distinguished from the present case. One can imagine two potential arguments in this regard.

27. To begin, it is incontrovertible that the source of nuclear energy at issue in the present case, a nuclear submarine forming part of the UK Royal Navy, is military in nature. This is even more manifest than was the case on the facts of Case C-61/03, which concerned radioactive waste from a decommissioned nuclear reactor no longer used for military purposes.

28. Next, I would observe that, on their face, the statements in the judgment excluding military uses of nuclear energy from the ambit of the EAEC Treaty are couched in broad and unequivocal terms. The Court's conclusion at paragraph 44 of the judgment that 'the Treaty is not applicable to uses of nuclear energy for military purposes' is *prima facie* categorical and absolute.¹⁶

29. The only possible question for consideration here is thus whether these statements should, by virtue of nuanced interpretation,

30. First, one could seek to argue that, while Case C-61/03 was concerned with the scope of Article 37 EA, different considerations apply to assessing the scope of (legislation based on) Article 31 EA. One could, for example, point to the fact that Article 31 EA does not in fact confer upon the Commission itself powers 'enabling it to intervene actively' in nuclear spheres in the sense of paragraph 35 of that judgment, but merely provides for the Commission to present a legislative proposal on basic standards to the Council.

31. This argument is, however, in my view untenable. The Court itself defines the issue in Case C-61/03 as whether the EAEC Treaty, as a whole, applies to uses of nuclear energy for military purposes.¹⁷ The language of the judgment throughout confirms this approach: military activities are 'outside the scope of [the EAEC] Treaty',¹⁸ not just outside the scope of Article 37 EA. Moreover, the threefold reasoning used by the

¹⁶ — Although it uses slightly different formulations throughout the judgment to express this concept — 'military uses of nuclear energy' (*ibid.*, paragraph 25); 'activities falling within the military sphere' (*ibid.*, paragraph 36) — there is in my view no relevant practical difference between these formulations.

¹⁷ — *Ibid.*, paragraph 25.

¹⁸ — *Ibid.*, paragraph 36.

Court to arrive at this conclusion – based essentially on the aims of the EAEC Treaty and the absence of any derogation in that Treaty to protect Member States' military interests analogous to Article 296 EC — applies to the Treaty across the board, and is thus as relevant to Article 31 EA as to Article 37 EA.

32. Second, one could argue, as the Commission does in the present case, that a distinction should be drawn based on the nature of the information to be provided under Article 5(3) of Directive 89/618, in comparison to the information to be provided under Article 37 EA. While Article 5(3) only requires information of a general nature to be provided to the public regarding health protection measures to be taken in the event of a nuclear emergency, the obligation under Article 37 EA goes further than this, arguably entailing the risk of 'reverse engineering' from data on military nuclear waste. In contrast, the risk of damage to Member States' military interests would in fact be nugatory by the extension of the Article 5(3) obligation to nuclear energy from military sources. This is particularly so in the present case, where the GIBPUBSAFE plan is in any event already available for consultation by the public in the Gibraltar public library.

33. On this point, I would begin by admitting that I have considerable sympathy for the substance of the outcome espoused by the Commission. It seems to me indeed very difficult to argue that Member States' military interests could be damaged by the provision of basic information to the public on how best to protect themselves in the event of a nuclear accident or emergency. As is clear from the terms of Annex I to Directive 89/618, the information covered by the Article 5(3) obligation is purely general in nature, including basic facts about radioactivity and its effects on human beings and on the environment; emergency measures envisaged to alert, protect and assist the general public in the event of a radiological emergency; and appropriate information on action to be taken by the general public in the event of a radiological emergency.

34. Moreover, the effort required for the United Kingdom to fulfil its Article 5(3) obligation in the present case is minimal: as confirmed by the Commission at the oral hearing, the United Kingdom could satisfy this obligation by merely ensuring that a copy of the GIBPUBSAFE plan is posted through the letterboxes of the Gibraltar population likely to be affected in the event of a radiological emergency concerning *HMS Tireless*. Needless to say, this seems a negligible burden when compared with the essential importance of the public health protection interest aimed at by Article 5(3).¹⁹ On the facts of the present case,

¹⁹ — See, on the importance of the aim of public health protection contained in Title II, Chapter 3, EA, my Opinion in Case C-61/03, paragraphs 67 to 77.

therefore, the position of the United Kingdom and the French Republic refuting the existence of such an obligation is plainly unattractive.

against the potential benefits for public health protection in assessing whether, and to what extent, an EAEC obligation applies in an individual case.

35. None the less, the legal reasoning behind the Commission's argument, based on the nature of the information to be provided under Article 5(3), seems to me irremediably flawed. It is evident that, as pointed out by the United Kingdom, the scope of an obligation contained in Directive 89/618, as secondary legislation, can be no broader than that of its legal base, Article 31 EA. Yet, as I have already discussed, the categorical nature of the Court's judgment in Case C-61/03 makes clear that the EAEC Treaty — including Article 31 EA — cannot apply to nuclear radiation from military sources, without exception.²⁰ There seems to me no tenable way of upholding the substance of the judgment while allowing a caveat for an individual case in which, in fact, no risk to Member States' military interests arises by applying an EAEC Treaty obligation to radiation from military sources. In particular, there seems to me no room in the Court's judgment for any kind of 'proportionality'-type reasoning, balancing the potential damage to Member States' military interests

36. I would add that the Court's selection of an unequivocal solution was evidently deliberate: suffice to recall that, in my Opinion in that case, I had set out a proportionality-based approach to the issue. Further, the Commission had argued for a middle-way interpretation of Article 37 EA, whereby Member States could, with a view to protecting their national defence interests, themselves decide the point at which radioactive substances emanating from military sources should be classified as 'waste', and the content of the general data to be provided under this article. The Commission's approach was explicitly rejected by the Court.²¹

37. It follows that the inevitable consequence of the Court's judgment in Case C-61/03 is that, for as long as the Community has not made use of its competence under the EC Treaty to legislate in this sphere,²² a gap exists in the protection of the

20 — The only slight caveat I can see as inherent in the Court's judgment is, as pointed out by the United Kingdom, the fact that Member States' duty to report on the overall level of radioactivity in their air, water and soil (see Articles 35 and 36 EA) will necessarily include measuring, purely incidentally and as part of these global levels, radioactivity emanating from military sources.

21 — Case C-61/03 *Commission v United Kingdom*, footnote 3 above, paragraphs 38 to 42.

22 — See *ibid.*, paragraph 44.

health of the general public. It is clear from the judgment's terms that the Court has accepted this consequence. For these rea-

sons, I am compelled to conclude that the Commission's action in the present case must fail.

VI — Conclusion

38. On these grounds, I am of the view that the Court should:

- (1) Dismiss the Commission's action for a declaration that, by failing to give the Gibraltar general public prior information on the health protection measures to be taken in the event of a radiological emergency in connection with the Royal Navy nuclear submarine 'HMS Tireless' berthed in Gibraltar harbour, the United Kingdom has failed to fulfil its obligations under Article 5(3) of Council Directive 89/618/Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency.
- (2) Order the Commission to bear the costs of the United Kingdom.
- (3) Order the French Republic to bear its own costs.