

THE UNCERTAIN FUTURE OF THE IGNALINA NUCLEAR POWER PLANT: LITHUANIA'S OBLIGATIONS UNDER THE TREATY OF ACCESSION TO THE EU

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Introduction

The fate of the Ignalina Nuclear Power Plant (NPP) has been one of the most controversial issues during Lithuania's preparations for EU membership. Already in June 1997, the European Commission stressed the need to establish a long-term energy strategy and a decommissioning plan for the Ignalina NPP. It was only after the fulfilment of this requirement that Lithuania could start official accession negotiations in February 2000. The decommissioning of the power plant and, in particular, its socio-economic and strategic consequences remained on the negotiating table until the final 2002 Copenhagen European Council. Confronted with the EU's insistence on a swift closure of the nuclear reactors, Lithuanian diplomats argued they could not commit themselves on the closure of the Ignalina NPP without firm guarantees of EU financial support. Ignalina has one of the most powerful commercial reactors in the world capable to provide electricity for the entire Baltic region. Closure of the NPP implies a loss of hard currency for the country. Since Lithuania

has no domestic natural energy resources such as coal, gas or oil, energy supply might become problematic after the Ignalina NPP has been shut down. Bearing in mind the dominant position of Russia in terms of energy supply and the possibility to exploit this power politically, as illustrated with the delivery problems to the Mazeikiu oil refinery or the gas disputes between Russia and Ukraine or Belarus, the importance of this issue for Lithuania's energy security cannot be underestimated. A closure of the Ignalina NPP will also increase the domestic price of electricity, thereby worsening the competitive situation of the domestic heavy industry. Employment in the nuclear energy sector is another economic factor to be reckoned with.

Based upon the socio-economic importance of the Ignalina NPP and the extraordinary cost the decommissioning of the nuclear reactors implies, Lithuania asked for € 376m between 2004–2006 and an equivalent amount for beyond 2006¹. The EU

¹ M. Kovalick, "High Costs of Closing Down Ignalina Plant", *Baltic Times*, 25 April 2002.

finally agreed to attribute € 285m between 2004-2006 with a commitment to provide “adequate additional Community assistance to the decommissioning effort beyond 2006”. The EU’s financial commitments paved the way for a compromise on the Ignalina issue, formalised in a legally binding protocol to the Act of Accession². The protocol specified the Union’s assistance for the period 2004-2006 and contained a specific legal basis for the adoption of a Council Regulation laying down the EU’s financial contribution to the Ignalina Programme for the period from 1 January 2007 to 31 December 2013 (€ 837 million)³. Lithuania, from its side, committed itself to close Unit 1 of the Ignalina NPP before 2005 and Unit 2 by 31 December 2009 at the latest and to the subsequent decommissioning of these units. Of crucial importance is the inclusion of a safeguard clause providing for the possibility to adopt specific measures if energy supply is disrupted in Lithuania. The interpretation of this provision has become particularly relevant for Lithuania’s national energy strategy.

Taking into account the need to ensure the country’s energy security after the closure of the Ignalina NPP, a new nuclear power plant will be constructed in Lithuania in order to avoid a growing dependency on imported fossil fuel. The *Sei-*

mas of the Republic of Lithuania already promulgated a law providing for the legal, financial and organisational preconditions for the implementation of the new nuclear power plant project⁴. Even though the first objective is “to provide Lithuanian consumers with power for an unlimited period of time in an independent, safe and reliable manner”, the decision to construct a new power plant in Lithuania is of particular relevance for the entire Baltic Sea region. Estonia, Latvia and Poland will, therefore, co-operate with Lithuania in order to ensure the building of the new NPP, which is expected to become operational by 2015 at the earliest. This long-term perspective is problematic in the light of Lithuania’s commitments under the EU Accession Treaty. The main question is how to ensure Lithuania’s energy security in the interim-period between the closure of the existing Ignalina NPP, scheduled to take place by the end of 2009, and the entry into force of the new power plant. In this context, it has been suggested to extend the lifespan of the Ignalina NPP after the end of 2009⁵. This paper assesses whether such a scenario is legally possible and feasible in the light of Lithuania’s obligations under the EU Treaty of Accession and, in particular, its Protocol No. 4 on the Ignalina NPP.

² Protocol No.4 to the 2003 Treaty of Accession on the Ignalina Nuclear Power Plant in Lithuania, *OJ* (2003) L 236/945.

³ Council Regulation (EC) No. 1990/2006 of 21 December 2006 on the implementation of Protocol No. 4 on the Ignalina nuclear power plant in Lithuania to the Act of accession of the Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, *OJ* (2006) L 411/10.

⁴ Law on the Nuclear Power Plant, 28 June 2007 No. X-1231 (as amended on 1 February 2008 No. X-1446).

⁵ Recently, Aleksandras Absila has been appointed chairman of a commission responsible for negotiations with the European Commission on the question of Lithuania’s energy security. In this context, the idea to extend the lifetime of the Ignalina NPP after the end of 2009 has come to the fore. See: “Former Lithuanian PM to seek extension of Ignalina NPP operations”, at: www.balticbusinessnews.com, 27 February 2008.

The Legal Status of the EU Accession Treaty

Lithuania's accession to the EU is legally based upon the Treaty of Accession which was signed in Athens on 16 April 2003 and entered into force on 1 May 2004. The term "Accession Treaty" is somewhat confusing because, in fact, it entails a single series of documents comprising three complementary elements: the Treaty itself (TA), the Act of Accession (AA) and a Final Act (FA). The TA is very short (three articles) and basically provides that the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia become members of the European Union and thereby parties to the Treaties on which the Union is founded on the basis of the conditions of admission and adjustments to the Treaties as set out in the AA⁶. The AA includes annexes with details of the transitional arrangements applicable for each new Member State. In addition, a list of ten protocols deals with specific policy issues. Of particular importance for the issue under discussion in this paper is Protocol No. 4 on the Ignalina Nuclear Power Plant in Lithuania (cf. *infra*). Pursuant to Article 60 AA, the annexes and protocols form an integral and legally binding part of the Accession Treaty. The FA, on the other hand, contains no less than 44 declarations from the acceding countries and/or the old Member States and supplements the TA and AA. The European Court of Justice (ECJ) has generally concluded that such declarations do not have binding

⁶ As set out in Art. 1(2) TA, the provisions of the AA form an integral part of the TA.

legal force but must nevertheless be taken into consideration for the purpose of interpreting the Accession Treaty⁷.

The Treaty of Accession as conceived under Article 49 EU is an international agreement between the Member States and the acceding countries, which has the status of primary Community law. As such, it is not an 'act of the institutions' in the sense of Article 230 EC. This means that the ECJ has no jurisdiction to consider the legality of its provisions⁸. On the other hand, however, the Court is competent to interpret the Accession Treaty provisions following preliminary references from the Member States' courts. It can declare acts of the institutions invalid if they contradict those provisions. Moreover, the European Commission can initiate enforcement proceedings under Article 226 EC against a Member State that fails to observe the obligations derived from the Accession Treaty.

Given the primary law nature of the Ignalina Protocol and taking into account the principle of loyal co-operation (Art. 10 EC), Lithuania is under a legal obligation to close the Ignalina NPP by the end of 2009. A failure to comply with Protocol No. 4 might lead to an infringement procedure before the European Court of Justice or the disruption of Community assistance. The question is, therefore, whether there are any possibilities to extend this deadline. In this respect, reference can be made to the

⁷ ECJ, Case C-192/99, *Kaur* [2001] ECR 1237 at para. 23-24.

⁸ ECJ, Joint Cases 31/86 and 35/86, *LAISA v. Council* [1988] ECR 2285 at para. 17. Case C-259/95, *Parliament v. Council* [1997] ECR I-5303 at para. 27. Case C-445/00, *Austria v. Council* [2003] ECR 8549 at para. 62.

case law of the European Court of Justice. Confronted with an action for annulment of a Council Regulation amending provisions of a Protocol to the Act of Accession of Austria, Finland and Sweden, the Court observed that “[t]he protocols and annexes to an act of accession constitute provisions of primary law which, unless that act provides otherwise, may not be suspended, amended or repealed otherwise than in accordance with the procedures established for review of the original Treaties”. Hence, an option to amend the deadlines included in the Ignalina Protocol is to follow the treaty amendment procedure of Article 48 EU. This is a very cumbersome procedure requiring not only the agreement of all EU Member States but also their internal ratification. In fact, one could argue that Lithuania missed an opportunity to raise the issue of the Ignalina NPP during the Intergovernmental Conference (IGC) preparing the Lisbon Treaty. Only in this framework an amendment of the primary law provisions was possible before the end of 2009. Now that the Lisbon Treaty has been concluded without any revision of Lithuania’s obligations under the EU Accession Treaty, the only option left is an application of the safeguard clause included in the Ignalina Protocol.

The Safeguard Clause of the Ignalina Protocol

Protocol No. 4 to the Act of Accession is entirely devoted to the future of Lithuania’s Ignalina NPP. In its form and substance the protocol is drafted as a specific bilateral agreement between the EU Member States and Lithuania. In essence, it is a compro-

mise between the EU’s insistence on clear deadlines for the closure of the two nuclear reactors and Lithuania’s preoccupation with Community assistance for the decommissioning efforts. Of particular importance in this respect is the guarantee that public aid in support of the Ignalina NPP may be considered as compatible with the internal market. Moreover, Community assistance may amount up to 100 per cent of the total expenditure, which is a significant derogation from the regular financing rules requiring co-financing from the receiving state. The most important provision, however, is Article 4 of the Ignalina Protocol, which provides that: “Without any prejudice to the provisions of Article 1, the general safeguard clause referred to in Article 37 of the Act of Accession shall apply until 31 December 2012 if energy supply is disrupted in Lithuania”⁹.

The scope of the latter provision is rather ambiguous and requires further explanation. First, it noteworthy that the Ignalina Protocol does not introduce specific safeguard measures or transitional arrangements but rather refers to the general economic safeguard clause of Article 37 AA. This clause enables both old and new Member States to request the Commission to institute temporary emergency measures protecting a sector of the economy or to protect against serious deterioration in the economic situation of a given area. Upon request of the state concerned, the Commission determines, on the basis of an emergency procedure, the protective measures which it considers necessary and

⁹ *OJ* (2003) L 236/945.

specifies the conditions and modalities of their application. As the ECJ concluded with regard to a similar clause in the Act of Accession of Greece, the Commission has a wide discretion in determining whether the conditions justifying the adoption of protective measures are fulfilled. The Court's jurisdiction is limited to a marginal control on the exercise of this discretion¹⁰. It is, therefore, clear that Lithuania cannot derogate from its obligations under the EC Treaty and the Act of Accession without the prior consent of the European Commission.

Paragraph 1 of Article 37 AA allows new Member States to apply for authorisation to take special measures “until the end of a period of up to three years after accession”, i.e. 1 May 2007. Paragraph 3 clarifies that measures authorised on this legal basis may involve derogations from the rules of the EC Treaty and the Act of Accession “to such an extent and for such periods as strictly necessary” for the attainment of its objectives¹¹. It is not very clear whether the date of 31 December 2012 mentioned in Article 4 of Protocol No. 4 refers to the deadline for requesting the safeguard measures, in contravention to paragraph 1 of Article 37 AA, or, to the deadline for the application of the safeguard measures, in contravention to paragraph 3 of Article 37 AA. Only the interpretation that the safeguard clause can be invoked until the end of 2012 and that the measures adopted in this respect can apply without any concrete deadline could justify the ap-

plication of safeguard measures. The main challenge for the Lithuanian government will be to convince the European Commission with concrete evidence that a closure of the Ignalina NPP leads to a disruption of energy supply.

Given the Commission's insistence on the swift closure of the Chernobyl-type of nuclear reactors, it is far from certain that a request for the application of Article 37 AA will be accepted. Despite diplomatic efforts to change the date of the final closure of Ignalina Unit 2 during the accession negotiations, the Commission has always defended the deadline of 31 December 2009¹². After enlargement the Commission confirmed that Lithuania's commitment regarding the closure of the Ignalina NPP could not be under discussion anymore¹³. Moreover, Council Regulation 1990/2006 on the implementation of the Ignalina Protocol reiterates the obligation to close Unit 2 by the end of 2009. Even in the hypothetical situation that the Commission accepts Lithuania's arguments on energy security, the application of Article 37 AA can in principle not lead to an extension of the Ignalina NPP's lifetime. Pursuant to Article 4 of the Ignalina Protocol, the general economic safeguard clause of Article 37 AA may only apply “without any prejudice to the provisions

¹⁰ Case 11/82, *SA Piraiki-Patraiki* [1985] ECR 207 at para 40.

¹¹ *OJ* (2003) L 236/45.

¹² K. Maniokas, R. Stanionis, “Negotiations on Decommissioning Ignalina Nuclear Power Plant”, in: K. Maniokas, R. Vilpisauskas, D. Zeruolis, (eds.), *Lithuania's Road to the European Union: Unification of Europe and Lithuania's EU Accession Negotiations*, Vilnius, Eugrimas, 2005, pp. 334-335.

¹³ See e.g. the speech of Andris Piebalgs, Energy Commissioner, at the European Parliament Plenary Session, “20 years after Chernobyl: lessons for the future”, Brussels, 26 April 2006, Speech/06/261.

of Article 1” of the same Protocol. Given that this Article 1 includes a clear commitment to close Unit 2 of the Ignalina NPP by the end of 2009, Article 4 of the aforementioned Protocol provides neither a legal basis nor a ground for derogation from the obligation to early definitive closure of Ignalina Unit 2 on 31 December 2009 at the latest. Only less far-reaching measures such as increased financial support or additional investments in energy links with EU Member States could be contemplated.

Towards an Energy Policy for Europe

Taking into account the legal obstacles for extending the lifespan of the Ignalina NPP beyond 31 December 2009, the emerging European energy policy is of particular interest for Lithuania. It is noteworthy that at the time of Lithuania’s accession negotiations, the EU did not have clear-cut common rules or legal standards for nuclear safety. The main reason was the absence of a specific legal basis for the establishment of EU safety standards for nuclear installations. In a judgment on the Community’s accession to the Nuclear Safety Convention, however, the ECJ clarified that under Articles 30 and 32 of the Euratom Treaty the Community possesses legislative competence to establish, for the purpose of health protection, an authorisation system for the construction or operation of nuclear facilities which must be applied by the Member States¹⁴. This interpretation has opened the door to a Commission proposal

for a Council Directive on the Safety of Nuclear Installations¹⁵. In addition, a new Instrument for Nuclear Safety Cooperation¹⁶ and a European High Level Group on Nuclear Safety and Waste Management¹⁷ has been established.

Whereas the issue of nuclear safety was brought on the pre-accession agenda as part of the Community’s “*non-binding acquis*”¹⁸, a legally binding *acquis* on nuclear safety is developing. However, the question of nuclear safety is only one dimension of the more complex issue of energy security. For Lithuania, it is of utmost importance that the challenges related to the supply of energy after the closure of the Ignalina NPP are dealt with at the EU level. The March 2006 European Council, which launched an Energy Policy for Europe (EPE), formed an important step in this direction. On this occasion, the EU Member States proclaimed the ambition to ensure the security of energy supply through the development of “common operational approaches to address crisis situations in a spirit of solidarity”¹⁹. The reference to solidarity reflects the spirit of

¹⁵ COM (2003) 32 final of 30 January 2003. An amended proposal has been issued on 8 September 2004, COM (2004) 526.

¹⁶ Council Regulation (EURATOM) No. 300/2007 of 19 February 2007 establishing an Instrument for Nuclear Safety Cooperation, *OJ* (2007) L 81/1.

¹⁷ Commission Decision of 17 July 2007 on establishing the European High Level Group on Nuclear Safety and Waste Management, 2007/530/Euratom, *OJ* (2007) L 195/44.

¹⁸ Contribution of the Commission services to question no. 1 of the questionnaire submitted on 13 September by the Presidency to the Atomic Questions Group in the framework of the mandate given to it by the COREPER on 26 July 2006, Non-Paper, 29/09/2000, at: http://ec.europa.eu/energy/nuclear/safety/doc/non_binding_acquis.pdf.

¹⁹ Presidency Conclusions March 2006 European Council, *Bull. EU* (2006) 3, I.7.46.

¹⁴ ECJ, Case C-29/99, *Commission v. Council* [2002] ECR I-11221, at para. 89.

the Ignalina Protocol. Whereas an amendment of Lithuania's obligations under this Protocol seems particularly difficult (cf. *supra*), the implementation of a common and integrated European energy policy is a crucial prerequisite for ensuring Lithuania's energy security after the closure of the Ignalina NPP.

The Lisbon Treaty introduces new legal instruments to deal with the challenges of energy security. Whereas the current EC Treaty does not have a clear-cut provision on energy²⁰, the Lisbon Treaty explicitly refers to energy as a matter of shared competence between the Union and the Member States. A new title and an Article on energy are inserted to give the Union's energy policy a specific legal basis. Again, reference is made to the "solidarity between Member States" and "the security of energy supply"²¹. Moreover, a "solidarity clause" has been included to cope with potential difficulties in the supply of energy. If such problems arise, the Council can adopt, on a proposal of the Commission, exceptional measures appropriate to the economic situation. Accordingly, the safeguard clause referred to in Article 4 of the Ignalina Protocol applies in a modified form after the end of 2012. The new legal

framework of the Lisbon Treaty thus provides Lithuania with additional legal tools to raise the issue of energy security at the EU level. Even though this cannot alter Lithuania's obligations under the Treaty of Accession, it allows for the adoption of secondary legislation potentially including additional guarantees for Lithuania.

Conclusions

Lithuania's commitment to the closure and decommissioning of the Ignalina NPP by the end of 2009 is a primary law obligation under European Community law. An extension of this deadline seems excluded as a result of the strict formulation of Lithuania's obligations in Protocol No. 4 to the Act of Accession. Only limited economic safeguard measures are possible under exceptional circumstances, i.e. when the energy supply to Lithuania is disrupted, and upon approval of the European Commission. The alternative of a formal treaty amendment on the basis of Article 48 EU is only a theoretical option given the complicated procedural requirements of such an exercise. Taking into account the Commission's principled position on the question of nuclear safety and the strict conditions for the application of safeguard measures, a continued operation of the old Ignalina NPP until 2015 or 2020 is not a realistic scenario. In other words, the political arguments in favour of an extended lifespan for the Ignalina NPP are not reconcilable with Lithuania's legal obligations to the EU. This observation does not prevent Lithuanian policy makers from raising the EU's attention to the precarious and specific situation of the Lithuanian energy sector.

²⁰ Whereas energy is included in the list or areas where the Community can adopt measures for the fulfilment of its objectives, no specific legal basis for a European energy policy is included. However, the EC Treaty provisions on the internal market, competition, common commercial policy, environment and transport all relate to the energy field. Accordingly, the EC has a competence to regulate energy questions in connection to those areas.

²¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ* (2007) C 306/1.

The Lisbon Treaty provides new legal instruments to transform the political necessity of an effective European energy policy, recognised at the March 2006 European Council, into operational and legally binding mechanisms guaranteeing the energy security of the EU Member States. Of particular importance for Lithuania is the introduction of a specific legal basis for a Union policy on energy as well as a solidarity clause in case of difficulties in the supply of energy. In addition to the safeguard clause included in the Ignalina

Protocol, which applies until the end of 2012, the legal framework of the Lisbon Treaty thus provides additional guarantees for Lithuania's energy security. Whereas the EU Accession Treaty limits Lithuania's opportunities to keep the Ignalina NPP open to overcome the difficult period between the closure of the old nuclear reactors and the finalisation of a new nuclear power plant, the Ignalina Protocol also ensures that the question of Lithuania's energy supply is not a national problem but rather the responsibility of the entire EU.

NEAIŠKI IGNALINOS ATOMINĖS ELEKTRINĖS ATEITIS: LIETUVOS RESPUBLIKOS ĮSIPAREIGOJIMAI PAGAL STOJIMO Į EUROPOS SĄJUNGĄ SUTARTĮ

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S a n t r a u k a

Straipsnyje nagrinėjamas Ignalinos atominės elektrinės (toliau – ir IAE) uždarymo klausimas, pateikiamas pagal Lietuvos Respublikos stojimo į Europos Sąjungą sutartį priimto įsipareigojimo uždaryti IAE teisinis įvertinimas.

Pirmaisiai aptariami Lietuvos Respublikos stojimo į Europos Sąjungą teisiniai pagrindai. Pateikiama Stojimo sutarties ir jos sudedamųjų dalių – pačios sutarties (toliau – ir Sutartis), Stojimo akto (toliau – ir SA) ir Baigiamojo akto (toliau – ir BA) teisinio statuso ir šių dokumentų sandaros apžvalga. Pažymima, jog Stojimo sutartis laikytina tarptautiniu ES valstybių narių ir stojančiųjų valstybių susitarimu, t. y. pirmine EB teise su visais iš to išplaukiančiais padariniais, o ne „institucijų teisės aktu“ pagal EB sutarties 230 straipsnį.

Analizuojamos iš SA 4 protokolo dėl IAE uždarymo kaip pirminės EB teisės kylantys teisiniai padariniai Lietuvos Respublikai. Daroma išvada, kad Lietuvos Respublika praleido progą įtraukti IAE darbo pratęsimo klausimą į jau pasirašytos Lisabonos sutarties tekstą, todėl SA 4 protokole numatyta apsaugos išlyga yra vienintelė išlikusi teisinė galimybė pratęsti elektrinės darbą.

Antroje straipsnio dalyje nagrinėjamos SA 4 protokolo nuostatos ir teisinė jų reikšmė. Ypatingas

dėmesys kreipiamas į šio protokolo 4 straipsnį, numatantį apsaugos išlygą, kuria remiantis būtų galima pateisinti IAE darbo pratęsimą. Išsamiai analizuojamos minėtos nuostatos galimos taikymo sąlygos ir su tuo susijusios problemos. Daroma išvada, kad, atsižvelgiant į griežtas šios išlygos taikymo sąlygas, politinę situaciją ir skeptišką Komisijos poziciją šiuo klausimu, Lietuvos Respublikai greičiausiai nepavyks pasiremti minėta nuostata.

Paskutinėje straipsnio dalyje trumpai apžvelgiamos bendros ES energetikos politikos perspektyvos ir energetinio saugumo klausimai. Pabrėžiama, jog, uždarius IAE, Lietuvos Respublika turėtų siekti, kad energetinio saugumo klausimai būtų sprendžiami ES lygiu.

Kažkiek apžvelgiamas ir Lisabonos sutarties poveikis nagrinėjamai sričiai. Teigiama, kad ši sutartis pirmą kartą Europos integracijos istorijoje numato, jog energetikos politika yra mišri ES ir jos valstybių narių kompetencija, taip sukuriamas naujas teisinis bendros energetikos politikos formavimo pagrindas. Be to, įtvirtinama solidarumo sąlyga energetinio saugumo srityje. Tai, anot straipsnio autoriaus, atveria Lietuvos Respublikai naujų galimybių ginti savo interesus, nepaisant to, kad ji faktiškai nebegali pakeisti Stojimo sutartimi priimtų įsipareigojimų, susijusių su IAE uždarymu.

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