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Competition Law and the Nuclear Sector: 
An EU Outlook

by Miguel Sousa Ferro*

Competition law essentially aims at preventing harmful distortions of competition in the market which may be caused by agreements between companies, by the abusive behaviour of dominant companies, by structural changes in the market due to mergers or by state aid. However, often such practices and measures are actually necessary to render certain services viable, to obtain new or better products, to pursue other policies for the greater benefit of the collective, etc. Occasionally, this raises interesting issues in the nuclear sector.

This paper aims to provide European competition law practitioners with a summary of the leading legal issues and precedents in this domain, alerting them to relevant specifics. It also aims to introduce nuclear lawyers to the reality and potential of antitrust enforcement in this sector.

For the purposes of this paper, the “nuclear sector” shall be broadly defined so as to include any activity which, given its link to nuclear energy or to ionizing radiation, is (at least partially) subject to special regulation under nuclear law.

While many nuclear-related activities will not, in principle, require a special analysis beyond the usual parameters of competition law enforcement, others present distinct challenges to practitioners. Some of these challenges are specific to the European legal order and justify the restriction of the scope of this analysis to the European Union. That being said, the extensive harmonisation of the national competition law of member states, as well as the fact that national competition authorities are required to enforce EU competition law, makes it advisable to look simultaneously at European-wide and national antitrust enforcement.

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1. While beyond the scope of this paper, it should be noted that in some legal orders nuclear regulators may also be called upon to apply competition policy when issuing a licence or allowing the transfer of licences to operators. This was the case with the U.S. Nuclear Regulatory Commission for several years until 2000 – see, e.g. www.nrc.gov/reading-rm/doc-collections/news/2000/00-097.html.
The relationship between EU competition law and the nuclear sector remains somewhat shrouded in mystery – perhaps excessively so. The issue has been tackled to some extent in general works on competition law\(^2\) and energy law.\(^3\) As one would expect, research developed in the framework of nuclear forums has been more detailed.\(^4\) Yet, 53 years after the entry into force of the Treaty establishing the European Atomic Energy Community (EURATOM Treaty) and the Treaty establishing the European Economic Community (EEC Treaty), such basic issues as the extent of the applicability of competition law to the nuclear sector are still disputed. The attempt to understand the precise practical implications of the *lex specialis* nature of the EURATOM Treaty has led to further controversies concerning, in particular, the reconciliation of opposing primary law objectives. These issues shall be tackled in Sections 2 and 3.

Section 4 shall provide an overview of previous market definitions by European competition authorities in the nuclear sector so as to assist legal practitioners in the complex procedure of applying economic principles and methods to determine the extent of a market. This also serves as a list of the types of activities that have already been subject to antitrust scrutiny.

Finally, Sections 5 to 8 shall distinguish the precedents that relate, respectively, to anti-competitive agreements, abuse of a dominant position, merger control and state aid. It should be stressed that the national precedents indicated are by no means exhaustive.

1. **Applicability of competition law to the nuclear sector**

Today, it is nearly beyond dispute that competition law applies to the nuclear sector. This is confirmed by a growing consensus among doctrine, the practice of the European Commission and several


national competition authorities, which have repeatedly applied antitrust rules to the sector. Generally, if something constitutes an economic activity, it is subject to competition rules. Unless the specific activity may be deemed a service of general economic interest, nuclear activities tend to be economic in nature and are, therefore, fully subject to competition law.

At the EU level, for some time it was argued that since nuclear activities are governed by the Euratom Treaty, which does not include competition provisions, it should not be possible to apply the competition rules of the EC Treaty, now Treaty on the Functioning of the European Union (TFEU), to this sector. Those defending this interpretation pointed to the apparent general condition of lex specialis given to the Euratom Treaty by Article 106a(3) of the Euratom Treaty [previously Article 305(2) of the EC Treaty], according to which “the provisions of the [Treaty on European Union] and of the [TFEU] shall not derogate from the provisions of this Treaty”. Such a phrasing, however, requires a case-by-case analysis: only in the presence of a contradiction between provisions of both treaties can there be a derogation.

It now seems fair to consider it settled that the Euratom Treaty constitutes a lex specialis, and that EU competition rules shall apply to the nuclear sector as long as they are not derogated from by the Euratom Treaty. The European Commission has repeatedly taken up this position, and it seems to be the logical conclusion in light of general EU case law.5

It should be noted that each legal order may choose to exclude economic sectors from the scope of competition law. However, no such exclusion for nuclear activities exists at the EU level. Furthermore, while member states are free to adopt such an exclusion, the primacy of EU law in this domain [see Article 3 of Regulation (EC) 1/2003], together with the case with which case law finds an effect on trade between member states (triggering the mandatory enforcement of EU competition law), would, in practice, almost always limit the relevance of such a national exclusion to unilateral practices and national merger control.

The real question has become the precise extent of the applicability of competition law. When might the Euratom Treaty be considered to derogate from competition rules? The liberalisation of energy markets in the EU, with increased competition between member states and between different types of power generation, has made the issue of competitive restrictions or distortions within the nuclear sector all the more sensitive, bringing renewed attention to it. Public discourse has, for over a decade now, focused on the need to ensure a level playing field for the different energy sources. Some environmentalist groups, for example, seem to be exploring the possible use of competition law as a way of making nuclear energy economically unviable.

In order to tackle this issue, one should first identify the provisions of the Euratom Treaty which may potentially come into conflict with competition law:

- Chapter 6 of the Euratom Treaty regulates the supply of ores, source materials and special fissile materials, channelled through the Euratom Supply Agency. By establishing a common supply policy, subject to the principle of equal access, Article 52 of the Euratom Treaty effectively excludes such supplies from the normal scope of competition on the market, as far as demand is concerned, with a specific impact at the level of prices (see Section 4 of Chapter 6).6

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5. See, e.g. the general principle highlighted in: Case T-458/93 etc., ENU (1995) ECR II-2459, at [70]. See also the principles developed around the relationship between the ECSC and the EC Treaty, e.g. in Case T-27/03 etc., Reinforcing bars (2007) ECR II-4331.

6. The possibility of fixing prices, foreseen in Article 69(§1), has never been used by the Council.
• "Joint undertakings" established by a Council decision under Chapter 5, may benefit from any or all of the advantages foreseen in Annex III to the Euratom Treaty (such as exemptions from certain taxes and duties). 7

• Article 98 of the Euratom Treaty requires member states to "take all measures necessary to facilitate the conclusion of insurance contracts covering nuclear risks". 8

As can be seen from this summary, there is a rather limited number of cases where a practice coming under the scrutiny of EU competition law will (also) be regulated by potentially conflicting Euratom provisions. The potential for conflict between the two treaties is, in this author’s view, extremely limited. This makes the discussion of the precise extent of applicability of EU competition law to the nuclear sector a moot point in most situations.

However, potential conflicts abound at a different level, e.g. that of treaty objectives. While competition policy aims at enhancing consumer welfare and promoting the proper functioning of the internal market, the Euratom Treaty sets specific objectives which, as practice has shown, are not always favoured by antitrust rules. Article 1 of the Euratom Treaty entrusts the Community with "creating the conditions necessary for the speedy establishment and growth of nuclear industries". Article 2 states that the Community shall:

• promote research and ensure the dissemination of technical information; (…)

• facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community;

• ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels (…).

It is clear that competition rules may result in the prohibition of practices and measures which would favour the development and growth of the nuclear industry. What is less clear is whether such conflicts of objectives are relevant at the stage of determining the applicability of EU competition law to the nuclear sector. Answering this question requires a more in-depth look at the principle of lex specialis as it exists in the EU legal order.

This analysis will also allow us to tackle the issue raised by André Bouquet, according to which it is still open for discussion whether the applicability of EU competition law is excluded only in the case of conflict with the lex specialis (Euratom Treaty) or also when a given matter has been exhaustively regulated by the lex specialis. 9

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7. Certain types of investment projects in the nuclear sector must be notified to the Commission (Chapter 4), but the procedure is limited to information and discussion, the EU having no binding powers to influence such projects. Thus, it does not seem appropriate to include these provisions in a list of rules which may come into conflict with competition law provisions. The same is true for the regulation of the nuclear common market, which may be aided by, but which can hardly come into conflict with, competition law.

8. It also empowers the Council to adopt a directive on this issue – a competence which has, so far, remained dormant.

9. Bouquet, op. cit., 2010. The case law on exclusion of action by member states, due to exhaustive regulation by the EU, is not extendable to this analysis. While our discussion lies within a single legal order, that case law concerns the relationship between different legal orders, connected by transfers of sovereignty and the principle of conferral of powers.
It should be noted that the different founding treaties constitute a single, indivisible legal order, the reason for which general legal principles discussed while interpreting one treaty are also applicable to the interpretation of another.

It is established that “the [Euratom] Treaty constitutes (...) a lex specialis in derogation from the lex generalis represented by the EC Treaty”. However, this does not mean that EC (TFEU) provisions are inapplicable to Euratom activities. Indeed, the Court of Justice of the European Union (ECJ) has stated that, since the Euratom Treaty contains no specific provisions on dumping practices, “nothing excludes a priori the application, to the nuclear energy sector, of the antidumping provisions laid down by the EC Treaty”. This approach had already been followed in determining that EC (TFEU) rules on state aid and conclusion of external trade agreements are applicable to Euratom activities – a specific derogation would need to be identified to exclude their applicability.

Referring to the relation between the (expired) Treaty establishing the European Coal and Steel Community (ECSC Treaty) and the EC Treaty, based on the same wording of Article 305 of the EC Treaty [now Article 106a(3) Euratom], the court equally stated that “the ECSC Treaty constituted a lex specialis derogating from the lex generalis of the EC Treaty”. That being said, “in so far as matters were not the subject of provisions in the ECSC Treaty or rules adopted under it, the EC Treaty and the provisions adopted for its implementation could (...) apply to products covered by the ECSC Treaty”. It is important to note that the court’s use of the expression “matters” referred not to encompassing the same facts, but to regulating the same legal issue (e.g. rules on anti-competitive agreements between companies or merger control).

No example could be found of lex specialis analysis by the ECJ or by the General Court of the European Union focusing on general objectives, rather than specific provisions, whose content could run counter to that of lex generalis provisions. Unless there is a situation which “special legislation

12. ENU, at [70].
16. Article 30 of the 1969 Vienna Convention, on conflicts of laws, uses the expression “subject matter” in this same sense.
(…) specifically seeks to regulate”,18 even if in a merely implicit manner, there can be no discussion of a relation of lex specialis.19 This is implied in the principle that “any general rule (…) may be limited or excluded – according to the principle that a special rule derogates from the general rule (lex specialis derogat legi generali) – where there are special rules governing specific matters”.20

Clearly, the identification of a special rule of the Euratom Treaty which may exclude the applicability of EU competition law in a given sector must take into account the “wording and the broad logic”21 or the “spirit and purpose of the rule”22 in question. Yet this is not to say that a general treaty objective (without being associated to a specific provision) may be used as grounds for inapplicability of EU competition law.

This interpretation is also the most consistent with the existence of the subsidiary competence clause (Article 203 of the Euratom Treaty), which allows the Euratom Community to adopt rules on an issue whenever it feels they are required for the pursuit of a treaty objective for which provision has not otherwise been made.

As for Bouquet’s reference to situations of “exhaustive regulation”, it is preferable to view the discussion in the following terms: provisions pursuing identical objectives and regulating the same matters, but presupposing different conditions in their scope (one of these sets of conditions being more specific), will necessarily be in a relation of lex specialis / lex generalis.23 This was the case with the ECSC rules on competition and state aid, but it does not occur with the Euratom Treaty.24 It is extremely unusual for a relation of lex specialis to exist between sets of rules that partially regulate the same sets of facts, but do not pursue the same objectives or regulate the same matter. An explicit or implicit contradiction must be found, such as to render it illogical to ever apply the general rules in question to those facts whenever they come under the scope of the special rules.

No general derogation (relation of lex specialis) exists if the different provisions can be found to be complementary, as pursuing different objectives without excluding or annulling each other.25 In other words, when different matters are being regulated, in the absence of an abstract and necessary contradiction, independent of specific circumstances, the lex specialis principle is not called into play, and instead we are faced with a – fairly common – situation of two sets of rules pursuing different

objectives in the same situation. The best known example of such a situation arising in the enforcement of EU competition law was the Wouters case which will be further discussed below.

Finally, while attempting to identify Euratom provisions which derogate from EU competition law, it is important to keep in mind that, to the extent that the Euratom Treaty would constitute "a lex specialis in derogation from the lex generalis represented by the EC Treaty (...) the terms used to delimit its scope must be given a strict interpretation". 26

In light of the above, it would seem that, aside from practices effectively excluded from the scope of competition by Chapter 6 (which are not as numerous as it may appear), and of Annex III advantages granted to joint undertakings, no other Euratom provisions are such as to generally and necessarily run counter to the applicability of competition law. Other provisions (such as Article 98), as well as general objectives, may be relevant for the enforcement of competition law, as discussed in the following section, but do not affect its applicability in abstract terms.

2. Opposing policies

Occasionally, the enforcement of competition law in the nuclear sector may run counter to the pursuit of other EU objectives or policies, maxime facilitating the development and growth of the European nuclear sector and guaranteeing safety and security of nuclear fuel supplies.

Unlike U.S. antitrust law, with its less formal rule of reason approach, EU competition law does not easily allow for the consideration of advantages outside the sphere of competition policy.

In principle, an anti-competitive agreement is only allowed if it meets the requisites of Article 101(3) of the TFEU. 27 Article 102 of the TFEU, on abusive unilateral conducts, does not even contain an exemption clause, even though the possibility of "economic justification" has been raised. In merger control, the only criterion for authorisation or interdiction of an operation is whether it will significantly impede effective competition. State aid may only be allowed if it falls under one of the exceptions [Article 107(2) and (3) of the TFEU], including "facilitating the development of certain economic activities or of certain economic areas".

Despite this general framework, some authors have suggested that the Commission's approach in the nuclear sector essentially seems to exclude competition rules whenever they run counter to Euratom objectives, it being unclear if this is done as a consequence of the lex specialis principle or on other grounds. However, the Commission's practice is interpreted differently here.

Of all Commission antitrust decisions in the nuclear sector, only two have discussed this issue, while the remaining make no mention of conflicting Euratom objectives.

The 2001 nuclear insurance pool cases are sometimes given as an example of primacy of Euratom objectives. However, the Commission's authorisation of those pools was based on the

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27. Any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
conclusion that, without such co-operation, there would be no market. It was logically impossible for the insurance pools to restrict competition on a market that would otherwise not exist. The solution was thus found exclusively within the realm of antitrust, and the approach is by no means exclusive to the nuclear sector.

In 2003 and 2006, in UK state aid cases, the Commission affirmed that, whenever issues fall within the scope of both the Euratom Treaty and EU competition law, they must be “assessed accordingly. However, to the extent that they [the practices or measures in question] are not necessary for or go beyond the objectives of the Euratom Treaty or distort or threaten to distort competition in the internal market, they have to be assessed under the EC Treaty”. 28 The only conclusion that can be drawn from this statement is that the Commission realises that it may have to analyse certain measures or practices under the provisions of both treaties, and that there may be conflicts between their objectives.

In both cases, the envisaged measures would contribute to several Euratom objectives. 29 However, while the 2003 Decision also mentioned the conformity with Euratom objectives in its conclusion, 30 the Commission’s analysis followed the usual method of enforcement of state aid rules (including the applicable guidelines), independently from those objectives. It found that there were state aid measures and authorised them only because they could be exempted under Article 107(3)(c), 31 subject to a range of conditions.

The 2006 case stands alone as the dubious example of enforcing a Wouters approach in this sector. 32 The decision contains statements both indicating and excluding this approach. It seemingly affirmed the parallel and autonomous enforcement of Euratom and state aid rules (rather than subordination of the latter to Euratom): “Insofar as this aid is in line with the objectives of the Euratom Treaty and does not affect competition to an extent which is contrary to the common interest, the measure in question is compatible with the common market”. 33 However, the Commission also stated that it considered “that the distortion of competition resulting from the measure (...) is outweighed by the positive contribution of the measure on the achievement of the Euratom Treaty objectives”. 34 Incidentally, it would seem that alternative solutions, exclusively within the realm of antitrust were


30. C 52/03, at [489].

31. Idem, at [306] and [489].

32. In Wouters (Case C-309/99, Wouters (2002) ECR 1-1577), the ECJ was asked whether EU competition law prevented the Dutch Bar Council from prohibiting Dutch lawyers from entering into partnerships with non-lawyers (e.g. accountants). The Court considered that such a prohibition was a decision of an association of undertakings which restricted competition. Typically, therefore, it would be caught by Article 101(1) of the TFEU, and could only be allowed if it met the requisites of Article 101(3). However, rather than applying those requisites, the Court found that the decision was not illegal, because it was necessary for the pursuit of overriding objectives (in this case, ensuring that the ultimate consumers of legal services and the sound administration of justice were provided with the necessary guarantees in relation to integrity and experience). In other words, the Court recognised that policy objectives outside the sphere of competition policy can occasionally justify exemptions from competition law.


34. C 39/2004, at [192], [206], [213], [217] and [223].
available.\textsuperscript{35} The internal contradictions in the decision and the non-discussed expansion of the \textit{Wouters} principle to the field of state aid cast doubts on the relevance of this precedent.

In short, only once has the Commission (seemingly) set aside competition law because its enforcement would run counter to Euratom objectives. More often, the Commission has devoted careful attention to finding competitive justifications for practices or measures which appeared anti-competitive, but were useful to pursue Euratom objectives.

It is well known that, under the \textit{Wouters} case law, even if a measure or practice is forbidden by EU competition law, that interdiction may be lifted by its necessity in order to pursue an overriding objective, which ultimately brings greater benefits to consumers or citizens,\textsuperscript{36} subject to proportionality (the \textit{Wouters} principle). However, this seldom enforced principle has only been applied openly to restrictive practices by undertakings. It is unclear whether the court would accept its invocation in the context of merger control and, even more so, of state aid rules. Furthermore, the Commission’s significant discretionary margin (even if larger under some provisions than others) renders the use of the \textit{Wouters} exception superfluous. In other words, the Commission will always have a way of authorising restrictive practices without the need to invoke \textit{Wouters}. Indeed, the \textit{Wouters} principle surfaced and is primarily geared as a mechanism of defence for the addressees of Commission decisions.

3. Relevant market definitions

Defining the relevant market is absolutely crucial to the enforcement of competition law. Regardless of the practice in question, be it agreements, unilateral practices, mergers or state aid, the effects on competition and consumer welfare cannot be fully understood without defining the market. In addition, because the economic criteria underlying market definition are identical, a market definition in the framework of one type of practice may be a useful precedent in a case concerning another type.

Competition authorities often hesitate to give clear market definitions in individual decisions, so as not to limit their analysis in subsequent cases. Furthermore, previous market definitions do not constitute legally binding precedents, nor should they since the circumstances of a specific case rarely repeat themselves, and the mere passage of time may change the characteristics of a market. That being said, it is useful to have a clear idea of the way competition authorities have tackled market definitions in the nuclear sector so far.

The following relevant markets have been considered by the European Commission and national competition authorities, although not always with a precise definition or discussion (it should be noted that some of these market definitions overlap and contradict each other):

- production, supply and distribution of electricity (including nuclear power);\textsuperscript{37}
- operation of licensed nuclear sites;\textsuperscript{38}

\textsuperscript{35} C 39/2004, e.g. at [209]-[212], [216], [221]-[222].


\textsuperscript{37} Scottish Nuclear (IV/33.473), (1991) O.J. L178/31; IVO/Stockholm Energi (M.1231), (1998) O.J. C288/4; EDF/British Energy (M.5224) (2008). Many other cases have apparently also dealt with companies active in this market, including nuclear power generation, but did not specifically address this sector. At the EU level see, e.g., cases M.1346, M.1659, M.1673, M.1720, M.2349, M.2414 and M.4110.

\textsuperscript{38} See infra the British Nuclear Management Partners Limited case.
• provision and management of fuel assemblies used in advanced gas cooled reactors/separate markets for manufacture and supply of nuclear fuel assemblies for boiling water reactor (BWR) and for pressurised water reactor (PWR) power plants (European Economic Area [EEA], with tendency to become worldwide),\(^{39}\)

• fuel route support services for individual advanced gas-cooled reactors (AGR),\(^{40}\)

• separate nuclear fuel procurement services: procurement of uranium (worldwide), conversion services, enrichment services and fuel assembly services for PWR power plants (EEA),\(^ {41}\)

• nuclear fuel supply (worldwide) and management of spent fuel,\(^{42}\)

• nuclear fuel supply, specifically enriched natural uranium, enriched depleted uranium and down blended Highly Enriched Uranium (HEU) with a 3-6 % content of U-235 (EU scope or wider; MOX as a separate product market),\(^ {43}\)

• oxide fuels reprocessing services (Europe-wide, with a tendency for globalisation),\(^ {44}\)

• nuclear decommissioning market (apparently national),\(^ {45}\)

• sodium circulators for commercial reactors,\(^ {46}\)

• engineering and field services for operating nuclear power plants (apparently worldwide),\(^ {47}\)

• design and manufacture of products for the “nuclear island” (apparently worldwide),\(^ {48}\)

• instrumentation and control systems for nuclear power plants (EEA-wide, with tendency to become worldwide),\(^ {49}\)

• market for sites for nuclear new build (national or smaller)\(^ {50}\)

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40. See infra the British Babcock International/Strachan & Henshaw case.

41. EDF/British Energy.

42. Tractebel/Synatom (M.466), (1994) O.J. C185/0.


45. See infra the British Babcock International / Strachan & Henshaw case.


48. Areva/Urenco.

49. Framatome/Siemens/Cogéma/JV; Areva/Urenco.
• production and marketing of radioactive products (for research, medical applications etc.);\textsuperscript{51}
• production of radiopharmaceuticals;\textsuperscript{52}
• co-insurance for nuclear installations;\textsuperscript{53}
• uranium mining (worldwide);\textsuperscript{54}
• production of radiation measuring instruments (with possible further subdivisions; national scope);\textsuperscript{55}
• production of special leaded glass for nuclear industry and medical radiology (national scope);\textsuperscript{56}
• various services for nuclear submarines.\textsuperscript{57}

4. Anti-competitive agreements and their exemption

Until recently, the European Commission had never initiated a case under Article 101 of the TFEU in the nuclear sector. This changed with the ongoing investigation in the Areva/Siemens case.\textsuperscript{58} Of particular concern to the Commission in the future, in the enforcement of Article 101 of the TFEU, may be the conclusion of long-term energy supply contracts to end-users.\textsuperscript{59}

On the other hand, the Commission has already dealt with agreements in the nuclear sector under the notification mechanism [to benefit from an exemption under Article 101(3) of the TFEU] that existed before Regulation (EC) 1/2003:

• United Reprocessors:\textsuperscript{60} exemption granted subject to conditions;
• KEWA:\textsuperscript{61} exemption granted;
• GEC/Weir:\textsuperscript{62} exemption granted;

\textsuperscript{50} EDF/British Energy.
\textsuperscript{51} Amersham Buchler (IV/30.517), (1982) O.J. L314/34.
\textsuperscript{52} See infra the Spanish Radio pharmaceuticals and Grupo J. Uriach cases.
\textsuperscript{53} See infra the Hungarian Atom Pool case.
\textsuperscript{54} RTZ/CRA (M.660), (1996) O.J. C22/10.
\textsuperscript{56} See infra the French Special leaded glass case.
\textsuperscript{57} See infra the British Babcock International/Devonport Management case.
\textsuperscript{58} Areva/Siemens (COMP/B-1/39736) (see Press Release IP/10/655).
\textsuperscript{60} United Reprocessors GmbH.
\textsuperscript{61} KEWA.
\textsuperscript{62} GEC-Weir Sodium Circulators.
- Amersham: exemption granted;
- Scottish Nuclear: exemption granted;
- Scottish Nuclear/British Nuclear Fuels: closed with a "comfort letter"; and
- national nuclear insurance pools: closed with a "comfort letter" (no restriction).

There are also relevant national precedents:

- Hungarian Atom Pool case: exemption granted to a co-insurance agreement between the Hungarian insurers to cover the material damages of nuclear installations and the associated liability losses.
- French special leaded glass case: infringement of Article 101 of the TFEU and national equivalent – the exclusive distribution agreement between PSG (manufacturer of special leaded glass for the nuclear industry and medical radiology) and ADH Technologie prohibited passive sales to foreign clients.
- Spanish radioactive materials case: Spanish competition authorities and courts have handled at least one case concerning anti-competitive agreements between manufacturers of radiopharmaceuticals.

5. Abuse of a dominant position

So far, no case has ever been decided at the EU level on abuse of a dominant position in the nuclear sector. Nonetheless, the ongoing investigation in the Areva/Siemens case deals inter alia with alleged infringements of Article 102 of the TFEU.

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63. Amersham Buchler.
64. Scottish Nuclear.
65. Scottish Nuclear/British Nuclear Fuels.
69. Case 563/03 "Radioactive Materials" ("Materiales Radioactivos") of the former competition authority – e.g. the Tribunal de Defensa de la Competencia – of 22 July 2004 which condemned Nucliber, S.A., Amersham Health, S.A., Tyco Healthcare Spain, S. L. and Schering España, S.A. for price fixing with a fine of EUR 250 000 each. Appeals before the Audiencia Nacional (Court of Appeal) all of which were dismissed: cases no. 454/2004 (Schering España S.A.), 466/2004 (Tyco Healthcare Spain S.L.), 467/2004 (Amersham Health S.A.) and 468/2004 (Nucliber S.A.); Appeals before the Tribunal Supremo (High Court), all of which were successful and led to the annulment of the TDC’s Decision 563/03: cases No. 3556/2007 (Nucliber S.A.) and 315/2008 (Tyco Healthcare Spain S.L.).
70. Areva/Siemens (COMP/B-1/39736) (see Press Release IP/10/655).
At the national level, this provision has already been invoked before the Swedish competition authority, in relation to an alleged abuse by Vattenfall. In 2007, the authority concluded that the legal requirements for an infringement were not met, but recommended a state imposed modification of the market’s structure.

The Spanish radioactive materials case, referred to above, also dealt with infringements of the national equivalent of Article 102. However, in its decision, the Tribunal de Defensa de la Competencia (TDC) did not condemn the parties for an abuse of dominant position. Also in Spain, the radiopharmaceuticals case, before the Comisión Nacional de Competencia, of 16 January 2008,\textsuperscript{71} did not lead to a finding of abuse of a dominant position.

There has been at least one example of use of Article 102 in national litigation relating to the nuclear sector.\textsuperscript{72}

Aside from the issue of what may constitute an abuse, it may be difficult in many cases to conclude that there is a dominant position on the relevant market, considering some of the existing precedents of market definition. Nonetheless, in certain countries, and in certain segments of the nuclear sector, it certainly remains true that “markets are typically highly concentrated and with few market participants, [making] it … highly likely that market power and dominance exist in the nuclear sector”.\textsuperscript{73}

6. Merger control

The following merger cases (quoted above) involving the nuclear sector have been decided at the EU level:

- Tractebel/Synacom: compatible;
- RTZ/CRA: compatible;
- Elsag Bailey/Hartmann & Braun AG: compatible;
- Westinghouse/Equipos Nucleares: compatible;
- IVO/Stockholm Energi: compatible;
- Framatome/Siemens/Cogéma/JV: compatible, as modified;
- Areva/Urenco: compatible, with commitments and obligations;
- Westinghouse/Toshiba: compatible, with commitments; and
- EdF/British Energy: compatible, with commitments.

\textsuperscript{71} Case No. 628/07.

\textsuperscript{72} Petition for referral of preliminary ruling to the ECJ, in a case before the Swedish Supreme Administrative Court (1999), which did not refer the case and concluded against an infringement of Article 102 of the TFEU (www.nea.fr/html/law/mb/Nlb-64/casalaw.pdf).

\textsuperscript{73} Garzaniti, \textit{op. cit.}, 2008, p. 1246.
Only in the UK was one able to identify precedents of national merger control specifically dealing with the nuclear sector. The first case mentioned is of particular interest due to its political relevance and the adaptation of usual competition law concepts to fit a specific nuclear regulatory reality:

- **Nuclear Management Partners Limited case:**\(^{74}\) NMPL acquired all the share capital of Sellafield Limited (SL) so as to take over the management of the decommissioning of Sellafield. The Office of Fair Trading (OFT) considered this was not a merger, as SL was not an “undertaking”. This conclusion was based primarily on the idea that the purchase of SL did not involve the transfer of a particular turnover-generating business activity, nor the increased potential to explore additional activities. SL merely had to conclude its obligations under its contract with the Nuclear Decommissioning Authority. Yet it seems debatable whether the same conclusion would have been reached if the legal form of the transaction had not been chosen merely because of nuclear regulatory restrictions (instead of the management contract generally used for these purposes).

- **Babcock International/Strachan & Henshaw case:**\(^{75}\) no substantial lessening of competition.

- **Babcock International/Devonport Management case:**\(^{76}\) no substantial lessening of competition.

- **Centrica/British Energy:**\(^{77}\) no substantial lessening of competition.

7. **State aid**

One author has summed up the Commission’s approach to state aid in the nuclear sector as follows: “in practice, (...) when a certain subsidy is necessary for the objectives of the Euratom Treaty, it will not be prohibited under the EC Treaty”.\(^{78}\)

The European Commission has looked at state aid in the nuclear sector in the following cases:

- **UK re-organisation of electricity generation and distribution:** state aid authorised,\(^{79}\)

- **German reserves for nuclear power plant decommissioning:** not state aid (justified by nature or general scheme of the German tax system),\(^{80}\)

- **Aid in favour of British Energy I:**\(^{81}\) no objections raised;

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74. OFT, Decision ME/3858/08, of 22 October 2008.
75. OFT, Decision ME/3650/08, of 2 July 2008.
76. OFT, Decision of 20 August 2007.
77. OFT, Decision ME/4133/09, of 7 August 2009.
78. Bouquet 2008, p. 1203. The European Nuclear Energy Forum is expected to present shortly a recommendation for EU action on the clarification of specificities of EU state aid rules when applied to the nuclear sector.
80. Case NN 137/01; upheld on appeal (*Stadtwerke Schwäbisch Hall*).
• Aid in favour of British Energy II: aid authorised with conditions;

• UK Nuclear Decommissioning Authority, aid authorised with conditions;

• Tax exemptions for Ignalina nuclear power plant: no objections raised;

• Coface guarantee for the building of a Framatome nuclear power plant: not state aid;

There has been at least one example of national litigation relating to the nuclear sector under reference to EC state aid rules, but which did not result in a decision by European institutions.

A specific concern in this domain that has recently been raised is whether certain national options concerning nuclear liability, especially state participation in compensation mechanisms, may come into conflict with EU state aid rules (particularly considering Article 98 Euratom). Another complex area for the enforcement of state aid rules is the funding of decommissioning measures.

8. Conclusion

This paper has argued that EU competition law is fully applicable to activities within the nuclear sector, *lato sensu*. The large number of EU and national precedents of antitrust enforcement in this domain leaves little room for doubt.

Although the Euratom Treaty is a *lex specialis* in relation to the TFEU, specific derogations must be identified in order to exclude the applicability of TFEU provisions. Apart from practices effectively excluded from the scope of competition by Chapter 6, and of Annex III advantages granted to joint undertakings, no such derogations exist, in general and abstract terms, in the Euratom Treaty.

On the other hand, while it is theoretically possible to set aside competition rules when their enforcement runs counter to overriding objectives, under the *Wouters* case law, there has been only one example in Commission practice where this option was taken in the nuclear field. Interestingly, this occurred in state aid control, where the validity of a *Wouters* approach has not yet been tested before the court.

In the rare cases where a clash between antitrust and Euratom objectives may occur, it is preferable to see the Commission continue its well established approach of finding justifications for those practices or measures strictly within the realm of antitrust. Such an approach would avoid the legal uncertainty that would necessarily arise from the use of a *Wouters* style approach that has yet to consolidate or even be tested in some areas of competition law.

82. Case C 52/2003.