

# LEGAL REGULATION OF RELATIONS REGARDING THE NUCLEAR FUEL SUPPLY TO THE EUROPEAN UNION COUNTRIES

DOI 10.18572/2410-4396-2019-4-82-86



**Babich Sergey A.**

Postgraduate Student of the Department  
of Energy Law of the Kutafin Moscow State Law University (MSAL)

■ [Lab.kenergy@msal.ru](mailto:Lab.kenergy@msal.ru)

*Currently, legal regimes of trafficking of nuclear materials in Russia and the EU countries differ significantly. These differences can be attributed to the main legal risks to be considered by Russian nuclear fuel exporters in their foreign trade activity.*

*Authorizing such bodies as the European Commission and Euratom Supply Agency to actually define the structure of the European market for nuclear materials under the pretext of necessity to ensure an equal and non-discriminatory access to nuclear power industry resources also opens up wide opportunities for a protectionism policy and imposing limitations on non-European suppliers of nuclear materials. The Agency exercises its powers and through these powers the policy stated in the Corfu Declaration in relation to new contracts for the nuclear materials supply to the Community. However, a probability exists that these powers can be applied also to contracts and agreements concluded by nuclear products consumer companies prior to their country's becoming a member of the Community.*

*It seems that if statutory requirements for licensing operations in the field of nuclear energy use and an efficient system for monitoring nuclear materials relocation (including transborder relocation) are in place, a state would be able to provide consumers with an uninterrupted and sufficient supply of nuclear products without recurring to the above more sophisticated mechanisms of legal regulation.*

**Keywords:** *energy law; nuclear law; legal regulation of relations regarding the nuclear fuel supply; European Union's energy law.*

**A**s V.V. Romanova justly notes, nuclear law is one of the most developed institutes of energy law [1]. While numerous aspects of legal regulation in the field of nuclear energy use are the subject of legal studies [2], there are many aspects of legal regulation remaining worth

attention and detailed analysis. The European Union countries represent a strategically important market for Russian nuclear fuel producers. The European Union countries are home to 7 nuclear power plants built according to Soviet design projects (reactors of the WWER type) with most

fuel for them supplied by Russian nuclear industry companies. While legal regimes of trafficking of nuclear materials in Russia and the EU countries differ significantly due to the fact that the European Union countries consuming Russian nuclear industry's products are members of such a large-scale geopolitical body as the European Union and this membership limits the states' independence in foreign trade. Accordingly, these differences (specific features) can be attributed to the main legal risks to be considered by Russian nuclear fuel exporters in their foreign trade activity.

The European system of legal regulation of nuclear material circulation is based on the European Atomic Energy Community (Euratom) Treaty, as initially signed by France, FRG, the Netherlands, Belgium, Luxembourg, and Italy, in effect since January 1, 1958 [3]. The new European community (hereinafter referred to as "Euratom", the "Community") was established to encourage peaceful use of nuclear energy, to provide the Euratom members' control over the nuclear power industry, and to form a common energy policy and coordinated decision making. [4]

One should start studying regulatory issues of the nuclear fuel supply to European countries with the voluntary waiver of the Euratom Treaty signatories of the right of ownership of nuclear materials: according to Article 86 of the said treaty, special fissile materials are the property of the Community, Euratom. Euratom's right of ownership extends to special fissile materials which have been produced or imported by Euratom member states, persons, or undertakings of member states. In exchange for that "sacrifice", the said states, persons, and undertakings are granted the unlimited right to use and consume special fissile materials which have properly come into their possession and also enjoy an equal and non-discriminatory access to nuclear resources based on a common supply policy administered by a special body, the Euratom Supply Agency, established for this purpose (Articles 52 and 87 of the said Treaty), and its role in the general system of nuclear materials market regulation is worth a detailed analysis.

The Agency has been granted a legal identity and financial autonomy for the purposes of performing its functions. On behalf of the Community, the Agency records relocations of special fissile materials in special accounts and also enjoys rather wide

powers, including, first of all, the Agency's exclusive right to enter into agreements (contracts) with their principal aim being the supply of ores, source (raw) materials and/or special fissile materials (import to or export from the Community countries), as well as the privileged right to buy ores and, raw and other materials produced within the Community. The above exclusive right of the Agency to enter into nuclear materials supply agreements is exercised in practice by the Agency's co-signing the corresponding supply contract as a third party or the Agency's refusal to sign the same (in this case, the contract will not take effect) [5]. And only if the Agency is not able to satisfy the demands of European buyers for nuclear materials supply, such suppliers may be granted the right to enter into a direct supply contract for the term of up to one year (with a renewal option) (Article 66 of the Euratom Treaty).

On the one hand, such an exclusive status provides efficient satisfaction of all needs of nuclear products consumer companies due to distribution of materials received thus ensuring an uninterrupted operation of nuclear power plants located in the Community. On the other hand, it makes the Agency the main player in the domestic and, more importantly for Russian suppliers, foreign nuclear materials markets.

Granting the Agency such considerable powers is justified by the very purpose of its establishing, namely exercising the policy of an equal and unprivileged access to the nuclear materials supply for all Community's market participants, as well as ensuring a secure (uninterrupted) provision with nuclear materials for internal needs of the Community. The said powers are also supported by judicial interpretation: according to the European Court's judgement, the Agency has been granted a broad discretion when determining what is necessary for securing supplies and, accordingly, what option to choose when making a decision. [6]

Despite the fact that Euratom was seemingly "brought beyond the European Union's framework" [8] with the Treaty of Lisbon taking effect [7], it preserved the system of institutes in common with the European Union: for example, the European Commission, which replaced the Euratom Commission in 1967 [9] as a governing body, is a supervisory body for the Agency with the right to veto the its resolutions.

At the same time, the European Commission is also authorized to regulate the nuclear materials market: all nuclear materials supply contracts with the duration of 10 years or more, as well as all contracts with their subject being nuclear materials exports from the territory of the Community require a mandatory preliminary approval of the European Commission (Article 60 of the Euratom Treaty).

Authorizing such supranational bodies as the European Commission and Euratom Supply Agency to actually define the structure of the European market for nuclear materials under the pretext of necessity to ensure an equal and non-discriminatory access to nuclear power industry resources also opens up wide opportunities for a protectionism policy and imposing limitations on non-European suppliers of nuclear materials.

According to the European Energy Security Strategy published in May 2014 [10], Russia is recognized to be the main competitor of the European market participants in the sphere of nuclear fuel production. Based on traditional European concerns about the dependence on Russian energy resources, the said strategy points out that special attention should be paid to investment projects in the field of constructing nuclear power plants within the European Union using non-European technologies in order to rule out the dependence of such plants' operators on Russian fuel suppliers: nuclear fuel supply diversification possibility must be a condition precedent of any investment projects in this field, and securing the compliance with that requirement is the task of the Agency. Besides, the 'portfolio of fuel supply' of all nuclear power plant operators requires diversification as well [11].

In this case, it should be noted that the ideological basis for the policy of limiting the growth of the Russian suppliers' share on the European nuclear materials market had been laid long before the European Energy Security Strategy was published. In 1994, in response to the allegedly failed negotiations with Russian authorities to limit the flow of cheap natural and enriched uranium, that threatened the stability of the Europe's industrial sector and, in particular, the production base of Europe's enrichment companies, the European Council and European Commission had to adopt the so-called Corfu Declaration, a political declaration of the Community member countries (a non-formal act)

named after the place where the representatives of the member countries gathered and reached an agreement regarding the main principles of the future policy in regard to limiting the share of foreign suppliers in the European nuclear materials market (island of Corfu). By adopting the Declaration, the signatories aspired to prevent a tangible reduction of the European suppliers' market share (maintained at 80% in 1991–1993) caused by the low-enriched uranium imports of Russian origin to the Community countries and possibly threatening their viability as nuclear materials suppliers. The Agency was also entrusted with administering that policy, but its actions are unofficial in most cases: European energy companies planning to initiate bidding for the nuclear materials supply are always well aware of the Agency's position and even hold preliminary consultations with its officials, which practically almost rules out the necessity for the Agency to exercise its right to veto contracts for the nuclear materials supply to the Community member countries [12].

The Agency exercises its powers and through these powers the policy stated in the Corfu Declaration in relation to new contracts for the nuclear materials supply to the Community. However, a probability exists that these powers can be applied also to contracts and agreements concluded by nuclear products consumer companies prior to their country's becoming a member of the Community.

According to Article 105 of the Euratom Treaty, its provisions do not cover the contracts concluded before January 1, 1958 (or, for acceding states, before the date of their accession to the Community) by a member state, person, or undertaking, provided the fact of conclusion of such contracts was communicated to the Community not later than 30 days after the corresponding date (hereinafter also referred to as "earlier contracts"). Accordingly, the Agency's powers should not extend to cover such contracts either. But the Euratom Treaty stipulates that its provisions can be applied to such contracts subject all of the following conditions:

the contract was concluded in the period from March 25, 1957 (date of signing the Euratom Treaty) to January 1, 1958 (the Euratom Treaty's effective date), or from the date of the respective country's signing documents on the accession to the Community or before the date of the official accession;

the European Court of Justice, ruling on an application from the Commission, found that one of the decisive reasons on the part of either of the parties in concluding the contract was the intention to evade the provisions of the Euratom Treaty (Article 105 of the Euratom Treaty).

The European Commission refused to dispute the inapplicability of the Euratom Treaty to earlier contracts [13] in accordance with the above mechanism, however, in practice, situations may occur where even contracts entered into before March 25, 1957, are sighted by the Agency attempting to review their terms.

The attempts to extend the Euratom Treaty provisions to cover earlier contracts may be caused by the lack of regulatory criteria delimiting nuclear materials regular supplies performed during the period starting from January 1, 1958, but within the framework of earlier contracts, and nuclear materials supplies performed under newly signed contracts. Based on the literal construction of Article 105 of the Euratom Treaty, it should be concluded that its provisions do not apply to contracts made before the Treaty's effective date. However, the Agency may also understand the term 'contracts' as amendments to earlier contracts for nuclear materials supply planned for the corresponding periods after January 1, 1958, and consider such agreements as governed by the Euratom Treaty.

The policy of limiting the growth of the Russian suppliers' share in the European nuclear materials market fits naturally within the overall picture of the political mood. However, it should be taken into account that the same Community member countries, who support the Corfu Declaration provisions, are also members of one more association, the World Trade Organization (WTO), which proclaims the most-favored-nation regime in trade for all WTO member countries as its main principle [14]. Such a regime stipulates that a party should offer conditions in trade, economy, and other fields not less favorable, than those that would have been offered to any other third country, or persons or legal entities of such country. Neither WTO's fundamental instruments (the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS)), nor the Euratom Treaty bring the nuclear materials trade beyond the general legal regulation within the WTO legal regulatory framework.

As referenced above, the Corfu policy's goal is to limit the growth of the Russian suppliers' share in the European nuclear materials market. The Russian Federation has been a WTO member since 2012 [15]. Despite the Corfu Declaration's goal formally contradicting the WTO's fundamental principles, and the fact that the Declaration's provisions are still in effect, the Russian Federation has not used mechanisms to appeal against the WTO member states' actions violating the GATT and GATS provisions. On the one hand, the explanation can lie in the informal nature (as noted above) of relations between nuclear materials consumer companies and the Agency, as related to the approval of the necessity and conditions of the materials supply to the territory of the Community, giving no formal ground to trigger protection mechanisms offered by WTO agreements. On the other hand, one should point out the possibility of the defendant state's using "loopholes" existing in the WTO's fundamental instruments, which is frequently used by parties in disputes within the WTO framework, particularly, the clause on the right of any WTO member country to take any action "which it considers necessary for protection of its essential security interests relating to fissionable materials or materials from which they are derived" (Article XXI b (i), GATT, and Article XIV bis 1b (ii), GATS); given the possibility of the recourse to that clause, initiating a dispute may be hopeless.

The described specific features of legal regulation of nuclear materials supply and, particularly, nuclear fuel supply to the territory of the Community countries are explained, as was already mentioned, by the supranational nature of the body uniting these countries, the European Union. As a part of one of the European Union's "pillars", the European Atomic Energy Community (Euratom) has been given an important mission of ensuring a sufficient and uninterrupted provision of the Community member countries with nuclear materials and regulating the general policy in the field of nuclear energy. For completing that mission, an efficient legal mechanism has been created to regulate the nuclear fuel circulation, and it differs significantly from the Russian system of legal regulation of transactions with such products.

It should be noted that, in opinion of the author of the article, the differences mentioned are not always justified from the legal point of

view. Particularly, the above deprivation of the Community member states of the right of ownership of nuclear materials for the exclusive benefit of the Community is seen as a redundant regulation instrument. Such a legal measure has no legal value per se and may be excluded from the European system of the nuclear materials market regulation, given another regulatory mechanism in the form of mandatory approval by the Agency of nuclear materials supply contracts, allowing achieving in full almost all goals of uniting the states into the European Atomic Energy Community. Here is an example from Russian practice: in accordance with Article 5 of the Federal Law On Nuclear Energy

Use, nuclear materials can remain the property of the Russian Federation or legal entities, while the foreign states' and foreign legal entities' right of ownership of nuclear materials, and nuclear material products imported to or purchased in the territory of the Russian Federation is also recognized. If statutory requirements for licensing operations in the field of nuclear energy use and an efficient system for monitoring nuclear materials relocation (including transborder relocation) are in place, a state would be able to provide consumers with an uninterrupted and sufficient supply of nuclear products without recurring to the above more sophisticated mechanisms of legal regulation. ■

#### References

1. Romanova V.V. Development Trends of Legal Regulation of Public Relations in the Energy Sector and the Tasks of Energy Law / V.V. Romanova // Works of the Institute of State and Law of the Russian Academy of Sciences. 2016. No. 6. P. 95–96
2. Problem issues and trends of legal regulation in the sphere of nuclear energy use. Moscow : Yurist Publishing House. 2017. 223 p.
3. Euratom Treaty. URL: <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/euratom-treaty>.
4. Consolidated version of the Treaty Establishing the European Atomic Energy Community // Official Journal of the European Union. 2012. Vol. 1. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012A/TXT&from=EN>.
5. Alehno I. Nuclear security of supply and the role of ESA / I. Alehno. 2016. URL: [https://ec.europa.eu/euratom/docs/September\\_2016\\_ESA\\_presentation\\_updated\\_data\\_AR\\_2015.pdf](https://ec.europa.eu/euratom/docs/September_2016_ESA_presentation_updated_data_AR_2015.pdf).
6. Case of Kernkraftwerke Lippe-Ems v Commission C-161/97 № C-161/97 P. URL: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=44530&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11212294> (Дело Kernkraftwerke Lippe-Ems v Commission C-161/97 № C-161/97 P. URL: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=44530&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11212294>).
7. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>.
8. Mescheryakova O.M. Treaty of Lisbon (the Reform Treaty) and the issue of the European Union structure. Mescheryakova O.M. // International Public and Private Law. 2015. No. 1. P. 12–16 (9. Merger Treaty. URL: <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/merger-treaty>).
10. Communication from the Commission to the European Parliament and the Council: European energy security strategy (COM (2014) 330 final of 28.5.2014. URL: <https://www.eesc.europa.eu/resources/docs/European-energy-security-strategy.pdf>).
11. Communication from the Commission to the European Parliament and the Council: European energy security strategy (COM (2014) 330 final of 28.5.2014. URL: <https://www.eesc.europa.eu/resources/docs/European-energy-security-strategy.pdf>).
12. Commission Decision of 6 October 2004 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3099 — Areva/Urenco), notified under document number C(2004) 3676 // Official Journal of the European Union. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0170&qid=1568821975898&from=EN>.
13. Euratom Supply Agency — Annual Report 2007
14. Luxembourg: Office for Official Publications of the European Communities. 2008. 36 p. URL: <https://ec.europa.eu/euratom/ar/ar2007.pdf>.
16. Article 1 of the General Agreement on Tariffs and Trade of 1994 // Annex to the Russian Federation Code. 2012. No. 37. Part VI.
17. Protocol on the accession of the Russian Federation to the Marrakesh Agreement establishing the World Trade Organisation of April 15, 1994 // Official web portal of legal information <http://www.pravo.gov.ru>, 23.07.2012