

ČEZ

JUDGMENT OF THE COURT (Grand Chamber)

27 October 2009*

In Case C-115/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesgericht Linz (Austria), made by decision of 5 March 2008, received at the Court on 17 March 2008, in the proceedings

Land Oberösterreich

v

ČEZ as,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, J.-C. Bonichot and P. Lindh, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann (Rapporteur), P. Küris, E. Juhász, G. Arestis and L. Bay Larsen, Judges

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2009,

after considering the observations submitted on behalf of:

- the Land Oberösterreich, by J. Hintermayr, F. Haunschmidt, G. Minichmayr, P. Burgstaller, G. Tusek and C. Hadeyer, Rechtsanwälte,

- ČEZ as, by W. Moring, Rechtsanwalt,

- the Austrian Government, by E. Riedl, C. Rauscher and C. Pesendorfer, acting as Agents,

- the Czech Government, by M. Smolek, acting as Agent,

- the French Government, by A.-L. Duing, acting as Agent,

- the Polish Government, by M. Dowgielewicz, M. Nowacki and D. Krawczyk, acting as Agents,

- the Commission of the European Communities, by E. Traversa and B. Schima, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 April 2009,

gives the following

Judgment

- ¹ The present reference for a preliminary ruling concerns the interpretation of Articles 10 EC, 12 EC, 28 EC and 43 EC.

- ² The reference was made in the context of proceedings between the Land Oberösterreich and ČEZ as ('ČEZ') concerning actual or potential nuisance emanating from ionising radiation affecting agricultural land situated in Austria and belonging to the Land Oberösterreich, arising from ČEZ's operation of a nuclear power plant at Temelín, in the Czech Republic.

Legal context

Community legislation

The EAEC Treaty

³ According to the second paragraph of Article 1 EA:

‘It shall be the aim of the Community to contribute to the raising of the standard of living in Member States and to the development of commercial exchanges with other countries by the creation of conditions necessary for the speedy establishment and growth of nuclear industries.’

⁴ Article 2 EA provides:

‘For the attainment of its aims the Community shall, in accordance with the provisions set out in this Treaty:

...

(b) establish, and ensure the application of, uniform safety standards to protect the health of workers and of the general public,

(c) facilitate investment and ensure, particularly by encouraging business enterprise, the construction of the basic facilities required for the development of nuclear energy within the Community,

...'

5 Articles 30 EA to 39 EA make up Chapter 3, entitled 'Health protection', of Title II of the EAEC Treaty, entitled 'Provisions designed to encourage progress in the field of nuclear energy'.

6 Article 30 EA provides:

'Basic standards for the protection of the health of workers and of the general public from the dangers arising from ionising radiation shall be established within the Community.

The term "basic standards" shall mean:

(a) the maximum doses compatible with adequate safety,

(b) the maximum permissible degree of exposure and contamination,

...’

7 According to Article 31 EA:

‘The Commission shall work out the basic standards after obtaining the opinion of a group of authorities appointed by the Scientific and Technical Committee from among the scientific experts, especially public health experts, of the Member States....

After consulting the Assembly, the Council, acting by means of a qualified majority vote on a proposal of the Commission which shall transmit to it the opinions received from the Committees, shall determine the basic standards.’

8 Article 32 EA states:

‘At the request of the Commission or of a Member State, the basic standards may be revised or supplemented according to the procedure laid down in Article 31.

The Commission shall be bound to examine any such request made by a Member State.’

9 Article 33 EA provides:

‘Each Member State shall enact the legislative and administrative provisions required to ensure compliance with the basic standards so determined...

The Commission shall make recommendations in order to ensure the harmonisation of the provisions applicable in Member States in this respect.

For this purpose, Member States shall communicate to the Commission all such provisions applicable at the time of the entry into force of this Treaty and any subsequent draft provisions of the same nature.

...’

10 Article 35 EA is worded as follows:

‘Each Member State shall set up the facilities necessary for the permanent control of the level of radioactivity in the air, water and soil and for controlling compliance with the basic standards.

The Commission shall have right of access to such control facilities; it may examine their operation and efficiency.’

11 According to Article 36 EA:

‘The competent authorities shall, in order that the Commission may be kept informed of the level of radioactivity likely to affect the population, report regularly to the Commission on the control provided for in Article 35.’

12 Article 37 EA provides:

‘Each Member State shall submit to the Commission such general data concerning any plan for the disposal of any kind of radioactive waste as will enable the Commission to determine whether the implementation of such plan is likely to involve radioactive contamination of the water, soil or airspace of another Member State.

The Commission, after consulting the group of experts referred to in Article 31, shall give its opinion thereon within a period of six months.’

13 Article 38 EA provides:

‘The Commission shall make recommendations to Member States regarding the level of radioactivity in the air, water or soil.

The Commission shall, in case of urgency, issue a directive requiring the Member State concerned to take, within a period fixed by the Commission, all measures necessary to prevent the basic standards from being exceeded and to ensure observance of any applicable provisions.

If such State does not comply with the Commission's directive within the prescribed period, the Commission or any Member State concerned may, notwithstanding the provisions of Articles 141 and 142, refer the matter to the Court of Justice immediately.'

14 Article 192 EA is worded as follows:

'Member States shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from acts of the institutions of the Community. They shall facilitate the achievement of the aims of the Community.

They shall abstain from any measures likely to jeopardise the achievement of the aims of this Treaty.'

The Convention on Nuclear Safety

15 The accession of the European Atomic Energy Community to the Convention on Nuclear Safety, adopted on 17 June 1994, was approved by Commission Decision 1999/819/Euratom of 16 November 1999 (OJ 1999 L 318, p. 20). All of the Member States are also parties to that convention.

16 The third paragraph of the Declaration attached to Decision 1999/819, as amended by Commission Decision 2004/491/Euratom of 29 April 2004 (JO 2004 L 172, p. 7), states that '[t]he Community possesses competences, shared with the ... Member States, in the fields covered by Article 7 and Articles 14 to 19 of the Convention as provided for by the Treaty establishing the European Atomic Energy Community in Article 2(b) and the relevant Articles of Title II, Chapter 3, entitled "Health and Safety"'.

17 According to Article 1(ii) thereof, the objectives of the Convention on Nuclear Safety are, inter alia, 'to establish and maintain effective defences in nuclear installations against potential radiological hazards in order to protect individuals, society and the environment from harmful effects of ionising radiation from such installations'.

18 Article 7 of the Convention on Nuclear Safety provides:

1. Each Contracting Party shall establish and maintain a legislative and regulatory framework to govern the safety of nuclear installations.

2. The legislative and regulatory framework shall provide for:

(i) the establishment of applicable national safety requirements and regulations;

(ii) a system of licensing with regard to nuclear installations and the prohibition of the operation of a nuclear installation without a licence;

(iii) a system of regulatory inspection and assessment of nuclear installations to ascertain compliance with applicable regulations and the terms of licences;

(iv) the enforcement of applicable regulations and of the terms of licences, including suspension, modification or revocation.'

19 Article 8(1) of that convention provides:

'Each Contracting Party shall establish or designate a regulatory body entrusted with the implementation of the legislative and regulatory framework referred to in Article 7, and provided with adequate authority, competence and financial and human resources to fulfil its assigned responsibilities.'

20 Article 14 of that convention, entitled 'Assessment and verification of safety', states:

'Each Contracting Party shall take the appropriate steps to ensure that:

(i) comprehensive and systematic safety assessments are carried out before the construction and commissioning of a nuclear installation and throughout its life. Such assessments shall be well documented, subsequently updated in the light of operating experience and significant new safety information, and reviewed under the authority of the regulatory body;

(ii) verification by analysis, surveillance, testing and inspection is carried out to ensure that the physical state and the operation of a nuclear installation continue to be in accordance with its design, applicable national safety requirements, and operational limits and conditions.’

21 Article 15 of the Convention on Nuclear Safety, entitled ‘Radiation protection’, provides:

‘Each Contracting Party shall take the appropriate steps to ensure that in all operational states the radiation exposure to the workers and the public caused by a nuclear installation shall be kept as low as reasonably achievable and that no individual shall be exposed to radiation doses which exceed prescribed national dose limits.’

22 Articles 16 to 19 of that convention, entitled ‘Emergency preparedness’, ‘Siting’, ‘Design and construction’ and ‘Operation’ respectively, lay down various obligations relating to those matters.

Directive 96/29/Euratom

23 Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation (OJ 1996 L 159, p. 1), was adopted on the basis of Articles 31 EA and 32 EA.

24 According to Article 2(1) of that directive:

‘This Directive shall apply to all practices which involve a risk from ionising radiation emanating from an artificial source or from a natural radiation source in cases where natural radionuclides are or have been processed in view of their radioactive, fissile or fertile properties, namely:

- (a) the production, processing, handling, use, holding, storage, transport, import to and export from the Community and disposal of radioactive substances;

- (b) the operation of any electrical equipment emitting ionising radiation and containing components operating at a potential difference of more than 5 kV;

- (c) any other practice specified by the Member State.’

25 Article 4(1)(a) of the same directive, entitled ‘Authorisation’, provides:

‘Except as provided for in this Article, each Member State shall require prior authorisation for the following practices:

(a) operation and decommissioning of any facility of the nuclear fuel cycle...'

²⁶ Article 6(3) of Directive 96/29 provides:

'In addition each Member State shall ensure that:

(a) in the context of optimisation all exposures shall be kept as low as reasonably achievable, economic and social factors being taken into account;

(b) without prejudice to Article 12, the sum of the doses from all relevant practices shall not exceed the dose limits laid down in this Title for exposed workers, apprentices and students and members of the public.'

²⁷ Article 13 of that directive fixes the dose limits to be observed for members of the public.

28 Under Title VIII of the same directive, entitled 'Implementation of radiation protection for the population in normal circumstances', Article 43 thereof, entitled 'Basic principles', provides:

'Each Member State shall create the conditions necessary to ensure the best possible protection of the population based on the principles set out in Article 6 and to apply the fundamental principles governing operational protection of the population.'

29 Article 44 of Directive 96/29, entitled 'Conditions for authorisation of practices involving a risk from ionising radiation for the population', provides:

'Operational protection of the population in normal circumstances from practices subject to prior authorisation means all arrangements and surveys for detecting and eliminating the factors which, in the course of any operation involving exposure to ionising radiation, are liable to create a risk of exposure for the population which cannot be disregarded from the radiation protection point of view. Such protection shall include the following tasks:

- (a) examination and approval of plans for installations involving an exposure risk, and of the proposed siting of such installations within the territory concerned, from the point of view of radiation protection;
- (b) acceptance into service of such new installations subject to adequate protection being provided against any exposure or radioactive contamination liable to extend beyond the perimeter, taking into account, if relevant, demographic, meteorological, geological, hydrological and ecological conditions;

(c) examination and approval of plans for the discharge of radioactive effluents.

These tasks shall be carried out in accordance with rules laid down by the competent authorities on the basis of the extent of the exposure risk involved.’

³⁰ Article 45 of that directive, entitled ‘Estimates of population doses’, is worded as follows:

‘The competent authorities shall:

(a) ensure that dose estimates from practices referred to in Article 44 are made as realistic as possible for the population as a whole and for reference groups of the population in all places where such groups may occur;

(b) decide on the frequency of assessments and take all necessary steps to identify the reference groups of the population, taking into account the effective pathways of transmission of the radioactive substances;

(c) ensure, taking into account the radiological risks, that the estimates of the population doses include:

— assessment of the doses due to external radiation, indicating, where appropriate, the quality of the radiation in question,

— assessment of the intake of radionuclides, indicating the nature of the radionuclides and, where necessary, their physical and chemical states, and determination of the activity and concentrations of these radionuclides,

— assessment of the doses that the reference groups of the population are liable to receive and specification of the characteristics of these groups;

(d) require records to be kept relating to measurements of external exposure, estimates of intakes of radionuclides and radioactive contamination as well as the results of the assessment of the doses received by reference groups and by the population.'

31 Article 46 of the same directive provides, under the title ‘Inspection’:

‘As regards health protection of the population each Member State shall establish a system of inspection to enforce the provisions introduced in compliance with this Directive and to initiate surveillance in the area of radiation protection.’

32 Article 47(1) of Directive 96/29, entitled ‘Responsibilities of undertakings’, provides:

‘Each Member State shall require the undertaking responsible for practices as referred to in Article 2 to conduct them in accordance with the principles of health protection of the population in the area of radiation protection and in particular to carry out the following tasks within its installations:

- (a) achieving and maintaining an optimal level of protection of the environment and the population;

- (b) checking the effectiveness of technical devices for protecting the environment and the population;

(c) acceptance into service, from the point of view of surveillance of radiation protection, of equipment and procedures for measuring and assessing, as appropriate, exposure and radioactive contamination of the environment and the population;

(d) regular calibration of measuring instruments and regular checking that they are serviceable and correctly used.'

33 Articles 48 to 53 of that directive, which make up Title IX thereof, relate to interventions in case of radiological emergencies.

34 Article 54 of the same directive provides:

'This Directive establishes the basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation with the aim of their uniform implementation by Member States. If a Member State is to adopt dose limits which are stricter than those laid down in this Directive, it shall inform the Commission and the Member States.'

35 It is common ground that the Republic of Austria did not communicate such information to the Commission or to the other Member States.

National legislation

- 36 Paragraph 364(2) of the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch) ('the ABGB') states:

'The owner of land may prohibit his neighbour from producing effects, emanating from the latter's land, by effluent, smoke, gases, heat, odours, noise, vibration and the like, in so far as they exceed normal local levels and significantly interfere with the usual use of the land. Direct transmission, without a specific legal right, is unlawful in all circumstances.'

- 37 Paragraph 364a of the ABGB provides:

'However, if the interference is caused, in excess of that level, by a mining installation or an officially authorised installation on the neighbouring land, the landowner is entitled only to bring court proceedings for compensation for the damage caused, even where the damage is caused by circumstances which were not taken into account in the official authorisation process.'

The dispute in the main proceedings and its context

- 38 The Land Oberösterreich is the owner of land used for agriculture and agricultural trials, on which there is an agricultural college. The land is situated about 60 km from the Temelín nuclear power plant, which itself is situated in the Czech Republic, 50 km from the Austrian border.

- 39 That power plant is operated by the Czech energy-supply undertaking, ČEZ, a limited company incorporated under Czech law in which the Czech State holds a majority share.
- 40 The construction and operation of the Temelín nuclear power plant were authorised by the Czech authorities in 1985 and it began operating on a trial basis on 9 October 2000.
- 41 In 2001, the Land Oberösterreich and other private owners brought actions before the Landesgericht Linz pursuant to Paragraph 364(2) of the ABGB, seeking an order that ČEZ put an end to the actual or potential nuisance relating to the ionising radiation potentially emanating from that power plant.
- 42 According to the Land Oberösterreich, the radioactivity generated by the normal functioning of that nuclear power plant or, in any event, the risk of contamination caused by the operation and potential malfunction of the plant cause a lasting interference with the normal use of its land. The requirements for bringing an action, possibly preventive, for cessation of a nuisance are therefore satisfied.
- 43 The Temelín facility was, moreover, the subject of negotiations between the Republic of Austria and the Czech Republic. A protocol resulting from those negotiations was signed in Melk (Austria) on 12 December 2000. On 29 November 2001, those two States adopted a document known as ‘The Conclusions of the Melk Process and Follow-Up’, referred to inter alia in the joint declaration of the Czech Republic and the Republic of Austria concerning their bilateral agreement relating to the Temelín nuclear power plant, annexed to the final act of the Treaty concerning the accession of

10 new Member States, including the Czech Republic, signed in Athens on 16 April 2003 (OJ 2003 L 236, p. 17), in which both States declared that they would fulfil the series of bilateral obligations set out in those conclusions.

⁴⁴ Since 2003, the Temelín nuclear power plant has operated at full capacity.

⁴⁵ According to the Communication of 6 November 2002 from the Commission to the Council and the European Parliament: Nuclear safety in the European Union (COM(2002) 605 final), in the negotiations leading up to the accession of 10 new Member States in 2004, particular attention was directed to the questions of nuclear safety at the power plants in the candidate States, following the adoption of the resolutions of the Cologne Council of 3 and 4 June 1999, the Commission having been requested to ensure the application of high safety standards in Central and Eastern Europe. The evaluation carried out led to the decommissioning of some nuclear reactors and to recommendations for improvements to other reactors in order to bring them up to a level of safety comparable to that prevailing in the European Union for comparable reactors, the implementation of which has been monitored by the Commission and the Council (see, in particular, point 4 of the introduction of that communication and points 1.1(b) and 3.2 thereof).

⁴⁶ In parallel with the Melk process, in which the Commission played an active role in facilitating the dialogue between the Czech and Austrian authorities, the safety of the Temelín nuclear power plant was evaluated by the Commission and the Council, as were the other nuclear installations in the candidate countries, and the results of that evaluation showed that the Temelín nuclear power plant, subject to the implementation of the proposed recommendations, showed a satisfactory level of nuclear safety (see point 1.1(b) of that communication).

47 Moreover, as indicated by point 5.3.2 of the Commission's Communication: Summary of the activities carried out during 2004 and 2005 in implementation of Title II, Chapters 3 to 10, of the Euratom Treaty (COM(2006) 395 final), since the accession of the Czech Republic to the European Union, checks have been carried out at Temelín in 2004 and in 2005, pursuant to Article 35 EA.

48 The Commission also issued an opinion on 24 November 2005 concerning the plan for the disposal of radioactive waste resulting from modifications at the site of the Temelín nuclear power plant, in the Czech Republic, in accordance with Article 37 of the Euratom Treaty (OJ 2005 C 293, p. 40). In that opinion, the Commission concluded *inter alia* that 'the implementation of the plan for the disposal of radioactive waste in whatever form resulting from modifications at the site of the Temelín Nuclear Power Plant ..., both in normal operation and in the event of an accident of the type and magnitude considered in the General Data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State'.

49 On 3 November 2006, the two reactors of the Temelín power plant were inspected and found to be compliant with the prevailing legislation; a definitive declaration was issued to that effect.

The questions referred for a preliminary ruling

50 The Landesgericht Linz states that, according to previous case-law, Paragraph 364a of the ABGB, which precludes bringing actions for cessation of a nuisance emanating from installations which have been granted official authorisation, was also applicable in respect of installations authorised by foreign authorities where it appeared that the nuisance in question was authorised by international law and the conditions of authorisation applicable in the State of origin were, in essence, equivalent to those prevailing in Austria.

- 51 In a judgment of 4 April 2006, however, the Oberster Gerichtshof held that only authorisations granted by the Austrian authorities come within the scope of application of Paragraph 364a. It took the view that the relevant article was based exclusively on consideration of diverging national interests and there was no reason why Austrian law should restrict the property rights of Austrian landowners purely in the interests of protecting a foreign economy and public interests in another country.
- 52 According to the Landesgericht Linz, that interpretation of the Oberster Gerichtshof could be contrary to Community law in that it discriminates between installations which have been granted official authorisation by the Austrian authorities and those which have been granted authorisation by the authorities of another Member State.
- 53 Considering that neither the EC and EAEC Treaties nor the secondary law deriving therefrom contain rules governing the grant of authorisations for nuclear power plants and the recognition of such authorisations in Member States other than those which issued them, the national court seeks to ascertain whether that discrimination infringes Articles 10 EC, 12 EC, 28 EC or 43 EC.
- 54 In those circumstances, the Landesgericht Linz decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
- ‘1. (a) Does it constitute a measure having equivalent effect within the meaning of Article 28 EC for an undertaking operating a power plant in a Member State, in compliance with the laws of that State and the relevant provisions of Community law, by means of which it produces electricity that it delivers to various Member States, to be forced, pursuant to an injunction in respect of a potential nuisance emanating from that power plant granted by a judgment of a court in a neighbouring Member State — which is enforceable in all Member States pursuant to Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(OJ 2001 L 12, p. 1) — to make changes to that installation in order to bring it in line with the technical rules of another Member State or even — if, because of the complexity of the plant as a whole, those changes are impossible to make — to stop operations at the installation, in a situation in which that court, as a result of an interpretation of national legal provisions given by the highest court of that country, is not allowed to take into account the existing operating authorisation for the power plant granted by the authorities of the Member State in which the plant is located, even though it would take into account, in the context of such an action for an injunction, an authorisation for an installation granted by the domestic authorities, with the effect that no judgment granting an injunction would be delivered in relation to an installation operating under an authorisation granted by the domestic authorities?

- (b) Are the grounds for justification laid down in the EC Treaty to be interpreted as meaning that it is unlawful, in any event, to make a distinction under the laws of a Member State between authorisations for installations granted by the domestic authorities and those granted by the authorities of another Member State, in so far as that distinction is motivated by the desire to protect only the national economy but not the economy of another Member State, since this is a purely economical motive which is not recognised as worthy of protection in the context of the fundamental freedoms?

- (c) Are the grounds of justification laid down in the EC Treaty and the corresponding principle of proportionality to be interpreted as meaning that a global distinction made under the laws of a Member State between authorisations for installations granted by the domestic authorities and authorisations for installations granted by the authorities of another Member State is per se unlawful, because the operation of an installation authorised by the authorities of the Member State in which it is located has to be assessed by the national court of another Member State in each individual case on the basis of the actual danger posed by operation of the installation to public policy, public security or public health or on the basis of other recognised overriding requirements of public interest?

- (d) Having regard to the principle of proportionality that must be considered in the context of the grounds of justification, are the courts of a Member State under an obligation, in any event, to treat the operating authorisation for an installation granted in the Member State in which it is located like an authorisation for an installation granted by the domestic authorities if the authorisation granted in the Member State in which the installation is located is essentially equivalent, in legal terms, to that of an authorisation granted by the domestic authorities?
- (e) For the purposes of considering the above questions, is it relevant that the installation authorised in the Member State in which it is located is a nuclear power plant, if, in another Member State in which an action for an injunction to prevent a nuisance which it is feared will emanate from a nuclear power plant is pending, operation of that type of installation is not permitted per se, even though other nuclear facilities are operated there?
- (f) If the interpretation of the national provisions which is described in Question 1(a) infringes Article 28 EC, are the courts of the Member State in which such an action for an injunction is pending under an obligation to interpret domestic law in a way conforming with Community law, so that the term “officially authorised installation” can cover both operating authorisations granted by the domestic authorities and those granted by the authorities of another Member State?
2. (a) Is it compatible with the prohibition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State laid down in Article 43 EC for an undertaking which operates a power plant in a Member State in compliance with the laws of that State and the relevant provisions of Community law to be forced, pursuant to an injunction in respect of a potential nuisance emanating from that power plant granted by a judgment of a court in a neighbouring Member State — which is enforceable in all Member States pursuant to Regulation No 44/2001 — to make changes to that installation in order to bring it in line with the technical

rules of another Member State or even — if, because of the complexity of the plant as a whole, those changes are impossible to make — to stop operations at the installation, in a situation in which that court, as a result of an interpretation of national legal provisions given by the highest court in that country, is not allowed to take into account the existing operating authorisation for the power plant granted by the authorities of the Member State in which the plant is located, even though it would take into account, in the context of such an action for an injunction, an authorisation for an installation granted by the domestic authorities, with the effect that no judgment granting an injunction would be delivered in relation to an installation operating under an authorisation granted by the domestic authorities?

- (b) Are the grounds on which freedom of establishment can be restricted to be interpreted as meaning that it is unlawful, in any event, to make a distinction under the laws of a Member State between authorisations for installations granted by the domestic authorities and those granted by the authorities of another Member State, in so far as that distinction is motivated by the desire to protect only the national economy but not the economy of another Member State, since this is a purely economical motive which is not recognised as worthy of protection in the context of the fundamental freedoms?

- (c) Are the grounds justifying a restriction of the freedom of establishment which are laid down in the EC Treaty and, in particular, the principle of proportionality to be interpreted as meaning that a global distinction made under the laws of a Member State between authorisations for installations granted by the domestic authorities and authorisations for installations granted by the authorities of another Member State is per unlawful, because the operation of an installation authorised by the authorities of the Member State in which it is located has to be assessed by the national court of another Member State in each individual case on the basis of the actual danger posed by operation of the installation to public policy, public security or public health or on the basis of other recognised overriding requirements of public interest?

- (d) Having regard to the principle of proportionality that must be considered in the context of justifying interference with the freedom of establishment, are the courts of a Member State under an obligation, in any event, to treat the

operating authorisation for an installation granted in the Member State in which it is located like an authorisation for an installation granted by the domestic authorities if the authorisation granted in the Member State in which the installation is located is essentially equivalent, in legal terms, to that of an authorisation granted by the domestic authorities?

- (e) For the purposes of considering the above questions, is it also relevant in the context of the freedom of establishment that the installation authorised in the Member State in which it is located is a nuclear power plant, if, in another Member State in which an action for an injunction against that nuclear power plant is pending, operation of that type of installation is not permitted per se, even though other nuclear facilities are operated there?

 - (f) If the interpretation of the national provisions which is described in Question 2(a) infringes Article 43 EC, are the courts of the Member State before which such an action for an injunction is pending under an obligation to interpret domestic law in a way conforming with Community law, so that the term “officially authorised installation” can cover both operating authorisations granted by the domestic authorities and those granted by the authorities of another Member State?
3. (a) Does it constitute prohibited indirect discrimination on grounds of nationality within the meaning of Article 12 EC for the courts of a Member State to take into account authorisations for installations granted by the domestic authorities in the context of a private action for an injunction brought against those installations, with the result that claims for cessation of operation of the installation or its modification are excluded, but not to take into account in the context of such actions for an injunction authorisations of installations located in other Member States granted by the authorities of those Member States?

- (b) Does such discrimination fall within the scope of the Treaty, since it affects the legal conditions under which undertakings operating such installations may establish themselves in an EU Member State as well as the legal conditions under which such undertakings produce electricity and deliver it to other EU Member States, so that it is at least indirectly connected to the realisation of the fundamental freedoms?

 - (c) Can such discrimination be justified on objective grounds, given that the relevant courts of the Member State do not conduct an individual assessment taking into consideration the facts underlying the authorisation of the installation in the Member State in which it is located? Would it not be consistent with the principle of proportionality — at least if the condition is fulfilled that the authorisation is essentially equivalent, from a legal point of view, to an authorisation for an installation granted by the domestic authorities — for the courts of the other Member State to take into account the authorisation granted by the authorities in the Member State in which the installation is located?

 - (d) If the interpretation of the national provisions which is described in Question 3(a) infringes Article 12 EC, are the courts of the Member State before which such an action for an injunction is pending under an obligation to interpret domestic law in a way conforming with Community law, so that the term “officially authorised installation” can cover both operation authorisations granted by the domestic authorities and those granted by the authorities of another Member State?
4. (a) Does the principle of loyal cooperation laid down in Article 10 EC with respect to the application of Community law also apply in respect of relationships among Member States?

- (b) Is it to be inferred from the principle of loyal cooperation that the Member States must not render other Member States' exercise of public authority more onerous or even impossible and does this apply, in particular, to decisions by Member States concerning the planning, construction and operation of nuclear installations within their territory?
- (c) If the interpretation of the national provisions which is described in Question 4(a) infringes Article 10 EC, are the courts of the Member State before which such an action for an injunction is pending under an obligation to interpret domestic law in a way conforming with Community law, so that the term "officially authorised installation" can cover both operation authorisations granted by the domestic authorities and those granted by the authorities of another Member State?

Preliminary observation

55 According to the Austrian Government, the national court gave an incorrect description of Paragraph 364a of the ABGB. The case-law is in fact to the effect that authorisations granted in Austria also fall outside the scope of application of that provision if they were adopted following a procedure which did not confer the status of party on the neighbour or where there was serious nuisance or risk to life or health. The difference in treatment described by the national court is therefore not established.

56 The Land Oberösterreich states that, contrary to what is stated in the order for reference, the expression 'officially authorised installation' in Paragraph 364a of the ABGB may also apply to authorisations granted by the authorities of another State. That would be the case where the nuisance is authorised under international law, where the conditions of authorisation prevailing in the Member State where the installation is situated are equivalent to those provided for in the State where the action is brought,

and where the owner of the property jeopardised has been able to participate as a party to the authorisation proceedings. However, in the present case, it is common ground that a nuclear power plant cannot be authorised under Austrian law, that the authorisation granted to ČEZ does not comply with the technical standards or procedural requirements currently in force and that the Land Oberösterreich was not able to participate in the authorisation procedure in question.

⁵⁷ It must be borne in mind, however, that it is not for the Court to rule on the interpretation of national provisions, as such an interpretation falls within the exclusive jurisdiction of the national courts. Thus, the Court, when a question is referred to it by a national court, must base itself on the interpretation of national law as described to it by that court (see, to that effect, inter alia, Case C-360/06 *Heinrich Bauer Verlag* [2008] ECR I-7333, paragraph 15 and case-law cited).

The questions referred for a preliminary ruling

Preliminary considerations

⁵⁸ As evidenced by the very wording of the questions referred for a preliminary ruling, the national court has formulated them on the assumption that the decision which it may have to take to order ČEZ to adapt the Temelín nuclear power plant, or even cease its operation if the required adaptations cannot be made, will carry the authority which attaches to decisions taken pursuant to Regulation No 44/2001 in all Member States.

59 In its observations, the Czech Government raises two objections to that assumption.

60 In the first place, it disputes that the provisions of Regulation No 44/2001 are even applicable to the judicial decision thus contemplated. Article 66(1) of that regulation, in principle, rules out the applicability of those provisions where, as here, legal proceedings were brought prior to the entry into force of that regulation. Moreover, neither of the two exceptions provided for in Article 66(2) are applicable here. First, the action in the main proceedings was brought only after the entry into force of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36) between the two States in question, since the Czech Republic was not a party thereto when the action was instituted. Secondly, the jurisdiction of the Austrian courts in the present case derives not from jurisdictional rules consistent with the rules laid down in Chapter II of that regulation, but from a purely domestic rule based on the legal domicile of the applicant in the main proceedings.

61 In the second place, the Czech Government maintains that, even if the provisions of Regulation No 44/2001 were applicable, Article 34(1) of that regulation, which provides that a judgment is not to be recognised where such recognition is manifestly contrary to public policy in the Member State in which recognition is sought, applies in the present case before the Czech courts.

62 In the light of the answer that will be given below to the questions referred by the national court, however, it is not necessary to rule on the objections thus formulated by the Czech Government, nor, more generally, on the interpretation of the provisions of Regulation No 44/2001.

Admissibility of the questions referred for a preliminary ruling

63 The Land Oberösterreich maintains that the questions referred are inadmissible on two grounds.

64 First, the excessive length of the questions and the fact that they list a large number of arguments and facts make it impossible to provide clear answers.

65 The Court finds, however, that the facts and matters of law in the reasoning in the grounds of the order for reference and in the questions themselves are such as to enable it to exercise the powers conferred on it.

66 Secondly, the Land Oberösterreich maintains that there are insufficient links between the situation at issue in the main proceedings and Community law, with the result that the questions referred are artificial or hypothetical in nature.

67 The Court points out that the issue of whether a situation such as that in the main proceedings comes within the scope of application of the Community provisions referred to by the national court is a question of substance relating to the interpretation thereof, with the result that any doubts in that regard do not affect the admissibility of the questions referred.

68 It follows from the foregoing that the reference for a preliminary ruling is admissible.

Identification of the Community provisions requiring interpretation

- 69 In its decision, the national court sets out the doubts it has regarding the compatibility of Paragraph 364a of the ABGB with Community law, given the difference in treatment such a provision gives rise to between, on the one hand, undertakings having an installation which has been officially authorised in Austria, which do not face the prospect of legal proceedings from their neighbours, including a possible action for an injunction to prevent a nuisance and, on the other, undertakings which, like ČEZ, have an installation, in this case a nuclear power plant, which has been authorised by the competent authorities of another Member State and is faced with such an action for an injunction to prevent a nuisance.
- 70 In that regard, the national court identifies more specifically four provisions of the EC Treaty which, in its view, may preclude such a difference in treatment, namely Articles 10 EC, 12 EC, 28 EC and 43 EC respectively.

Observations submitted to the Court

- 71 Without prejudice to the positions they have advocated in relation to the four abovementioned articles of the EC Treaty, ČEZ, the Czech, French and Polish Governments and the Commission submit that a number of provisions of the EAEC Treaty and the rules adopted on the basis thereof are relevant to the issues raised by the national court.
- 72 Taking the view that the difference in treatment at issue in the main proceedings is contrary to Article 12 EC, the Commission submits inter alia in that regard that the prohibition of discrimination on grounds of nationality laid down in that article is a general principle which also applies under the EAEC Treaty or that, at the very least, the fact that the case concerns an undertaking coming within the scope of that treaty weighs in favour of the application of Article 12 EC thereto. Articles 30 EA to 32 EA,

Directive 96/29 and Article 37 EA in particular indicate that the situation at issue in the main proceedings comes within the scope of the EAEC Treaty.

73 At the hearing, the Commission stated *inter alia* in that regard that, if a Member State does not allow an action for an injunction to prevent a nuisance to be upheld when the activity causing the nuisance has been officially authorised, that Member State may not authorise such an action when the activity in question is that of a nuclear power plant established in another Member State where it has been officially authorised. Such difference in treatment cannot, the Commission submits, be justified, *inter alia* because such an authorisation indicates, on the basis of the law deriving from the EAEC Treaty, that compliance with ionising radiation exposure limits in normal operations has been duly examined and continues to be monitored.

74 According to the Czech Government, Articles 30 EA to 39 EA and Articles 7, 8 and 14 of the Convention on Nuclear Safety are applicable to the main proceedings. The Austrian courts' examination of the authorisation granted for the operation of the Temelín nuclear power plant by the State Office for Nuclear Safety, the national authority in the Czech Republic designated pursuant to Article 8 of that convention, disregards the abovementioned provisions, including the powers conferred on that office and, by extension, Article 192 EA. The provisions as a whole imply in particular an obligation of mutual trust between Member States as regards authorisations granted and inspections carried out by them.

75 At the hearing, ČEZ pleaded that for an Austrian court to carry out an appraisal of the official authorisation granted by the competent Czech authority or of the Temelín nuclear power plant's safety encroaches on the jurisdiction of the Czech Republic as recognised by the Convention on Nuclear Safety and disregards both that convention and the duty of sincere cooperation laid down in Article 192 EA.

- 76 The Polish Government considers that Articles 30 EA to 39 EA, Directive 96/29, in particular Articles 4(1)(a), 13, 44 and 45 thereof, and the Convention on Nuclear Safety, including Articles 7, 14 and 15 thereof, establish minimum harmonised standards for emission dose limits of ionising radiation with which every nuclear power plant must comply in order to obtain operating authorisation. Those provisions also provide for the due introduction of safety assessments and checks in the form of analysis, monitoring, testing and inspections, and enable both the Commission, through on-site inspections and information which must be provided to it, and the neighbouring Member States, through inter-party consultations and sharing of information, to conduct an assessment of the activities of nuclear power plants. In those circumstances, the national court should restrict itself to ascertaining that ČEZ holds an authorisation for the Temelín nuclear power plant; to go beyond that is contrary to Article 192 EA.
- 77 The French Government, which intervened at the stage of the oral procedure, stated that in the present case it was necessary to take into consideration Articles 30 EA to 32 EA, 33 EA, 35 EA, 37 EA and 38 EA, read in the light of the Court's case-law, and Directive 96/29, the purpose of which is specifically to define a framework for protecting populations against the risks associated with nuclear installations.
- 78 The French Government adds that the operating conditions at the Temelín nuclear power plant were the subject of an in-depth examination by the Commission during the accession process and its operation was not called into question at that time. It also refers to the inspections carried out by the Commission and its favourable opinion, referred to in paragraphs 47 and 48 of this judgment.
- 79 The French Government goes on to state that the framework established by the EAEC Treaty does not allow a court of a Member State to order an operator of a nuclear power plant operating in another Member State, in compliance with the requirements imposed by the legislation under that framework, to adapt or cease the activities of that power plant.

80 The French and Polish Governments, moreover, indicated at the hearing that they share the Commission's view that the principle of non-discrimination on grounds of nationality laid down in Article 12 EC is a general principle which is also applicable in the area covered by the EAEC Treaty. They state that such a principle is, in the present case, frustrated by the difference in treatment resulting from Paragraph 364a of the ABGB in respect of nuclear power plants which have an authorisation granted in a Member State other than the Republic of Austria in compliance with rules which have been the subject of a minimum harmonisation at Community level.

Findings of the Court

81 The fact that the national court has, formally speaking, worded the question referred for a preliminary ruling with reference to certain provisions of Community law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions (see, inter alia, Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 20 and case-law cited, and Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 29 and case-law cited). It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of Community law which require interpretation, having regard to the subject-matter of the dispute (see, inter alia, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9).

82 The Court notes as a preliminary point that, in the present case, the dispute in the main proceedings concerns essentially the issue whether an industrial activity consisting in the operation of a nuclear power plant may be pursued and, if so, what are the technical conditions which may be imposed on such a power plant because of an actual or potential nuisance allegedly caused to land situated in another Member State due to its possible exposure to ionising radiation originating from that power plant.

83 Such industrial activity, by reason of its very purpose and to a large degree, falls within the scope of application of the EAEC Treaty and it is common ground that that treaty contains a set of rules relating precisely to the protection of populations and the environment against ionising radiations.

84 Moreover, the Court, under Articles 234 EC and 150 EA, has identical jurisdiction for the purpose of interpreting the relevant provisions of the EC and EAEC Treaties. Thus the fact that the national court, formally speaking, referred questions to the Court pursuant to Article 234 EC concerning the interpretation of provisions of the EC Treaty does not prevent this Court from providing to the national court all the elements which may be of assistance in adjudicating on the case pending before it, including when they come under the EAEC Treaty and involve the Court ruling by virtue of its jurisdiction under Article 150 EA (see, to that effect, Case 44/84 *Hurd* [1986] ECR 29, paragraphs 1 and 14).

85 It must also be remembered that Article 305(2) EC provides expressly that the provisions of the EC Treaty do not derogate from those of the EAEC Treaty.

86 In the present case, an examination of the principles and specific provisions of the EAEC Treaty and certain measures adopted pursuant thereto will, as will be shown below, enable a response to be given to the queries raised by the national court.

The principle of prohibition of discrimination on grounds of nationality within the scope of application of the EAEC Treaty

The existence of the principle

- 87 Article 12 EC, referred to in the third question, prohibits any discrimination on grounds of nationality within the scope of application of the EC Treaty.
- 88 Although the EAEC Treaty does not contain any explicit provision which corresponds to that article of the EC Treaty, the fact remains that, as the Court pointed out very early on, the principle laid down in Article 12 EC forms part of the ‘principles’ of the Community and the rule on equal treatment with nationals is one of the fundamental legal provisions of the Community (see, inter alia, Case 2/74 *Reyners* [1974] ECR 631, paragraphs 15 and 24).
- 89 Article 12 EC, which prohibits any discrimination on grounds of nationality, is a specific expression of the general principle of equality, which itself is one of the fundamental principles of Community law (see, to that effect, inter alia, Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16, and Case C-224/00 *Commission v Italy* [2002] ECR I-2965, paragraph 14).
- 90 In the light of the foregoing, it would appear to be contrary to both the purpose and the consistency of the treaties to allow discrimination on grounds of nationality, which is prohibited under the EC Treaty by virtue of Article 12 EC, to be tolerated within the scope of application of the EAEC Treaty.

91 It must therefore be recognised that although the principle of prohibition of any discrimination on grounds of nationality within the scope of application of Community law is expressly laid down only in Article 12 EC, it is a general principle which is also applicable under the EAEC Treaty.

The existence, in the main proceedings, of a difference in treatment on grounds of nationality within the scope of application of the EAEC Treaty

92 First of all, it is settled case-law that the rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result (see, *inter alia*, Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 14, and *Commission v Italy*, paragraph 15).

93 In that regard, the order for reference indicates that, under Paragraph 364a of the ABGB, an undertaking having an industrial installation situated on Austrian territory which has been officially authorised by the competent Austrian authorities cannot, in principle, be subject to an action for an injunction to prevent an actual or potential nuisance caused by that installation to neighbouring properties, brought on the basis of Paragraph 364(2) of the ABGB. In such a case, the only remedy available to owners of neighbouring property is a claim for damages for harm actually caused to their property, even when the loss is caused by factors which were not taken into account in the official authorisation procedure.

94 Paragraph 364a of the ABGB thus draws no distinction according to the specific nature of the authorised industrial activity pursued at the installation or according to which factors were taken into account in the authorisation procedure.

- 95 However, the national court states that an undertaking which, like ČEZ, has an industrial installation situated in the territory of another Member State, where it has received all the required official authorisations granted by the authorities of that Member State, may be the subject of an action for an injunction to prevent a nuisance brought pursuant to Paragraph 364(2) of the ABGB, without being able to rely on the exception provided for in that regard in Paragraph 364a of the ABGB.
- 96 It is, moreover, common ground that undertakings which operate an installation situated in a Member State other than the Republic of Austria are usually undertakings established in that other Member State.
- 97 It follows that the difference in treatment introduced by Paragraph 364(2) and Paragraph 364a of the ABGB, which works to the detriment of installations which have received official authorisation in a Member State other than the Republic of Austria in reality leads to the same outcome as a difference in treatment on grounds of nationality.
- 98 Secondly, as that difference in treatment on grounds of nationality is established, it is necessary to ascertain whether in the present case it comes within the scope of application of the EAEC Treaty.
- 99 Although it is true that the EAEC Treaty does not contain a title relating to nuclear energy production installations, the fact remains that Title II of that Treaty, entitled 'Provisions for the encouragement of progress in the field of nuclear energy', includes a Chapter 3, entitled 'Health and safety', which is intended to provide for the protection of public health in the nuclear sector (see, inter alia, Case C-62/88 *Greece v Council* [1990] ECR I-1527, paragraph 17).

100 The Court has held on a number of occasions that the provisions of said Chapter 3 are to be interpreted broadly in order to give them practical effect (see, inter alia, Case C-29/99 *Commission v Council* [2002] ECR I-11221, paragraph 78). Thus, having noted that Chapter 3 implements Article 2(b) EA, which requires the Community to ‘establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied’, the Court has held inter alia that it is apparent that such protection cannot be achieved without controlling the sources of harmful radiation (see *Commission v Council*, paragraph 76).

101 In paragraph 72 of *Commission v Council*, the Court, which was asked to rule on the scope of Community competence for the purposes of concluding the Convention on Nuclear Safety, held that the Community possesses competences, shared with the Member States, to take, pursuant to Article 15 of that convention, the appropriate steps to ensure that in all operational states radiation exposure to workers and the public caused by a nuclear installation be kept as low as reasonably achievable and that no individual be exposed to radiation doses which exceed prescribed national dose limits.

102 In paragraph 82 of that same judgment, the Court added that it could be inferred from its earlier case-law that it is inappropriate, in order to define the Community’s competences, to draw an artificial distinction between the protection of the health of the general public and the safety of sources of ionising radiation. It inferred therefrom inter alia that the Community also has a certain amount of external competence in the areas covered by Articles 7, 14 and 16 to 19 of the Convention on Nuclear Safety, which cover, respectively, the authorisation system applicable to the construction and operation of nuclear power plants, assessment and verification of safety, emergency preparedness, siting, design and construction of power plants and operation thereof.

103 In particular, it held, with respect to Article 7 of the Convention on Nuclear Safety, that, even though the EAEC Treaty does not grant the Community competence to authorise the construction or operation of nuclear installations, under Articles 30 EA to 32 EA

the Community possesses legislative competence to establish, for the purpose of health protection, an authorisation system which must be applied by the Member States. Such a legislative act constitutes a measure supplementing the basic standards referred to in Article 30 EA (*Commission v Council*, paragraphs 88 and 89).

104 When interpreting Article 37 EA, which is a provision which must be applied in order to prevent the risk of radioactive contamination of water, soil or airspace of another Member State, the Court has held inter alia that that article must be interpreted as meaning that the Commission must be provided with general data relating to any plan for the disposal of radioactive waste before such disposal is authorised by the competent authorities of the Member State concerned. The Court noted in that regard the very great importance of the guidelines that the Commission can give, after consulting the group of experts, to that Member State, which the Member State must be able to examine in detail in circumstances such that the Commission's suggestions may be taken into account before the authorisation is issued (Case 187/87 *Land de Sarre and Others* [1988] ECR 5013, paragraphs 12 to 16, and Case C-61/03 *Commission v United Kingdom* [2005] ECR I-2477, paragraph 39).

105 It follows from all the foregoing that the granting of official authorisations for the construction and operation of nuclear installations, in their various aspects relating to health protection against the dangers of ionising radiations for the general public, comes within the scope of application of the EAEC Treaty.

106 The action in the main proceedings is aimed at determining whether the actual effects or potential effects due to current or future ionising radiation emanating from the Temelín nuclear power plant justify, notwithstanding the authorisations granted in respect of that power plant, ČEZ being ordered to adapt or even close it, in order to prevent or mitigate such effects or risks.

107 It follows that the difference in treatment referred to in paragraph 97 of this judgment, such as that at issue in the main proceedings, does come within the scope of application of the EAEC Treaty.

The existence of a justification

108 In accordance with the Court's case-law, the finding in paragraph 107 of this judgment is not by itself sufficient to substantiate a conclusion that the national provisions are incompatible with the prohibition of discrimination on grounds of nationality under the EAEC Treaty. It is also necessary to ascertain whether the failure to take account of the official authorisations granted in respect of nuclear installations situated in Member States other than the Republic of Austria, pursuant to Paragraph 364a of the ABGB, and the application of Paragraph 364(2) of the ABGB alone in respect of those installations, may not be justified by objective considerations unrelated to nationality and, if so, whether such a difference in treatment is proportionate to the legitimately pursued objective (see, inter alia, to that effect, regarding Article 12 EC, *Commission v Italy*, paragraph 20; Case C-164/07 *Wood* [2008] ECR I-4143, paragraph 13; and Case C-524/06 *Huber* [2008] ECR I-9705, paragraph 75).

109 As regards, first, the query contained in questions 1(b) and 2(b), it must be noted that the willingness of the Austrian legislature to take account of the interests of domestic economic operators, to the exclusion of those of economic operators established in other Member States, cannot be accepted as justification for the difference in treatment resulting from the legislation at issue in the main proceedings. Just as they cannot justify a barrier to the fundamental principles of free movement of goods or the freedom to provide services (see, inter alia, Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41), aims of a purely economic nature cannot justify discrimination on grounds of nationality within the scope of application of the EAEC Treaty.

- 110 As regards, secondly, justifications which might be put forward relating to protection of life or health, referred to by the national court, or even protection of the environment or property rights, also referred to by the Land Oberösterreich, they do not appear, either, to be such as to justify a difference in treatment such as that at issue in the main proceedings, between the official authorisations granted by the Austrian authorities in respect of industrial installations situated in Austria and those granted in respect of a nuclear power plant situated in another Member State by the competent authorities there.
- 111 The Court notes as a preliminary point that, according to the fourth recital in the preamble to the EAEC Treaty, the signatories thereto were '[a]nxious to establish conditions of safety which will eliminate danger to the life and health of the people'. Article 2(b) EA, for its part, states that, in order to perform its task, the Community must, as provided for in that treaty, 'establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied'.
- 112 These aspects are elaborated on in Articles 30 EA to 39 EA, which make up Chapter 3 of Title II of the EAEC Treaty, and are, as the Court has noted earlier, intended to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source and whatever the categories of persons exposed to such radiations (Case C-70/88 *Parliament v Council* [1991] ECR I-4529, paragraphs 13 and 14).
- 113 Articles 30 EA and 31 EA provide, in particular, for the Community, following the opinion of a scientific group of experts, to adopt basic standards for health protection for the general public against the dangers arising from ionising radiations.
- 114 Under the first paragraph of Article 33 EA, each Member State is required to lay down the appropriate provisions, whether by legislation, regulation or administrative action, to ensure compliance with the basic standards which have been established by the Community. Under the second paragraph of Article 33 EA, however, the Commission

may make appropriate recommendations for harmonising the provisions applicable in that field in the Member States. As observed by the Court, such competence to make recommendations may be exercised, inter alia, with respect to those aspects relating to the design and construction as well as the operation of a nuclear installation which enable compliance with the basic standards to be ensured. The Member States are, furthermore, required to assist in drawing up those recommendations through the communications referred to in the third paragraph of Article 33 EA (*Commission v Council*, paragraph 105).

115 Those basic standards, which must be governed inter alia by the principle of optimisation of protection (see, to that effect, Case C-376/90 *Commission v Belgium* [1992] ECR I-6153, paragraph 27), and which have been amended on various occasions in order to take account of developments in scientific knowledge about radiation protection, are fixed by Directive 96/29.

116 As evidenced by paragraphs 23 to 34 of this judgment, Directive 96/29 also contains a number of provisions relating to systems for authorisation, monitoring, inspection and intervention in the event of radiological emergency, which the Member States are to introduce in respect of practices entailing a risk of ionising radiation for the general public.

117 Secondly, the legal structure established by the EAEC Treaty with respect to health protection is not limited to setting out basic standards, but also comprises an important section relating to compliance with those standards and monitoring of the radioactivity of the air, water and soil.

118 The provisions of Chapter 3 of Title II of the EAEC Treaty form a coherent whole conferring on the Commission powers of some considerable scope in order to protect the population and the environment against the risks of nuclear contamination (see *Land de Sarre and Others*, paragraph 11, and *Commission v Council*, paragraph 79).

- 119 That, in particular, is the purpose of Articles 35 EA to 38 EA which, as the Court has observed on previous occasions, confer substantial powers on the Commission (*Commission v United Kingdom*, paragraph 35).
- 120 Article 35 EA thus requires the Member States to establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards.
- 121 Under the second paragraph of Article 35 EA, the Commission is given a right of access to those facilities in order to verify their operation and efficiency. Article 36 EA further lays down an obligation for the competent national authorities to communicate regularly to the Commission the information on the checks referred to in Article 35 EA, so that the Commission is kept informed of the level of radioactivity to which the public is exposed.
- 122 As mentioned in paragraph 47 of this judgment, the Commission did carry out checks at Temelín, pursuant to Article 35 EA, in 2004 and 2005.
- 123 As stated in paragraph 104 of this judgment, the purpose of Article 37 EA is to prevent the possibility of radioactive contamination of the water, soil or air of another Member State. Under that provision, the Commission must be provided with general data relating to any plan for the disposal of radioactive waste before such disposal is authorised by the competent authorities of the Member State concerned, in order to enable that Member State to examine the guidelines the Commission may give it, after consulting the group of experts, in detail and in circumstances such that the Commission's suggestions may be taken into account before the authorisation is granted.

- 124 The Court has previously emphasised the importance of the role played in this area by the Commission, owing to its unique overview of developments in the nuclear power industry throughout the territory of the Community (*Land de Sarre and Others*, paragraphs 12 and 13).
- 125 As stated in paragraph 48 of this judgment, on 24 November 2005 the Commission issued an opinion pursuant to Article 37 EA, in which it concluded that the implementation of the planned disposal of radioactive waste, in any form whatsoever, resulting from the modifications for the site of the Temelín nuclear power plant, is not such as to result, either in normal operation or in the event of an accident of the type and magnitude considered in the general data, in significant radioactive contamination from the point of view of health for the water, soil or airspace of another Member State.
- 126 Lastly, Article 38 EA gives the Commission, on the one hand, the power to make recommendations to the Member States with regard to the level of radioactivity in the air, water and soil and, on the other, in cases of urgency, to issue a directive requiring the Member State concerned to take, within a period laid down by the Commission, all necessary measures to prevent infringement of the basic standards and to ensure compliance with regulations. Should the State in question fail to comply with the Commission directive within the period laid down, the Commission or any Member State concerned may forthwith, by way of derogation from Articles 141 EA and 142 EA, bring the matter before the Court of Justice.
- 127 Thirdly, it must be remembered that both the European Atomic Energy Community and its Member States are parties to the Convention on Nuclear Safety, the objective of which according to Article 1(ii) is, inter alia, 'to establish and maintain effective defences in nuclear installations against potential radiological hazards in order to protect individuals, society and the environment from harmful effects of ionising radiation from such installations'.

- 128 In that regard, Article 15 of that convention provides that each Contracting Party is to take the appropriate steps to ensure that in all operational states the radiation exposure to the workers and the public caused by a nuclear installation is kept as low as reasonably achievable.
- 129 The preamble to that convention further states, in (iii), that ‘... responsibility for nuclear safety rests with the State having jurisdiction over a nuclear installation’, whilst Article 7(2) of the same convention states that each Contracting Party is to establish and maintain a legislative and regulatory framework comprising inter alia a system of licensing with regard to nuclear installations and the prohibition of the operation of a nuclear installation without a licence, a system of regulatory inspection and assessment of nuclear installations to ascertain compliance with applicable regulations and the terms of licences and measures for the enforcement of applicable regulations and of the terms of licences.
- 130 Fourthly, it must be borne in mind that, as observed in paragraphs 45 and 46 of this judgment, in the negotiations leading up to the accession of 10 new Member States to the European Union on 1 May 2004, the questions relating to safety at the power plants in those States, including the Temelín nuclear power plant, were evaluated by the Commission, which led to the drafting of Community recommendations for improvements to those reactors in order to bring them up to a level of safety comparable to that prevailing in the European Union for comparable reactors, the implementation of which has been monitored by the Commission and the Council.
- 131 It must also be borne in mind that, in the event of malfunction of the protection system introduced under the EAEC Treaty, the Member States have a number of remedies at their disposal for obtaining the corrections necessary in the circumstances.

132 First of all, Article 32 EA gives each Member State the right to request that the basic standards fixed be revised or supplemented in accordance with Articles 30 EA and 31 EA; the Commission is obliged to examine all such requests.

133 Next, under Article 142 EA, a Member State which considers that another Member State has failed to fulfil an obligation under the EAEC Treaty may bring the matter before the Court. In cases of urgency as described in Article 38 EA, the matter may even be brought before the Court immediately.

134 Lastly, like the corresponding provisions of the EC Treaty, Articles 145 EA to 149 EA provide for judicial review mechanisms concerning both the lawfulness of the measures taken by the Council or the Commission and cases where one of those institutions fails to take a decision, in breach of the EAEC Treaty.

135 In those circumstances, the Court finds that, if a Member State has enacted a domestic provision which, like Paragraph 364a of the ABGB, as interpreted by the national court, prevents an action for an injunction to prevent an actual or potential nuisance from being brought when the alleged nuisance originates from an officially authorised industrial installation, that Member State cannot, in principle, exclude from the scope of application of such a provision authorisations granted in respect of nuclear installations situated in other Member States by maintaining that such an exclusion is justified on grounds of protecting life, public health, the environment or property rights.

136 Such an exclusion disregards completely the fact that the Community legislative framework, as described in paragraphs 111 to 134 of this judgment and of which such authorisations form a part, contributes precisely and essentially towards ensuring such protection. That exclusion cannot be regarded as necessary for the purposes of protection and therefore cannot be held to satisfy the requirement of proportionality, either.

The obligation to interpret national law in a manner which ensures compliance with Community law

137 As evidenced by question 1(f), question 2(f), question 3(d) and question 4(c), the national court also asks what are the likely consequences of possible non-compliance with Community law of the interpretation currently applied by the national courts in relation to the legislation at issue in the main proceedings.

138 In that regard, it must be borne in mind that, according to settled case-law which has developed in relation to Article 10 EC, which is also applicable in respect of Article 192 EA, the duty imposed on Member States by those provisions to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of Community law is incumbent on all the authorities in the Member States, including, for matters within their jurisdiction, the courts. When applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law. Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereby on individuals, if necessary disapplying any provision if its application would, in the circumstances of the case, lead to a result contrary to Community law (see, inter alia, Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraphs 38 to 40).

139 In the light of all the foregoing, the answer to the questions referred is that the principle of prohibition of discrimination on grounds of nationality within the scope of application of the EAEC Treaty precludes the application of the legislation of a Member State, such as that at issue in the main proceedings, under which an undertaking in possession of the necessary official authorisations for operating a nuclear power plant situated in the territory of another Member State, may be the subject of an action for an

injunction to prevent an actual or potential nuisance to neighbouring property emanating from that installation, whereas undertakings having an industrial installation situated in the Member State where the action is brought and in possession of an official authorisation may not be the subject of such an action and may only be the subject of a claim for damages for harm caused to a neighbouring property.

¹⁴⁰ By way of further answer, it is for the national court to give, in so far as possible, to the domestic legislation which it must apply an interpretation which complies with the requirements of Community law. If such an application in accordance with Community law is not possible, the national court is bound to apply Community law in full and protect the rights it confers on individuals, and to disapply, if necessary, any provision in so far as application thereof, in the circumstances of the case, would lead to a result which is contrary to Community law.

Costs

¹⁴¹ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. The principle of prohibition of discrimination on grounds of nationality within the scope of application of the EAEC Treaty precludes the application of the legislation of a Member State, such as that at issue in the main proceedings, under which an undertaking in possession of the necessary**

official authorisations for operating a nuclear power plant situated in the territory of another Member State, may be the subject of an action for an injunction to prevent an actual or potential nuisance to neighbouring property emanating from that installation, whereas undertakings having an industrial installation situated in the Member State where the action is brought and in possession of an official authorisation may not be the subject of such an action and may only be the subject of a claim for damages for harm caused to a neighbouring property.

- 2. It is for the national court to give, in so far as possible, to the domestic legislation which it must apply an interpretation which complies with the requirements of Community law. If such an application in accordance with Community law is not possible, the national court is bound to apply Community law in full and protect the rights it confers on individuals, and to disapply, if necessary, any provision in so far as application thereof, in the circumstances of the case, would lead to a result which is contrary to Community law.**

[Signatures]