

The Relation of the EU Law and the Nuclear Liability Legislation: Possibilities, Limits and Mutual Interaction¹

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Abstract: *The authors of the paper deal with the legal relations of nuclear liability in their narrow meaning, i.e. specifically they deal with the civil law relationships for the nuclear damage caused by the nuclear incident that are, due to their specific character and potential cross-border consequences, regulated by a regulation of international law. The emphasis is in the paper put on questions of potential application and limits of the European Union (“EU”) legislation, represented by the Regulation Brussels I that is applicable to legal nuclear liability relations (eventually, their procedural aspects by application of this right by legitimate subjects) and connected by mutual relationships between the Regulation and international nuclear liability conventions as well as questions of definition of concrete rules setting the jurisdiction of courts in matters of nuclear damage compensation where the Regulation Brussels I may be applicable. An attention is given also to the question of potential application of the Regulation Rome II to legal relationships of nuclear damage compensation and to the legal relationships that are closely connected with the nuclear damage compensation, though these are not directly regulated by international nuclear liability conventions.*

Key Words: *Nuclear Liability Legislation; Nuclear Liability Regimes; International Nuclear Liability Conventions; Regulation Brussels I; Regulation Rome II; the European Union Legislation.*

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Nuclear liability regimes in a brief outline

The historical roots of the legal regime of liability for nuclear damage go back to the 1960s when there were parallel established two legal regimes. This established a “double track” in the nuclear liability law. These two legal regimes were established by the two basic nuclear liability conventions.

The Vienna regime² is represented by the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter as the “Vienna Convention”). It is an open system with a “worldwide applicability”. It enables all states to accede without any restrictions. The Paris regime³ is represented by the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982 (hereinafter as the “Paris Convention”),⁴ that is open only for the OECD member states and they are entitled, due to their membership in the Convention, to accede to international treaties that were initiated by the International Atomic Energy Agency.⁵

Both these conventions are based on the principle of civil liability of the operator of a nuclear installation that bears a full and exclusive liability for the nuclear damage.

Half a century of the existence of these first generation conventions needed to be adapted to new conditions. This was especially due to the development of nuclear industry and the consequences of the Chernobyl

² The contracting states of the Vienna Convention and also the members of the “Vienna liability regime” are Argentina, Armenia, Belarus, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Chile, Croatia, Cuba, Czech Republic, Egypt, Estonia, Hungary, Jordan, Kazakhstan, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Montenegro, Niger, Nigeria, Peru, Philippines, Poland, Moldova, Romania, Russian Federation, Vol. Vincent and the Grenadines, Saudi Arabia, Senegal, Serbia, Slovakia, Macedonia, Trinidad and Tobago, Ukraine, and Uruguay.

³ The contracting states of the Paris Convention and also the members of the “Paris liability regime” are Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Turkey, and United Kingdom (Switzerland ratified the Paris Convention in 2009, however, in the version as amended by the Protocol (2004); as a consequence the Paris Convention will become effective in Switzerland together with the Protocol (2004)).

⁴ 1960 *Paris Convention on Nuclear Third Party Liability* [Paris Convention] [online]. 2014 [cit. 2014-08-18]. Available at: https://www.oecd-nea.org/law/nlparis_conv.html.

⁵ KOSNÁČOVÁ [NOVOTNÁ], M. Občianskoprávna zodpovednosť za jadrovú škodu v práve EÚ. *International and Comparative Law Review*. 2004, roč. 4, č. 11, p. 35. ISSN 1213-8770.

disaster. The discussions have also shown that there is a need to extend the liability of the operator of nuclear equipment which was shown as undersized. The changes and amendments of the first generation conventions also concerned the concept of the damage to be compensated as the current extent has been shown inadequate as well as the extension of period for application of the right to damage compensation (its extension due to the health injuries).⁶

The result was the revision of the nuclear liability regimes – in relation to the Vienna regime the Protocol in 1997 was adopted (Protocol (1997)) and in relation to the Paris Convention the protocols which amended the Paris Convention and Brussels Convention were adopted in 2004 (Protocol (2004)).

Another area that was of interest of the international community was the creation of public funds of which aim was compensation of nuclear damages in cases where the operator of the nuclear equipment, as a liable entity, would not compensate the damage. As a result of these efforts, the Convention on Supplementary Compensation for Nuclear Damage from 1997 was adopted. This is considered to be an independent convention which does not belong either to the Vienna regime or the Paris regime. Accession to the Convention on Supplementary Compensation for Nuclear Damage is not bound to any of these regimes and all the states participating either in the Vienna regime or the Paris regime may accede to this Convention. This convention is supported especially by the USA that ratified it in 2008. The USA supports its adoption by the states belonging to the US sphere of interest (due to the fact that the Convention reflects the needs and economic interests of the US nuclear industry).⁷ More than quarter a century from the adoption of this convention it has not still become valid. This leads to a disappointment as many expectations were connected with this convention.

⁶ Compare with NOVOTNÁ, M. and J. HANDRLICA. *Zodpovednosť za jadrové škody: Výzvy pre medzinárodnú a národnú zodpovednostnú legislatívu v post-fukushimskom období*. 1. vyd. Bratislava: Veda, vydavateľstvo Slovenskej akadémie vied, 2011, p. 76. ISBN 978-80-224-1218-6.

⁷ NOVOTNÁ, M. and J. HANDRLICA. *Zodpovednosť za jadrové škody: Výzvy pre medzinárodnú a národnú zodpovednostnú legislatívu v post-fukushimskom období*. 1. vyd. Bratislava: Veda, vydavateľstvo Slovenskej akadémie vied, 2011, p. 87. ISBN 978-80-224-1218-6.

Participation of the European Union in the field of nuclear liability law

European Union and its member states as contracting parties of the nuclear liability conventions?

As this paper deals with the nuclear liability, an important issue to deal with is the relations between international nuclear liability legislation and the EU law. May the European Union, that has a status of a supranational community, in accordance with the Article 216 (1) TFEU which regulates the implicit external competence of the EU, participate in any of the nuclear liability regimes by accession to any of the conventions of the first or second generation? The answer in this case would be negative. The parties to these conventions may only be the sovereign states. This fact thus excludes supranational organizations from accession to these conventions.⁸ This is the ground why the EU may not become a part of this nuclear liability regime (i.e. a contracting party of any of these conventions). This possibility is only reserved to states, including the EU member states.

The secondary question is the accession of the EU member states to the nuclear liability regime. This question is more complicated as it is necessary to take into account more facts – temporal factor, i.e. time of accession to a convention and, on the contrary, the time of accession of a member state to the EU. Material factor, i.e. what is the content of the nuclear liability conventions.

Status quo of the EU member states and their nuclear liability regime is not homogenous. Ten EU member states are party to the Vienna Convention (Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia) and thirteen EU member states are party to the Paris Convention (Belgium, Finland, Greece, France, the Netherlands, Germany, Spain, Sweden, the United Kingdom, Italy, Denmark, Portugal, and Slovenia).

Some EU member states do not take part in any international regime (Austria, Ireland, Luxembourg, Cyprus, and Malta). These states either adopted their own national legislation independent from the interna-

⁸ HANDRLICA, J. and M. NOVOTNÁ. Európska únia a Protokol z r. 1997, ktorým sa dopĺňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. *Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

tional regimes or they rely on the universal tort law and generally applicable conflict of law rules.

A part of this revised regime of the Vienna Convention, as amended by the Protocol (1997) (effective as from 2003), are Latvia, Poland, and Romania (the Czech Republic, Hungary, Italy, and Lithuania signed the Protocol but have not ratified it yet).

Protocol (2004) that revised the Paris Convention was signed on February 12th, 2004, on behalf of the European Community by all the EU member states that are the party of the Paris Convention. However, the Protocol (2004) has not become effective yet.

With respect to the Convention on Supplementary Compensation for Nuclear Damage from 1997 (not yet effective) may be said that Romania is the only EU member state that ratified this convention.

The membership in the EU significantly restricts the freedom of its member states to act independently in the accession to international agreements that are eligible to influence the applicability of the EU law in this area, i.e. those laws that are regulated by the EU law. In addition, the EU itself also enters into some areas, including the liability relations of nuclear law.

Normative activity and other forms of the EU actions relating to material and procedural aspects of nuclear liability

The material scope of the nuclear liability conventions is applicable both to material regulation of conditions of establishment the liability for damage caused by a nuclear incident as well as to procedural regulation of setting the jurisdiction of the court that is competent to deal with the nuclear damage compensation as well as with connected issue of recognition of such court decisions.

With respect to the material aspects of nuclear liability it is necessary to note that the nuclear liability has not been regulated by any legal act of the EU law. Not any EU legislation has been adopted yet that would regulate concrete matters of nuclear damage liability and its compensation or that would be contrary to current or potential future nuclear liability legislation.

One of the reasons of the missing EU legal regulation (despite the current efforts of the EU to cover the nuclear liability regime by the sin-

gle EU secondary legislation) is the scope of competences of the EU in this area.

Although some publications about the nuclear law refer to articles 98 and 203 of the Treaty Establishing the European Atomic Energy Community (“EURATOM Treaty”), the competence of the EURATOM in this area is not explicitly established.

An explicit interpretation of Article 98 of the EURATOM Treaty is that it only regulates adoption of a directive regulating conclusion of insurance contract that cover the nuclear risks. Despite the relatively closely specified field of application that could fall within the relevant directive, interpretation of this article becomes broader and some authors suggest that it is also applicable to an area of nuclear liability.

The purpose of the Article 203 of the EURATOM Treaty is to enable the European Atomic Energy Community (“EURATOM”) to act if the EURATOM does not have an explicit competence to act, but adoption of certain act is necessary to attain the objectives of the EURATOM Community (this article has an equivalent in Article 352 TFEU). If the Article 203 of the EURATOM Treaty is used, unanimous decision of all member states in the Council is required. However, it is still questionable if the requirement of the necessity of the objectives of the EURATOM is achieved.⁹

Despite the disputable character of the EU competence in the area of material aspects of nuclear damage compensation, the procedural aspect of setting the court competence and the conditions of recognition and enforcement of the court decision fall within the EU competence.

From this point of view, the competence of the EU in the area of nuclear liability is clearly identified in accordance with the Article 81 (2) TFEU. This article enables the European Parliament and the Council to adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring the mutual recognition and enforcement between member states of judgments and of decisions in extrajudicial cases (the competence of the EU in the justice cooperation).

Due to the EU competence in the area of enforcement and recognition of decisions in civil and commercial matters represented by the Regulation Brussels I that is overlapped with the procedural regulation of the

⁹ HANDRLICA, J. and M. NOVOTNÁ. Európska únia a Protokol z r. 1997, ktorým sa dopĺňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. *Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

conventions regulating the nuclear liability, it is clear that the states are not entitled to accede to these conventions without an authorization of the EU institutions.

On the contrary, as the EU itself cannot participate in an international regime of the international nuclear liability law, it enters into this area in a way that the EU authorizes its member states to accede or to ratify specific international conventions. In such an authorization the EU must explicitly specify the relation of the EU law to the regime established by the international convention.¹⁰

The EU issued two authorization decisions concerning the international liability regime of nuclear law.

The first authorization decision No. 2004/294/EC authorized the member states that participate in the Paris regime of nuclear liability to ratify the Protocol that amended the Paris Convention or to accede to the Paris Convention. This authorization decision obliged¹¹ the member states that were parties to the Paris Convention¹² to ratify or accede to the Protocol that revised the original Paris Convention. The obligation to ratify or to accede to the revised Paris Convention is, however, not applicable to Austria, Ireland, Luxemburg, and the non-nuclear states that were not in the past or are currently not the contracting parties of the Paris Convention in its original or amended version.

The second authorization decision No. 2013/434/EU was adopted in 2013 in relation to the Vienna nuclear liability regime. It authorizes specific EU member states, in the interest of the EU, to ratify the Protocol that amends the Vienna Convention or to accede to this Convention and to make a declaration on application of relevant internal rules of the EU.¹³ This authorization decision, unlike the former, only authorizes (i.e.

¹⁰ HANDRLICA, J. and M. NOVOTNÁ. Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. *Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

¹¹ Compare article 1 of the authorization decision to the Protocol (2004): "Without prejudice to the Community's powers, the Member States which are currently Contracting Parties to the Paris Convention *shall* (highlighted by the authors) ratify the Protocol amending the Paris Convention, or accede to it, in the interest of the European Community."

¹² Belgium, Finland, France, the Netherlands, Germany, Spain, Sweden, United Kingdom, Denmark, and Italy.

¹³ Protocol (1997) interferes with its procedural provisions into the exclusive competence of the EU in its jurisdiction competence and the competence of enforcement and recognition of decisions. Due to this fact the ratification or accession to the protocol must be authorized by the EU.

enables, but not obliges)¹⁴ the member states to which it is addressed (the Slovak Republic, Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, and Poland) to ratify the Protocol from 1997 that amended the Vienna Convention from 1963.

We will deal with the relation of these authorization decisions to the EU law in section “The relation of the EU and the EU legislation to the Protocols 2004 and 1997” of this study.

Regulation Brussels I and its relation to international nuclear liability conventions

Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)¹⁵ (hereinafter as “Regulation Brussels I”) is the outcome of the so-called communitarization of international private law. Its characteristic feature is that the member states lose their competence to conclude international treaties regulating the competence, enforcement, and recognition of decisions and to enter into obligations that may interfere the application of the EU law in this area.¹⁶

After the Regulation Brussels I was adopted, the EU has acquired an exclusive competence in the area of judicial cooperation and enforcement of decisions. Member states were thus revoked the competence to enter

¹⁴ The original proposal of the authorization decision imposed the member states an obligation to ratify or to accede to the Protocol. The change of the wording was influenced by the significant reservations of the member states concerning several of its provisions, including the proposed obligation to accede the revised nuclear liability regime represented by the Protocol (1997). For further information relating to the original proposal of the authorization decision and its potential impacts see HANDRLICA, J. and M. NOVOTNÁ. *Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občiansko-právnej zodpovednosti za jadrové škody z r. 1963. Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

¹⁵ The regulation Brussels I will be replaced (as from January 10th, 2015) by the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12th, 2012, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

¹⁶ NOVOTNÁ, M. and J. HANDRLICA. *Zodpovednosť za jadrové škody: Výzvy pre medzinárodnú a národnú zodpovednostnú legislatívu v post-fukushimskom období*. 1. vyd. Bratislava: Veda, vydavateľstvo Slovenskej akadémie vied, 2011, p. 299. ISBN 978-80-224-1218-6. Similarly HANDRLICA, J. The Brussels I Regulation and Liability for Nuclear Damage. *Nuclear Law Bulletin: No. 86* [online]. 2010, no. 2, p. 30 [cit. 2014-08-18]. ISSN 0304-341X. Available at: <https://www.oecd-nea.org/law/nlb/NLB-86-E.pdf>.

into international obligations that regulate the areas of laws with this exclusive EU competence.

Due to the fact that the original versions of both the Vienna Convention and the Paris convention, as well as their amended versions, contain specific rules on judicial competence, there is a conflict with the Regulation Brussels I. There is a double conflict: (i) conflict between the two sources of (ii) conflict between content of the provisions regulating the jurisdiction rules.

The aim of the nuclear liability legislation was to establish a regime of exclusive jurisdiction. According to the Article XI (1) of the Vienna Convention, the competence to deal the actions on compensation of nuclear damages have those courts where the nuclear incident occurred. This rule shall be applicable if the nuclear incident occurred in the territory of a state that is a party to the Vienna Convention. Similarly, the Article 13 (a) of the Paris Convention establishes the criterion for jurisdiction of courts, the place where the nuclear incident occurred.

Both, the Vienna Convention and the Paris Convention do not enable the remission (*renvoi*), i.e. reference to national legal order of the contracting member state. There is not any possibility for the contracting member states to modify the exclusive jurisdiction established by the Convention.¹⁷ If a plaintiff would sue a claim on a court of another contracting state, that court would not be able to decide the case because of the lack of competence.¹⁸

Unlike the exclusive competence which is typical for nuclear liability legislation, the Regulation Brussels I enables alternative delimitation of jurisdictions.

Article 2 of the Regulation Brussels I specifies the general rule for jurisdiction which means that persons domiciled in a member state shall be

¹⁷ HANDRLICA, J. and M. NOVOTNÁ. The Vienna Convention on Civil Liability for Nuclear Damage Revisited: Challenges for Updating the Czech and Slovak Legal Framework. *The Lawyer Quarterly*. 2013, vol. 3, no. 4, pp. 301-304. ISSN 1805-840X.

¹⁸ MAGNUS, U. Jurisdiction and Enforcement of Judgements under the Current Nuclear Liability Regimes within the EU Member States. In: N. PELZER, Hrsg. *Europäisches Atomhaftungsrecht im Umbruch*. 1. Aufl. Baden-Baden: Nomos, 2010, p. 111. ISBN 978-3-8329-5281-5.

sued in the courts of that member state,¹⁹ whatever their nationality. The Regulation Brussels I in its Article 5 (3) also regulates the alternative jurisdiction. According to this rule, in matters relating to tort, delict or quasi-delict,²⁰ it shall be sued in the courts of the place where the harmful event occurred or may occur. The case law of the EU courts interprets the *term place where the harmful event occurred* as a place where the damage occurred (i.e. the place where the damage happened) and at the same time the place where the event, of which consequence is the damage, occurred (i.e. the place where the damage happened).²¹

From the above mentioned it is clear that application of the Brussels I jurisdiction rules which enable the harmed person to opt several courts of member states, may lead to forum shopping. Despite some opinions refusing the negative connotations of forum shopping (due to harmonized standard of judicial proceedings in some EU member states) we cannot agree with application of this concept to nuclear liability cases.

The option of the harmed person to opt between several jurisdictions in cases of nuclear incident of greater extent or radioactive contamination during transport of nuclear material through the territory of more EU member states, would be in contradiction with the aims of nuclear liability legislation – i.e. concentration of the decisions on the right to damage compensation and elimination of broadly specified jurisdictional rules, and with this related forum shopping.

The conflict of the Regulation Brussels I with the nuclear liability conventions requires definitions of the Regulation Brussels I application in matters of nuclear liability enforcement, whether this regulation may be applicable in nuclear liability matters, and if the answer is positive, what would be the conditions for its application.

¹⁹ For the operators of the nuclear equipment who are natural persons, the domicile is on the territory of a member state where the registered seat, central administration or main place of business is.

²⁰ See *Athanasios Kalfelis v. Banque Schröder, Münchmeyer, Hengst & Co., and Others* [1988-09-27]. Judgement of the Court of Justice of the European Union, C-189/87, pp. 5579-5587; and *eDate Advertising GmbH v. X; and Olivier Martinez and Robert Martinez v. MGN Limited* [2011-11-25]. Judgement of the Court of Justice of the European Union, C-509/09 and C-161/10.

²¹ See *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S. A.* [1976-11-30]. Judgement of the Court of Justice of the European Union, C-21/76, pp. 1735-1749.

Material application of Regulation Brussels I in nuclear liability matters

Regulation Brussels I shall apply in civil and commercial matters. Both these terms are, however, not legally defined, but these terms have their autonomous interpretation. It is clear that application of Regulation Brussels I falls within the private law and legal relations of public law are excluded. Exclusion of public law relations does not mean that public administrative institutions are automatically excluded from application of Regulation Brussels I. These institutions are only excluded if they act as public institutions, i.e. if they act from the position of their power. However, if they act as a party to a private relation of a civil or commercial nature the Regulation Brussels I would be applicable. In this situation it is not important where the claim was applied,²² but what is the nature of the legal relation.

Due to the fact that legal nuclear damage relations (arising both from international as well as national legislations) may be characterized as non-contractual obligations of a civil-law nature characterized by legal channelling of the operator of nuclear equipment. This civil-law nature is a reason for application of the Regulation Brussels I to legal relations concerning the nuclear liability of the operator of nuclear equipment towards persons harmed by a nuclear incident.

The fact that operators of nuclear equipment may be the states or companies in which the states may have a majority, or natural persons where the states performs inspections, or the fact that operating of nuclear facilities underlies an approval procedure, may lead to a conclusion that the application of the Regulation Brussels I may be excluded in matters of nuclear damage liability (as there are significant public-law connotations of operating the nuclear facilities or there is an prevalence of public-law elements over private-law elements).

Regulation Brussels I does not provide an exact definition of relationships that fall within civil or commercial matters. Therefore, a very broad interpretation needs to be applied and to include into the *ratione materiae* all relations concerning the civil and commercial matters, except of those explicitly excluded by the Regulation Brussels I.

²² MAGNUS, U. and P. MANKOWSKI, eds. *Brussels I Regulation*. 2nd ed. Munich: Sellier, 2012, p. 55. ISBN 978-3-86653-142-0.

This procedure was also confirmed by the Court of Justice of the EU (“CJEU”) that was dealing with the application of the Regulation Brussels I in several cases.²³ The CJEU confirmed that the material applicability of the Regulation Brussels I is also applicable to relations where one party of the relation was the public-law entity and the other party was a private-law entity.²⁴ However, this was conditional to the character of action of the public-law entity, i.e. it shall act as a private entity in private-law relations. The criterion would not be the status of a public entity as state authority but the nature and character of the legal relation and the nature of laws applicable to this relation. It is also irrelevant if the public authority has a position of a plaintiff or a respondent.

If this was the interpretation, the application of Regulation Brussels I would be excluded due to the reason that there would not be civil or commercial matter in situation of performance of public functions.²⁵

Since operation of nuclear facilities does not fall within performance of public functions²⁶ (even if the nuclear facility is operated directly by the state or another public-law entity) and also due to the fact that the nuclear liability legal relations are of a private-law character, the application of the Regulation Brussels I would be applicable (unless it is excluded by Article 71 of the Regulation) also to determination of jurisdiction in cases of nuclear damage compensation.

²³ See *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976-10-14]. Judgement of the Court of Justice of the European Union, C-29/76, pp. 1541-1553; *The Netherlands State v. Reinhold Rüffer* [1980-12-16]. Judgement of the Court of Justice of the European Union, C-814/79, pp. 3808-3822; and *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* [1993-04-21]. Judgement of the Court of Justice of the European Union, C-172/91, pp. I-1990-I-2003.

²⁴ KOSNÁČOVÁ [NOVOTNÁ], M. Občianskoprávna zodpovednosť za jadrovú škodu v práve EÚ. *International and Comparative Law Review*. 2004, roč. 4, č. 11, p. 39. ISSN 1213-8770.

²⁵ Compare with *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976-10-14]. Judgement of the Court of Justice of the European Union, C-29/76, pp. 1541-1553; *Frahuil SA v. Assitalia SpA* [2004-02-05]. Judgement of the Court of Justice of the European Union, C-265/02, pp. I-1546-I-1557; and NOVOTNÁ, M. and J. HANDRLICA. *Zodpovednosť za jadrové škody: Výzvy pre medzinárodnú a národnú zodpovednostnú legislatívu v post-fukushimskom období*. 1. vyd. Bratislava: Veda, vydavateľstvo Slovenskej akadémie vied, 2011, p. 301. ISBN 978-80-224-1218-6.

²⁶ Compare with SANDS, Ph. and P. GALIZZI. The 1968 Brussels Convention and Liability for Nuclear Damage. In: *Reform of Civil Nuclear Liability: Budapest Symposium 1999*. 1st ed. Paris: Organisation for Economic Co-Operation and Development, 2000, p. 494. ISBN 92-64-05885-0.

Subsumption of nuclear liability relations under the material scope of Regulation Brussels I is also supported by the case law of the CJEU. The case law of the CJEU interprets the civil and commercial as autonomous terms, independent from legal orders of the member states and other legal acts issued within the judicial cooperation in civil matters – e.g. Regulation Rome II²⁷ that explicitly excludes the issues of nuclear damages from its application.²⁸

Relationship of the Regulation Brussels I and the Vienna Convention (1963) and the Paris Convention (1960)

The application of Regulation Brussels I to legal nuclear liability relations does not establish a conclusion on its application to all the relations underlying the EU jurisdiction. Since the nuclear liability conventions regulate independently the procedural jurisdictional rules and rules for recognition and enforcement of decisions, it is important to define their relation to the Regulation Brussels I and to define the source of law in a concrete situation in relation to procedural aspects of nuclear damages.

Article 71 of the Regulation Brussels I is important for specification of the relation of this regulation towards the Vienna Convention as well as the Paris Convention in the area of nuclear liability relations. In accordance with the Article 71 of the Regulation, this Regulation does not influence those conventions to which all the member states are contracting parties and which regulate the jurisdiction or recognition and enforcement of decision in specific matters. This provision thus excludes application of the Regulation to relations regulated by the conventions, as the EU member states are parties to these conventions and these conventions also regulate jurisdiction and recognition and enforcement of decision.

Discussions may be about the interpretation of the term “specific matters” as the Regulation does not specify this term. Specification of this term would thus be subject to interpretation of the Regulation.²⁹

²⁷ Article 1 (2) (f) of the *Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007-07-11]. Regulation of the Council of the European Union, No. 864/2007.

²⁸ HANDRLICA, J. Channelling of Nuclear Third Party Liability towards the Operator Jeopardised by the Brussels Regulation. *Czech Yearbook of Public & Private International Law*. 2011, vol. 2, p. 77. ISSN 1805-0565.

²⁹ MAGNUS, U. and P. MANKOWSKI, eds. *Brussels I Regulation*. 2nd ed. Munich: Sellier, 2012, p. 866. ISBN 978-3-86653-142-0.

The Vienna Convention as well as the Paris Convention regulate the jurisdiction as well as recognition and enforcement of decisions in an autonomous way. Due to the specific character of these liability relations, these may be considered as a specific matter.³⁰

The Article 71 of the Regulation Brussels I would be of significant importance for jurisdiction of courts in case of a nuclear incident in case of a state that is a party to the Vienna Convention and at the same time is an EU member state where the Regulation is directly applicable.

Despite the Article 71 of the Regulation Brussels I establishes the priority of other conventions regulating specific matters, the interpretation of Article 71 clearly refers to conventions that the member states were parties to in the time when the Regulation was adopted and vice versa, does not apply to conventions the member states become parties to in the future.³¹

This interpretation may be supported by the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters (1968) which is the legal predecessor of the Regulation Brussels I. This Brussels Convention in its Article 57 (1) acknowledged a prior application to conventions regulating specific jurisdiction or recognition and enforcement of decisions in specific matters the contracting parties of this convention were parties to or may become the parties to in the future. As the Regulation Brussels I does not regulate a prior application of international treaties the member states may become parties to, it is clear that it was not intention of the Regulation Brussels I to give priority to the conventions the member states were party to when the Regulation was adopted (this may be supported by the argument that during the legislation process specific conventions were discussed that would have a prior application).

From the facts we mentioned above, it is clear that the Regulation Brussels I is not applicable in nuclear damage compensation in all EU member states as most of them are contracting party either to the Vienna Convention or the Paris Convention and based on Article 71 of the Regulation the procedural rules of these liability conventions shall apply.

³⁰ For more details see KOSNÁČOVÁ [NOVOTNÁ], M. Občianskoprávna zodpovednosť za jadrovú škodu v práve EÚ. *International and Comparative Law Review*. 2004, roč. 4, č. 11, pp. 37-40. ISSN 1213-8770.

³¹ MAGNUS, U. and P. MANKOWSKI, eds. *Brussels I Regulation*. 2nd ed. Munich: Sellier, 2012, p. 860. ISBN 978-3-86653-142-0.

Despite relatively clear division of application between the Regulation Brussels I and other international conventions regulating court jurisdiction in specific matters, the Article 71 of the Regulation Brussels I keeps some questions unanswered. These are especially the situations where the Vienna Convention or the Paris Convention regulate some specific issues only marginally, but the Regulation Brussels I regulates such issue in its complexity.³² The CJEU was of opinion that a convention that regulates specific matters excludes the application of Regulation Brussels I, however, only in questions which it regulates. This means that the issues not regulated e.g. by the Vienna Convention (in matters of nuclear liability) are regulated by the Regulation Brussels I, despite its Article 71. We may thus speak about subsidiarity relation between the Vienna Convention and Regulation Brussels I.³³

The relation of the EU and the EU legislation to the Protocols 2004 and 1997

As mentioned above, the Regulation Brussels I does not explicitly regulate its relation to the international conventions the member states were not parties to in time of the adoption of the regulation, i.e. it is not clear how to solve the situation if the member states intend to accede to conventions after adoption of the Regulation.

To make assessment of these conventions in relation to member states it is necessary to come out from the Amsterdam Treaty, which became effective on May 1st, 1999, and which acknowledged new competences to the European Community in the area of justice cooperation in civil matters.

In line with the AETR doctrine formulated by the CJEU and expressed in Article 216 (1) TFEU, the EU has a competence to adopt and to realize the contractual obligations towards third states, if the EU rules are promulgated to achievement of the aims of the Treaty and the member states are not competent to enter into these relations individually or collectively. The judgment of the CJEU has thus specified the extent of the EU competence in the field of international treaties conclusion. As a con-

³² HANDRLICA, J. The Brussels I Regulation and Liability for Nuclear Damage. *Nuclear Law Bulletin: No. 86* [online]. 2010, no. 2, p. 36 and following [cit. 2014-08-18]. ISSN 0304-341X. Available at: <https://www.oecd-nea.org/law/nlb/NLB-86-E.pdf>.

³³ MAGNUS, U. and P. MANKOWSKI, eds. *Brussels I Regulation*. 2nd ed. Munich: Sellier, 2012, p. 869. ISBN 978-3-86653-142-0.

sequence of adoption of the EU legislation, the member states lose their competence to conclude international treaties.

This is applicable to the liability conventions of the second generation, i.e. the Protocol (1997) that revised the Vienna Convention and Protocol (2004) that revised the Paris Convention. Similarly, as in the case of the conventions of the first generation, only the sovereign subjects of international law may become its parties. The EU as a supranational community is thus excluded from participation in the cooperation within these conventions.

As the EU has a competence in the area of freedom, security, and justice, which is also the area regulated by the Protocols from 2004 and 1997, the member states lost their competence to enter into international regimes established by these conventions.

Two facts are crucial: the first is the fact that both the EU as a supranational organization and the member states are not entitled to become contracting parties of the protocols that amend the original nuclear liability legislation. The second is the effort of the EU institutions to cover the “labyrinth of nuclear liability”³⁴ through legislative activities that aim is to support the coherent and consistent nuclear liability legislation of the EU states and to harmonize the basic starting points on which this regime is established (e.g. the limitation of liability, extent of damages to be covered, etc.).

Due to these efforts the EU institutions have adopted the authorization decisions in relation to the protocols:

- ✚ In relation to the Protocol (2004) that amended the Paris Convention: Council Decision 2004/294/EC of 8th March 2004 Authorizing the Member States Which Are Contracting Parties to the Paris Convention of 29th July 1960 on Third Party Liability in the Field of Nuclear Energy to ratify, in the interest of the European Community, the Protocol amending that Convention, or to accede to it;
- ✚ In relation to the Protocol (1997) that amended the Vienna Convention: Council Decision 2013/434/EU of 15th July 2013 Authorizing Certain Member States to Ratify, or to Accede to, the Protocol Amending the Vienna Convention on Civil Liability for Nuclear Dam-

³⁴ VANDEN BORRE, T. Nuclear Liability: An Anachronism in EU Energy Policy?. In: M. M. ROGGENKAMP and U. HAMMER, eds. *European Energy Law Report VII*. 1st ed. Antwerp: Intersentia, 2010, pp. 183-191. Energy and Law 11. ISBN 978-94-000-0049-0.

age of 21st May 1963, in the interest of the European Union, and to make a declaration on the application of the relevant internal rules of the Union law.

The basic question connected with these authorization decisions is how to understand their meaning. Do these authorization decisions enable the member states to depart (if they decide) from the Regulation Brussels I that they will accede as a contracting party to the nuclear liability conventions or do these authorization decisions oblige the member states to ratify (accede to) these conventions as one interpretation may be that these authorization decisions represent a decision of the EU to respect the nuclear liability conventions and thus to integrate them into the EU law.

Solutions of this question assume clarification of several variances in the text of both these authorization decisions. The first authorization decision relating to the Protocol (2004) that amended the Paris Convention stipulates that the member states “shall ratify or accede” the Protocol. The second authorization decision relating to the Protocol (1999) that amended the Vienna Convention established a facultative decision of the member states (“the Council hereby authorizes...”) to ratify or to accede the Protocol.³⁵

The nature of the latter authorization decision that authorizes the member state to ratify or to accede the Protocol makes a conclusion (together with the AETR doctrine and the formulation “in the interest” of the EU) that the authorization decisions only enable the member states to become a contracting party to the Protocol, but after its ratification it does not become automatically part of the EU law.

The same conclusion may be adopted also in case of the latter authorization decision to the Protocol (2004), despite this authorization decision obliged the member states to ratify or accede to the Protocol. The obligation to accede to the Protocol (2004) is only addressed to spe-

³⁵ The original version of the proposal of the authorization decision submitted by the European Commission imposed on the member states an obligation to ratify, in the interest of the EU, the Protocol (1997). Compare Article 1 (1) of the original proposal of the decision: “Without prejudice to the European Union’s powers, the Member States which are currently Parties to the Vienna Convention on Civil Liability for Nuclear Damage of 21st May 1963 *shall* (highlighted by the authors) ratify the 1997 Protocol, or accede to it, in the interest of the European Union.” Obligation to ratify or to accede to the Protocol (1997) was further changed (due to significant reservations of member states) to a possibility. This also changed the character of this action.

cific member states (Belgium, Finland, France, Greece, the Netherlands, Germany, Portugal, Spain, Sweden, and the United Kingdom). Ratification or accession to the convention will only be binding for the member states as contracting parties, but will not be binding for the whole EU.³⁶ This conclusion may be supported by the text of the authorization decision as it excludes from its application those member states that were not the contracting parties of the original Paris Convention (Austria, Ireland, and Luxembourg) and they are not bound by the obligation to accede the Protocol.³⁷ These states are not the signatories of the Protocol (2004) and according to the authorization decision (point 8) they “will continue to base themselves on the Community rules contained in Regulation (EC) No. 44/2001 and to apply them in the area covered by the Paris Convention and by the Protocol amending that Convention.”³⁸

In contrast with the states excluded from the application of the authorization decision, the authorization decision does explicitly deal with the collision of the Protocol with the Regulation Brussels I towards the states that become the party to the revised Paris regime, as it is assumed by the authorization decision.

If the aim of the authorization decision would be the priority of the Regulation Brussels I, the text of the authorization decision would also include the obligation of the concerned member states to accede or to ratify the Protocol (2004) with the reservation of the prior application of the Regulation Brussels I (similarly as in case of authorization decision³⁹

³⁶ Pelzer is of an opposite opinion. In his view, the authorization decision has as a consequence that the Protocol (2004) becomes a part of the EU legal order. There shall be a relation of the *lex generalis* (Regulation Brussels I) and *lex specialis* (Protocol (2004)). PELZER, N. Hrsg. *Europäisches Atomhaftungsrecht im Umbruch: European Nuclear Liability Law in a Process of Change*. 1. Aufl. Baden-Baden: Nomos, 2010, p. 142. ISBN 978-3-8329-5281-5.

³⁷ The authorization decision was not in compliance (till July 1st, 2007) with Article 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community binding also for Denmark as it is also a party to the Protocol (2004). The mutual relation of Denmark and the issue in question was resolved by two bilateral agreements between Denmark and the European Community. HANDRLICA, J. and M. NOVOTNÁ. *Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

³⁸ HANDRLICA, J. and M. NOVOTNÁ. *Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

³⁹ *Council Decision of 19 September 2002 Authorizing the Member States, in the Interest of the Community, to Sign, Ratify or Accede to the International Convention on Civil Liability for*

in relation to the ratification of the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001)).⁴⁰

Solution of the collision of the Article 13 of the Protocol (2004) and the Regulation Brussels I remains despite the authorization decision obliged all member states that were parties of the Paris Convention at the time the authorization decision was adopted to coordinate saving the ratification documents or accession documents at the latest till December 31st, 2006. This has, however, not yet happened and the Protocol (2004) has not come into force yet. There are still questions about consequences of breach of this obligation.⁴¹

The text of the authorization decision that entitles to the ratification or accession to the Protocol (1997) and that regulates the relation of the Protocol to Regulation Brussels I, is different from the text of the authorization decision concerning the Protocol (2004).

The original proposal, similarly to the final version of the authorization decision that entitles to ratification or accession to the Protocol that revised the Vienna Convention, also included the requirement on the member states to make a reservation in relation to the prior application of the Regulation Brussels I provisions on enforcement and recognition of decisions. According to the Article 3 of the original proposal of the authorization decision, the addressees shall have been obliged to make a declaration in time of accession or ratification, based on which the judgments in matters regulated by the Protocol (1997) issued by a court of the EU member state that is also a party to the Protocol, shall be recognized and enforced in any EU member state that is a contracting party to the Protocol, in accordance with the EU law in that area.

Several member states formulated their reservation to the obligation to make a declaration in time of accession or ratification of the Protocol

Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) [2002-09-19]. Decision of the Council of the European Union, No. 2002/762/EC.

⁴⁰ HANDRLICA, J. and M. NOVOTNÁ. Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. *Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

⁴¹ The EU delivered a reasoned opinion to three EU member states (Belgium, Italy, and the UK) in accordance with the Article 258 TFEU in 2012 to submit their observations due to not fulfilment of their obligations from the authorization decision. HANDRLICA, J. and M. NOVOTNÁ. Európska únia a Protokol z r. 1997, ktorým sa doplňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. *Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

(1997) and pointed out the inconsistency with the position of those member states that had to ratify or accede (based on the authorization decision) to the Protocol (2004) that revised the Paris Convention. These member states were not obliged to make such declaration on prior application of the Regulation Brussels I. The European Commission has promised that it will make steps towards the member states participating in the Paris Convention regime to make such reservations.⁴²

The final version of the declaration retained the substance of the reservation relating the Regulation Brussels I in a way that the provisions regulating recognition and enforcement of decisions under Regulation Brussels I shall prevail over procedural provisions on recognition and enforcement of decisions of the Protocol (1997). In comparison to the original text the text of the declaration has been slightly changed: "Judgments on matters covered by the Protocol of 12th September 1997 amending the Vienna Convention on Civil Liability for Nuclear Damage of 21st May 1963, when given by a court of a Member State of the European Union, which is a Contracting Party to that Protocol, shall be recognized and enforceable in [name of the Member State making the declaration] in accordance with the relevant rules of the European Union on the subject."

By making the declaration the member states have given up the possibility to apply procedural rules of the Vienna Convention regime on recognition and enforcement of decisions in their amended version and are obliged to apply the procedural rules of the Regulation Brussels I. The change to the original version of the text of the proposal of the authorization decision concerned also the original obligation of the concerned member states to make the declaration. Based on the approved version, the Council has authorized the member states to make the declarations, i.e. it left up to their discretion if they decide to make the declaration in time of ratification or accession to the Protocol (1997).

Moreover, the declaration is only applicable to questions of enforcement and recognition of decisions, i.e. the jurisdiction of the court competent to deal with the nuclear damage compensation is regulated by the exclusive jurisdiction, as is regulated by the nuclear liability legislation of the revised Vienna regime.

⁴² HANDRLICA, J. and M. NOVOTNÁ. Európska únia a Protokol z r. 1997, ktorým sa dopĺňuje Viedenský dohovor o občianskoprávnej zodpovednosti za jadrové škody z r. 1963. *Justičná revue*. 2014, roč. 66, č. 2, pp. 252-268. ISSN 1335-6461.

In this respect it is questionable if the Article 71 of the Regulation Brussels I is applicable (which regulates the priority to international treaties of which the member states were parties to in the time of adoption of the Regulation Brussels I) to the revised Vienna regime. It is clear that its priority is applied with respect to the Vienna Convention in its original version. It is however questionable how to deal with the Protocol (1997). If it would be understood as a new international treaty, Article 71 of the Regulation Brussels I would not be applicable. If the Protocol would be understood as amendment of the original version of the Vienna Convention, it would be possible to apply the Article 71 of the Regulation Brussels I in relation to the Vienna Convention in its amended version.

The relation of the Regulation Rome II and nuclear liability legislation

The Regulation Rome II cannot be ignored within the specification of the relation between the EU secondary legislation and the international nuclear liability legislation. The Regulation Rome II⁴³ is a tool for unification of the collision regulation in non-contractual relationships. It is applicable to civil and commercial matters.

As the nuclear liability compensation has a character of non-contractual civil law liability and at the same time we may assume the collision of several legal orders will be relevant if there is a nuclear incident having cross-border consequences (thus the basic conditions for application of the regulation are met),⁴⁴ it is necessary to solve the relationship of the regulation to existing nuclear liability conventions.

At first glance it may seem that the relation of the regulation to the nuclear liability conventions is clearly defined in Article 1 (2) (f) of the regulation which stipulates that non-contractual obligations arising out of nuclear damage shall be excluded from the scope of the regulation. Exclusion of nuclear liability relations from the scope of application of the

⁴³ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II) [2007-07-11]. Regulation of the Council of the European Union, No. 864/2007.

⁴⁴ The conditions of application of the Regulation also see NOVOTNÁ, M. Kolízná úprava mimozmluvných závazkov. In: N. ŠTEFANKOVÁ, P. LYSINA, et al. *Medzinárodné právo súkromné*. 1. vyd. Praha: C. H. Beck, 2011, p. 394 and following. ISBN 978-80-7400-351-6.

regulation was in the Explanatory Memorandum⁴⁵ to the Regulation Rome II reasoned by the importance of economic and state interests as well as by contribution of the member states to the creation of liability measures permitting the nuclear damage compensation in an international system, that is established by conventions that regulate the field of nuclear liability.

Explanatory memorandum proclaimed the priority of the nuclear liability conventions to the provisions of the Regulation Rome II. On the other hand, vague formulation and insufficient effectivity⁴⁶ of the wording of exclusion clause opened wide scope for interpretation.

In particular, it is not possible from the present structure (and with the reference to explanatory memorandum) to identify the exact boundaries between the regulation and nuclear liability conventions regulating the matters of nuclear damage compensation. When the courts decide the nuclear liability compensation cases, they use as a legal base the relevant conventions which are self-executing treaties, i.e. they directly impose the rights and obligations to the concerned persons. At the same time, in all matters not regulated by these conventions (however, related with damage compensation) the *lex fori* principle is used. Is the exclusion clause also to the relations not falling under the scope of international nuclear conventions, however, related with the establishment of the nuclear damage, or will these relations be regulated by the Regulation Rome II?

The answer to this question cannot be found even in the Article 25 of the Regulation that regulates the relation to the existing international treaties and that enables the member states to apply preferentially the conflict rules applicable to non-contractual obligations as specified by the conventions that the member states were parties to in the time of adoption of the regulation. From the text of the Regulation it is also not clear if the Article 25 of the Regulation is applicable to conventions regulating the nuclear damage compensation. We may assume from the explanatory memorandum that the intention of the legislature was to establish the prior applicability of conflict rules of the international conventions. Nei-

⁴⁵ *Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")*, presented by the Commission.

⁴⁶ NOCERA, F. Recent European Union Legislation and the International Nuclear Third Party Liability Regime – Conflicts, Problems and Solutions. *Uniform Law Review*. 2004, vol. 9, no. 1, p. 92. ISSN 1124-3694.

ther the Vienna Convention, nor the Paris Convention are those international treaties that would regulate the choice of applicable law. Due to this fact, they should not be excluded from the scope of application of the regulation.⁴⁷

If we accept this argumentation, the relations arising from nuclear damage compensation governed by nuclear liability conventions would be, according to the Article 1 (2) (f) of the Regulation, excluded from its scope of application. On the other side, the conflict of law rules in matters connected with nuclear damage compensation, that are however not directly the damage compensation relations, would underlie the Regulation Rome II in matters of determination of applicable law. This may lead to curious situation, i.e. another national law could be applied to nuclear damage compensation and another national law to related relations.

If the Article 25 of the Regulation is interpreted in a close link with the following article that imposes on the member states an obligation to notify the European Commission the list of conventions to which this article applies. From the experience it may be assumed that the conventions regulating nuclear damage liability stipulate the jurisdiction rules in an autonomous way. By using the extensive interpretation, we may also find a conflict of law rule and we may also theoretically consider about exclusion of these conventions from the scope of application of the Regulation Rome II.⁴⁸

If we use this argumentation, similarly, all the nuclear damage compensation relations regulated by the nuclear liability conventions would be excluded, in accordance with Article 1 (2) (f), from the scope of application of the Regulation. In the same and according to Article 25, also the relations connected with damage compensation would be excluded from the scope of its application. This would ensure the full application priority of the international nuclear liability legislation over the Regulation Rome II.

Conclusion

The nuclear liability relations have, due to their nature, both public law and private law characters; the sources of law come from the interna-

⁴⁷ KOSNÁČOVÁ [NOVOTNÁ], M. Občianskoprávna zodpovednosť za jadrovú škodu v práve EÚ. *International and Comparative Law Review*. 2004, roč. 4, č. 11, p. 42. ISSN 1213-8770.

⁴⁸ KOSNÁČOVÁ [NOVOTNÁ], M. Občianskoprávna zodpovednosť za jadrovú škodu v práve EÚ. *International and Comparative Law Review*. 2004, roč. 4, č. 11, p. 42. ISSN 1213-8770.

tional and national environments. These relations are significantly difficult and the adoption of the EU secondary legislation has even made these relations more complicated, despite that none of these EU legislative acts directly regulates the nuclear damage compensation.

In the EU, the nuclear liability damage rules have not been unified or harmonized so far in the form of secondary legislation. Nevertheless, there is a conflict between international nuclear liability rules with the EU rules, i.e. in areas that fall to the competence of the EU and that are at the same time regulated by the instruments of international nuclear liability law (the matters of jurisdiction, enforcement, and recognition of decisions). Due to this conflict of legal orders the member states have lost their competence to enter into international relations independently and to accept commitments in areas that fall within the EU competence (the authorization decisions addressed to concrete member states are exception from this rule).

The attorneys at law Gomez-Acebo & Pombo have addressed a questionnaire elaborated from a mandate of the European Commission in 2007. The aim of this questionnaire was to identify the positions of the member states, nuclear industry, international organizations managing the international nuclear liability conventions (OECD, IAEA), and other concerned subjects in the EU member states to the question of creation the single European regime for the nuclear damage liability and the optimal tools for achievement of this aim.

The outcome was a study that outlined several possible reactions of the EU to solve the nuclear liability matters on the EU level, including their viability and the legal base for actions of the EURATOM Community.

The study proposes as first possibility to leave the current legal situation without any unification of nuclear law at the EU level. Another possibility was accession of all EU member states to the Paris Convention and all its protocols. This would ensure the unification of nuclear liability relations. It is, however, questionable, how the member states would respond to the need to accede or to ratify the Paris Convention in its amended version. And there are still member states that do not belong to any liability regime and keep their neutral position.

Next possibility is accession of the EURATOM to the Paris Convention in its revised version. The Article 98 of the EURATOM Treaty could be used as a legal base for this accession. It is, however, questionable, if this article is a sufficient legal base for this accession.

The last possibility concerned adoption of a directive that would harmonize minimum amount of the nuclear damage compensation and that would have inspiration in the revised version of the Paris Convention.

Despite significant differences expressed by the respondents in relation to a preferred solution, several major points of the respondents' answers have common major features. The most important is refusal of majority of the respondents to adopt a directive. They argue by the lack of competences of the EU in this area and they point out to the fact that the "European" solution will not cover the need of "global" problems of nuclear liability as the nuclear damages may very often exceed the borders of the EU.⁴⁹ Another obstacle is the unwillingness of the parties to the Vienna Convention to ratify the Paris Convention in its amended version.

Some states suggested other solutions leading to harmonization of the nuclear liability regime within the EU (e.g. they suggest that all member states that are party to the Paris Convention shall accede to the Common Protocol on application of the Vienna and Paris Conventions; all member states shall accede to the Vienna Convention in its amended version; adoption of a directive based on both the Vienna and the Paris Conventions; all member states shall accede to the Convention on additional Compensation, etc.⁵⁰).

How the EU will deal with the matter of the single European nuclear "umbrella" is still not clear, despite we may only assume some steps as there are some proposals to regulate this issue by the secondary legislation.

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⁴⁹ *Legal Study for the Accession of EURATOM to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*. Final Report, TREN/CC/01-2005, p. 87.

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