

# **Most actual developments in the nuclear liability law in the European Union**

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# Where do we stand now with the nuclear liability in the European Union (1)

Most of the “old” (pre-2004) member states are contracting parties to the Paris Convention.

Most of the “new” (post-2004) member states are contracting parties to the 1963 Vienna Convention.

Most, but not all of the contracting parties to the Paris Convention are contracting parties to its companion convention, the 1963 Brussels Supplementary Convention (BSC).

Only some of the contracting parties to the Paris Convention are contracting parties to the Joint Protocol relating to the Application of the Vienna Convention and Paris Convention (1988 Joint Protocol) which provides a link between the Paris Convention and the 1963 Vienna Convention; on the contrary, all member states that are contracting parties to the 1963 Vienna Convention are at the same time contracting parties to the 1988 Joint Protocol.

Some “new” member states have joined the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (1997 Vienna Protocol), and only two member states have actually ratified it.

Very few member states have signed the 1997 Convention on Supplementary Compensation for Nuclear Damage (1997 CSC) and only one has ratified it.

Most of the “old” member states have signed the 2004 Protocol to amend the Paris Convention (2004 Paris Protocol) and of those, most have signed the 2004 Protocol to amend the Brussels Supplementary Convention (2004 BSC Protocol).

## Where do we stand now with the nuclear liability in the European Union (2)

The 15 “old” member states of the Community are parties to the following conventions:

**Paris Convention only:** Greece, Portugal

**Paris Convention and BSC:** Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, the United Kingdom.

**1988 Joint Protocol:** Denmark, Finland, Germany, Greece, Italy, the Netherlands, Sweden.

**2004 Paris Protocol:** Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom have signed this instrument; none has yet ratified it.

**2004 BSC Protocol:** Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden and the United Kingdom have signed this instrument. Only Spain has ratified it.

Austria, Ireland and Luxembourg stand outside the legal framework created by the international conventions.

**Member states after the 2004 and 2007 enlargements (“new” member states):**

**1963 Vienna Convention:** Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and the Slovak Republic.

**1997 Vienna Protocol:** Czech Republic, Hungary, Latvia, Lithuania, Poland and Romania have signed this instrument and only Latvia and Romania have ratified it.

**1988 Joint Protocol:** Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia are party to this Protocol.

**1997 CSC:** Only Romania has ratified this instrument which is not yet in force.

**Paris Convention and BSC:** Only Slovenia<sup>14</sup> has acceded to these instruments.

**2004 Paris Protocol and 2004 BSC Protocol:** Only Slovenia has signed these instruments.

Cyprus and Malta stand outside the legal frameworks created by these international conventions.

Existing nuclear liability regimes and sub-regimes in force in the 27 Member States as of January 2010

	EC Member State	Peacefull use of nuclear energy	PC 1960	BSC 1963	VC 1963	JP 1988	VP 1997	CSC 1997	PP 2004	BP 2004
1.	Austria		☞	☞						
2.	Belgium	℞	☑	☑		☒			✂	✂
3.	Bulgaria	℞			☑	☑				
4.	Cyprus									
5.	Czech Republic	℞			☑	☑	☒	☒		
6.	Denmark		☑	☑		☑			✂	✂
7.	Estonia				☑	☑				
8.	Finland	℞	☑	☑		☑			✂	✂
9.	France	℞	☑	☑		☒			✂	✂

10.	Germany	R	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
11.	Greece		<input checked="" type="checkbox"/>						<input checked="" type="checkbox"/>	
12.	Hungary	R			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
13.	Ireland									
14.	Italy	*	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
15.	Latvia				<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
16.	Lithuania	R			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
17.	Luxembourg		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>						
18.	Malta									
19.	Netherlands	R	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
20.	Poland	*			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
21.	Portugal		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	
22.	Romania	R			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
23.	Slovakia	R			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>				
24.	Slovenia	R	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
25.	Spain	R	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

26.	Sweden	☞	☑	☑		☑			☞	☞
27.	United Kingdom	☞	☑	☑	†	☒			☞	☞

### Explanations:

- PC 1960 : The Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 as amended by the Protocol of 1964 and by the Protocol of 1982.
- BSC 1963 : The Brussels Convention Supplementary to the Paris Convention of 1963 as amended by the Protocol of 1964 and by the Protocol of 1982.
- VC 1963 : The Vienna Convention on Civil Liability for Nuclear Damage of 1963.
- JP 1988 : The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 1988.
- VP 1997 : The Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage of 1997.
- CSC 1997 : The Convention on Supplementary Compensation for Nuclear Damage of 1997.
- PP 2004 : The 2004 Protocol to Amend the Paris Convention of 1960.
- BP 2004 : The 2004 Protocol to Amend the Brussels Convention Supplementary to the Paris Convention of 1963.
- ☞ : State using nuclear energy (peacefull use of nuclear energy).
- ★ : Political statements regarding starting a nuclear program in the future have been made currently.
- ☞ : Convention signed, but never ratified (state expressed clear unwillingness towards ratification).
- ☒ : Convention signed, but not ratified yet.
- ☑ : Convention signed and ratified.
- ☞ : Convention signed and ratification process is pending.
- ☞ : On 9 November 2001, the "rtikle" General of the IAEA received a notification of termination of application of the Vienna Convention from the Republic of Slovenia. Pursuant to "rtikle XXV (2), the Convention ceased to apply to Slovenia as of 12 November 2002.
- † : Originally, Spain and the United Kingdom had signed the VC 1963, but later, both countries ratified the PC 1960.

## Some problems arising from the „nuclear liability patchwork“ in the European Union

Due to **different liability limits and variations in the availability of supplementary funds** to cover nuclear damage, an inequality can be observed between claims for nuclear damage under the Paris/Brussels and Vienna regimes respectively. Victims in member states party to the Paris Convention and the BSC can rely on a financial capacity of SDR 300 million while financial capacities are rather lower for victims in member states party to the 1963 Vienna Convention. Because of the trans-boundary impact of nuclear accidents, victims in the “old” member states are disadvantaged in that there is no guarantee that their damages, caused by a nuclear incident in a “new” member state, will be compensated.

Furthermore, **different prescription periods** imply that in the case of a nuclear incident, victims in different member states will have different time periods within which to bring their claims.

Nuclear power plant operators are in different positions with respect to liability amounts, the amount they must financially secure and the time period for which they can be held liable. The **existence of different provisions on additional state compensation and state guarantees** makes these divergences even more complex.

Neither the Paris Convention nor the Vienna Convention address **liability for environmental damages** caused by a nuclear accident, while the 1997 Vienna Protocol, as well as the 2004 Paris Protocol have modified the definition of “nuclear damage” to cover certain environmental damage. This suggests that, depending on progress made in the ratification process, an *environmental nuclear liability patchwork* will be established in addition to the already existing differences.

# The European Commissions' view on the existing nuclear liability patchwork

Communication from the Commission to the Council and the European Parliament - Nuclear Illustrative Programme presented under Article 40 of the Euratom Treaty\*

*“Liability for nuclear accidents in the EU-15 member states is governed by the Paris Convention of 1960, which created a harmonised international system on liability for nuclear accidents, currently limiting the liability to operators in case of nuclear accidents to around EUR 700 million. The Vienna Convention, another arrangement on the same subject but linked with the Paris Convention by a Common Protocol of 1988 (creating a joint regime with mutual recognition of the two Conventions), is applicable in the majority of the ten new member states. The Commission is aiming at harmonising the nuclear liability rules within the Community. An impact assessment will be started to this end in 2007.*”

*In order to finalise and improve the proposals already made, the discussion should notably focus on developing a harmonised liability scheme and mechanisms to ensure the availability of funds in the event of damage caused by a nuclear accident”.*

The European Economic and Social Committees' Opinion of 12 July 2007\*

*“A harmonised liability scheme, including a mechanism to ensure the availability of funds in the event of damage caused by a nuclear accident without calling on public funds, is in the view of the EESC also essential for greater acceptability of nuclear power. The current system (liability insurance of EUR 700 million) is*

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\* COM (2006) 844 final.

\* O.J. 27 October 2007, C 256, pp. 51-61.

*inadequate for this purpose. The insurance problem of an extremely low probability of an accident combined with potentially very serious and costly damages needs to be addressed in an open, constructive and practical way. One possibility could be an insurance pool scheme”*

### **EC Commissioner for Energy**

The Commissioner for Energy, *Andris Piebalgs*, expressed the following thoughts during a speech in Brussels on 3 October 2007:

*“Finally, on nuclear liability, as noted by the European Economic and Social Committee in its Opinion on the Commission’s Nuclear Illustrative Programme, a harmonised liability scheme, including a mechanism to insure the availability of funds in the event of damage caused by a nuclear accident is essential to the long-term acceptability of nuclear power. Third party liability for nuclear damage does also fall within the scope of the Euratom Treaty. In its early years, the Community chose to rely on the OECD’s Paris Convention on nuclear liability as a common basis of an insurance and compensation regime in its member states. Since the 2004 enlargement, many new member states rely on the IAEA’s Vienna Convention for their nuclear liability regimes. The co-existence of two major third party nuclear liability regimes with several subregimes does not guarantee the same level of compensation for nuclear damage everywhere within the Community”.*

## The 2007 Questionnaire on „nuclear liability patchwork“ in the European Union

The European Commission's activity in the field of nuclear liability moved forward in December 2007 when it commissioned solicitors to prepare a questionnaire, a so-called *Impact Assessment Study* (Gomez Acebo Legal Study) which was then sent out to member states, industries and others within the Community.

Following options have been presented in the questionnaire:

- **Preservation of the status quo:** Under this scenario, 13 member states would remain party to the Paris Convention, 9 member states would remain party to 1963 Vienna Convention and 5 member states would remain outside the existing convention regimes.
- **Harmonisation through ratification of the Paris Convention revised by the 2004 Paris Protocol (together referred to as the “revised Paris Convention”) by all member states.**
- **Partial harmonisation of the nuclear liability framework:** A partial harmonisation could be reached if the 9 contracting parties to the 1963 Vienna Convention would join the revised Paris Convention and the 13 contracting parties to the Paris Convention would ratify the 2004 Paris Protocol. However, 5 member states would still remain outside the convention framework.
- **Euratom as a contracting party to the revised Paris Convention.**
- **European Nuclear Liability Directive.**

Originally classified as an „impact analysis“, it was later re-classified among “legal studies” commissioned by the European Commission. Finally, the study was published on 1 December, 2009, described as merely a legal report. This was not approved in any way by the European Commission and should not be relied upon as a statement of Commission views (thereinafter “Gomez Acebo Legal Report” (referencing the Spanish Law Firm that prepared it)). The Questionnaire was later reclassified on legal study, not intended to have any legal implications for the future. The outcomes have been published in December 2009.

# Re-thinking Euratom competencies in the field of nuclear liability

The most recently published Gomez Acebo Legal Study again opens the discussions on powers of the European Atomic Energy Community, arising from **Article 98 EuratomT**. The Gomez Acebo Legal Study points out that Article 98 EuratomT manifestly contains an *obligation to act* upon the Community.

However, the Gomez Acebo Legal Study clearly shares the interpretations already presented by the authors in the early 1960s, which means that the powers of the European Atomic Energy Community are restricted on areas of insurance contracts. The study called for a rather wider scope of directive (pursuant to the Article 98 EuratomT) than the initial draft proposed by the European Commission in 1959. Basically, the following areas have been identified to be covered by future legislative initiatives in this field; essentially, uniformity in the rules:

- a. for claims-handling procedures and exchange of information between the nuclear insurers of different Member States in the event of a nuclear accident;
- b. on the initiation and termination of nuclear third party liability insurances;
- c. on the obligations of operators to notify the risks of their installations to the insurer, periodically pay insurance fees and take measures to prevent or attenuate possible damages;
- d. on the rights of inspection and information of the insurers;
- e. on the obligations of the insurer in the event of a nuclear accident;
- f. on the subrogation of the rights to reclaim;
- g. on the consequences of terminations for the applicable insurance fees;
- h. on sanctions of operators that do not comply with their obligations under the insurance contract;

- i. implementing the non-discrimination principle between victims outside and inside the installation state throughout the European Union;
- j. for the interplay between private insurances and 2nd tier state intervention, in line with EC competition law; and
- k. filling out of the concepts of insurable damages and exclusions, irrespective of whether they are applicable to all member states or not in the light of the progress on the revisions of the Paris and Vienna Conventions;

Another source of competence in the area of nuclear liability is found in **Article 203 EuratomT**, which reads as follows:

“If action by the Community should prove necessary to attain one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

The fact is that the use of competencies arising from this provision, in relation to the issues of nuclear liability, has never been discussed in the past. The most recent Gomez Acebo Legal Study points to this provision as a promising source for powers in the field of nuclear liability

## Perspectives of the future development

Taking the most recent developments into account, further involvement of European legislation into the matters of nuclear liability is to be expected during the coming period. All most recent statements agree the existing nuclear liability “patchwork” presents a considerable challenge for both legislators and industry stakeholders. However, proposals dealing with the existing situation are rather different. Those opposing any regulation through means available under the Treaty argue that a further development of nuclear liability must be realised within the framework of existing treaties in order to reach a global nuclear liability model. Therefore, the 1988 Joint Protocol is identified by the supporters of this development as a tool to reconcile the legal authority of the European Union.

However, after the Gomez Acebo Legal Report pointed out the obligation of the Community to act, pursuant to the Article 98 EuratomT, it can be expected that a regional European authority will be created to at least address concerns over rules for facilitating nuclear insurance contracts. The Nuclear Insurance Directive is to be proposed by the European Commission, which in the coming period will create a unique opportunity for Euratom to face the issues of nuclear liability.

A broader range of legislative involvement of the Community (in principle based cumulatively on Article 2 (g) and 203 EuratomT) will surely be the subject of further discussions. Having lessons in mind from the area of oil pollution liability, one could expect that even an initiative from the European Commission might lead to speeding the process of ratifying existing multilateral treaties. Basically, it could also support accession to the 1988 Joint Protocol in those member states that are currently not party to this instrument.

