



Nuclear Policy in the EU from a Legal and Institutional Point-of-View

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Abstract

The regulation of nuclear issues dates back as far as the foundation of the European Community. The Treaty establishing the European Atomic Energy Community (EURATOM) was one of the founding treaties of the European Communities next to the Treaty establishing the European Coal and Steel Community (ECSC) and entered into force on January 1, 1958. Since then and unlike the other founding treaties, the EURATOM Treaty has never been significantly amended or reformed. Why?

To be able to answer this question, one must look at the legal conditions and political key messages for the setting up of the EURATOM Community. The latter not only from within Europe but also from abroad. Due to the Members States' original compromise and the limits between what is controlled and regulated under the treaty and what remains in the discretion of the Member States, the EURATOM Treaty is clearly limited in its scope.

The EU has no competences in regulatory fields such as operational safety of nuclear power plants, management and safe disposal of radioactive waste, storage or disposal facilities and decommissioning of installations. All these

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crucial objectives remain the sole responsibility of national authorities and are co-guided by standards adopted at the international level, especially under the framework of the International Atomic Energy Agency (IAEA). The EURATOM Treaty then remains as the only sectoral energy policy impeding the integration of policy towards a democratic energy Union. This is reflected by the European Parliament's role being rather that of an opinion-giving onlooker than a co-decision maker in matters related to nuclear regulation.

1 Introduction: EURATOM – a treaty without harmony

The EURATOM Community and its Treaty establishing the European Atomic Energy Community (EURATOM) are marked by their inherent failure to achieve a joint common nuclear policy and establish a common interest of the European Communities, and later the European Union, in the development of nuclear energy. Instead, the EURATOM treaty has set the European energy landscape on a distortive pathway, which was foreshadowed by its limitations and conflicts back in 1945.

In October 1945, the provisional French government under President Charles de Gaulle issued *ordonnance* N° 45–2563 establishing the French “*Commissariat à l'énergie atomique*” in order for France to keep its place in the field of nuclear research.² The Commissariat and its Committee were, at that time, directly attached to the Government and under direct tutelage of the French President.³ De Gaulle established this Committee weeks after the nuclear bombing of Hiroshima and Nagasaki in August 1945. France was the only founding member of EURATOM that, alongside the civil use of nuclear energy, sought hegemony in military nuclear power and competed against the dominant position of the United States of America.

Article 1 of the *ordonnance* clarifies : “*Le Commissariat à l'Energie Atomique poursuit les recherches scientifiques et techniques en vue de l'utilisation de l'Energie Atomique dans les divers domaines de la science, de l'industrie et de la défense nationale*”.

2 See « Ordonnance N° 45–2563 du 18 Octobre 1 945 (J.O. du 31 .10.45) et rectificatif du J.O. du 3.11 .45) modifiée par la loi n° 47–1497 du 13 Août 1947(J.O. du 14.8. 47) et par le décret n° 51 -7. du 3 Janvier 1951 (J.O. du 4. 1 . 51) ; copy online in

3 See exposé des motifs : « ...L'autorité de l'Etat sur la marche du Commissariat est d'ailleurs la contrepartie nécessaire de la liberté, tout à fait exceptionnelle dans notre droit public, qui' lui est donnée dans sa gestion. Pour assurer une consécration indiscutable à cette autorité, il est prévu que le Comité est présidé par le Président du Gouvernement Provisoire.... ».

France's continued research in the military use of nuclear energy resulted in its first bomb tests in 1960, eight years after the United Kingdom's test in 1952. The peaceful use of nuclear energy in France was as important as its wish to remain and grow as an independent nuclear military force in the World. Today, France, together with the United Kingdom, the United States of America, Russia and China, is one of the five nuclear weapon states (NWS) under the Nuclear Non-Proliferation Treaty (NPT).⁴, with four undeclared or unrecognized states, with possibly more on their way.

When it came to purchase and choice of nuclear energy technology, none of the other founding states even showed strong interest in purchasing French civil nuclear technology. From the beginning of EURATOM, and even ahead of its ratification, these other founding Member States- Belgium, the Federal Republic of Germany, Italy, Luxemburg and the Netherlands- were more interested in ordering US technology for new nuclear power plants. A specific agreement with the United States – the EURATOM Cooperation Act followed in 1958⁵, immediately after the establishment of EURATOM.

Jean Monnet and others in Europe together with eminent non-EU politicians such as US President Eisenhower “*hoped that EURATOM would foster European integration*”.⁶ As was outlined by the European Parliament's research unit in 2002: “*Sectoral integration of nuclear energy was chosen by Spaak and Monnet because it was viewed as less ambitious than a general common market or customs union, and therefore less likely to fail. Nuclear energy was an appealing prestige technology, especially after the liberalisation of US nuclear policy. The Euratom proposal was*

4 The Principle of the NPT is that other states which were signatories eschewed the nuclear weapons option and in return were promised assistance in civil nuclear power development by the weapons states.

5 EURATOM Cooperation Act of 1958 is a United States statute enabling a cooperative program between the European Atomic Energy Community and the United States. Following the US Atomic Energy Act of 1954, the cooperative program was designed to be an international agreement cleared the way for the United States to build nuclear power plants within the European Atomic Energy Community territory.

6 In fact, Monnet after the first failures for more European institutions tried to push for a EURATOM treaty as integrating force and peace enforcing similar to the ECSC approach. Only, especially countries such as Germany did not want any EURATOM treaty without a Common market: “To Monnet's great surprise the German government was not interested in the new (EURATOM) Community, while Erhard, already credited with the German Wirtschaftswunder, was openly opposed to it. A meeting with German officials established the basic fact of the coming negotiations, namely that Germany would not swallow EURATOM without a general common market...” Werner Kamppeper: Lessons of European Integration, April 2000, http://www.fes.de/analysen/kamppeper1_1.html

*expected to appeal to the French, since France had a strong interest in the development of [...] nuclear energy*⁷

On the other hand, the United States was a keen competitor of France in view of the supply of nuclear power plants, having a competitive advantage at the time of the EURATOM negotiations.⁸ In addition, relations between France and the US were quite frail after the Suez crisis in 1956.

This made France turn to its European neighbors rather than towards the United States⁹ for cooperation in nuclear issues but without wanting to give up dominion on its own nuclear policy.

France wanted to close the widening gap between itself and the United States' prolific construction and sale of nuclear power plants. For France, EURATOM was the vehicle to stop American dominance in the supply of nuclear energy in Europe.

As was distinctly pointed out by Louis Armand, President of the French CEA (Comité de l'équipement industriel au Commissariat à l'énergie atomique (CEA)), during the EURATOM debate in the French National Assembly on 5 July 1956: *"Il est inutile d'attendre pour se demander si telle solution (EURATOM, d.Verf.) serait la meilleure. Je ne sais comment vous faire partager mon angoisse quant à l'urgence. Le temps presse et, si nous voulions faire de l'effet, je vous dirais que, pendant que*

7 O' Driscoll, Mervyn, European Parliament, Directorate-General for Research, Working paper, The European Parliament and the Euratom Treaty: past, present and future, 2002.(ENER 114 EN), p. 36.

8 Sebastian Wolf; EURATOM, the European Court of Justice, and the Limits of Nuclear Integration in Europe, German Law Journal; 12 (2011), 8. – S. 1637–1657, p. 1653; Dwight D. Eisenhower: "I am especially pleased to approve the EURATOM Cooperation Act of 1958, which enables the United States Government to begin active preparation for the Joint United States-EURATOM Program to develop nuclear power in Europe. EURATOM (The European Atomic Energy Community), which came into being on January 1, 1958, was formed by six of our European friends--Belgium, Germany, France, Luxembourg, Italy and the Netherlands--in order to combine their efforts in developing the peaceful uses of atomic energy. It holds great promise, not only as a means to this end, but also as a means of furthering European unity. Our Joint Program, which is EURATOM's first major program, is designed to achieve the construction in Europe of about six nuclear power reactors with a total installed capacity of about one million kilowatts of electricity and to improve power reactor technology through a research program of great scope. This Joint Program should prove highly beneficial both to Europe and to the United States."-The EURATOM Cooperation Act of 1958 is Public Law 85–846 (72 Stat. 1084). Dwight D. Eisenhower: "Statement by the President upon Signing the EURATOM Cooperation Act." August 29, 1958. Online by Gerhard Peters and John T. Woolley, The American Presidency Project <http://www.presidency.ucsb.edu/ws/?pid=11203> .

9 Grégoire Mallard, Crafting the Nuclear Regime Complex (1950-1957): Dynamics of harmonization of opaque treaty rules; EJIL (2014) , Vol. 25 No. 2, 445–472, p. 455.

nous parlons, un ensemble d'alternateurs équivalent à ceux, réunis, de Génissiat, de Donzère, d'Eguzon, de Gennevilliers, soit tout l'ensemble des alternateurs français, travaillent en Amérique à alimenter les usines de séparation isotopiques, donc à augmenter la distance qui nous sépare de l'industrie américaine. Tout cela va tellement vite que, si nous ne nous dépêchons pas, nous ne rattraperons plus. Sans EURATOM, c'est bien simple, tous les pays européens iront s'adresser aux colosses. L'Italie, nous le savons, achète dès maintenant une installation américaine de 75.000 kilowatts, du même type que celle que les Belges ont acquise et qu'on inaugurerait l'année prochaine à Bruxelles. Et voilà le commencement de ces accords bilatéraux, le commencement de cet achat de matériel. ...Aussi, ce que je puis vous dire, c'est que le travail des experts à Bruxelles a été un travail fonctionnel. On l'a dit et c'est vrai. Ce n'est pas institutionnellement que le problème a été étudié. Il a été défini en fonction des besoins, et comme M. Perrin l'a dit, en faisant juste le nécessaire, mais en le faisant bien, car on n'a pas besoin de tout associer. Mais ce qu'on associe, il faut l'associer avec des règles telles que l'ensemble travaille mieux que ne le feraient les mêmes éléments, mais séparés. C'est ainsi que nous n'avons pas pensé à la création d'un commissariat européen de l'énergie atomique.... Nous avons respecté tous les programmes nationaux, comme le demandait M. Perrin, et limité l'association à un minimum, mais au minimum vital, c'est le cas de le dire, au minimum nécessaire pour une large irradiation. Les experts de Bruxelles ont envisagé que l'association ne porterait que sur 20 p. 100 des équipements. C'est ainsi que les recherches resteront indépendantes".¹⁰

And, on the other hand, France insisted during the negotiations for the EURATOM Treaty that “equality of rights of the Members”, as was claimed by the other founding Member States to EURATOM, was not in any way pursued in order to hinder its own nuclear weapon programme.

During the months before final consent on the EURATOM treaty text was reached, conflict and discussion continued. Disagreement was rife over Article 77 on the balance to be drawn when it came to defining the single jurisdiction that would have control over fissile material on the EURATOM territory.

At the London Conference of nine powers on 28th of September to 3rd of October 1954, German Chancellor Konrad Adenauer declared that his country would not produce nuclear weapons in Germany and thus enabling his country for

10 ARMAND, Louis; PERRIN, Francis. L'EURATOM : Exposés faits à la tribune de l'Assemblée nationale le 5 juillet 1956 par Francis Perrin et Louis Armand. Paris: 1956. 31 p. p. 19-31. http://www.cvce.eu/obj/expose_de_louis_armand_sur_la_politique_nucleaire_de_la_france_et_sur_l_euratom_5_juillet_1956-fr-9ee0da8e-928a-4e5e-af43-a3abfeef683e.html

re-armament.¹¹ Nonetheless, in January 1957 in Algeria, France and Germany, the latter being a deliberate opponent so that France would not alone have a military use for nuclear fissile material¹², signed a secret military cooperation agreement in a meeting between their defense ministers (Maurice Bourgès-Maunoury and Franz Josef Strauss). This agreement was later extended to Italy in 1957. These secret agreements laid the ground for a biased application of the control articles of EURATOM. In consequence of these agreements, EURATOM never clearly governed material destined for military use. Only in that way did France accept that the EURATOM inspectors would “*control the conformity between the ‘real’ and ‘declared’ uses of nuclear fuels (be they civil or military uses)*”¹³

Therefore, the inspectors could only verify that the material in France was for military use but could not prevent this use. This weakened EURATOM’s role as a backbone of the international Non Proliferation Treaty (NPT) and its objectives and immediately hamstrung its status as the governing supranational body. Moreover, it created a situation from the beginning where there was a split vision between France and the other EURATOM founding members. This in effect weakened any hope for unity under EURATOM. One can thus conclude that divergence was an integral part of EURATOM from its beginning. Also, to the outside world and especially to the United States, this biased approach prevailed. Monnet briefed his assistant Max Kohnstamm¹⁴ before they went to negotiate details for the EURATOM-US

11 For the extent of this policy in order to ensure France’s acceptance of Germany having an own army (die Bundeswehr) again, see Soutou Georges-Henri. Les accords de 1957 et 1958 : vers une communauté stratégique nucléaire entre la France, l’Allemagne et l’Italie? In: Matériaux pour l’histoire de notre temps, n°31, 1993. Penser et repenser les défenses (suite). pp. 1-12;doi : 10.3406/mat.1993.404096 http://www.persee.fr/doc/mat_0769-3206_1993_num_31_1_404096

12 See for background of a quite lively s dispute between the ministers of foreign affairs of France and Germany, Grégoire Mallards, a.a.O.

13 Grégoire Mallard, a.a.o.

14 Max Kohnstamm: From 1948 to 1952 Max Kohnstamm was appointed to the Dutch Ministry of Foreign Affairs, as Diplomat under the direction of Minister Hirschfeld, where he was responsible for German affairs and in particular the Ruhr Authority and later under Minister Stikker, he was responsible for European concerns. He helped negotiating for the Schuman Plan where he met Monnet. After this, he participated in the negotiations for EURATOM and in the negotiations for the US-EURATOM Agreement of 1958, where he was Secretary to the three “Wise Men”. He later became Vice-President of the Action Committee for the United States of Europe, 1956–1975. He was a close supporter of Monnet in his endeavor for creating an integrated Europe. A fascinating wealth of information are his archives at the European University Institute (<http://archives.eui.eu/en/fonds/155415?item=JMDS.A-09.06>).

treaties on Nuclear to “*avoid explaining how the system of EURATOM control would work*” and to maintain “*the appearance*” of equivalence between the American and the EURATOM control and thus of strictly non-military civic use of fissionable material belonging to and controlled under EURATOM.¹⁵

2 EURATOM Ltd.

The problematic start thus led to a future where no real Atomic Energy Union was ever established in Europe. Instead, EURATOM has served as a basis for gigantic and continuing benefits for nuclear research over the last decades in comparison to other energy research. Additionally, there never was a unified movement to promote a European policy framework for nuclear.

The EURATOM treaty remains a treaty with limited liability.

There seems to have been a recent move to attach an aspect of exclusive supremacy to EURATOM over the European Union treaties, at least when it applies to the internal energy market and to the observance of procurement and competition rules. Under the current Commission and its predecessor, EURATOM was re-invented as a way of underlining a common European interest to support the creation of new nuclear power plants with public money and guarantees, as will further be shown.

National preferences or antipathies concerning a powerful EURATOM Community prevail until today.

The above, almost fascinating, national obstinacy of Member States to not create a true Atomic Energy Union when agreeing to the EURATOM Treaty in the past is well documented by numerous examples, the first of which being the unwillingness of France in the years after EURATOM entered into force to sign the NPT. The NPT, as joint initiative of the Soviet Union, the United States of America and the United Kingdom has been open for signature since 1968.

The signature of the Community did not lead to an automatic assent of France to the NPT since the EURATOM treaty is only binding internally, with its own safe guard clause under Art. 77, on the regional Member State level.

In 1973, the seven non-nuclear weapon States within EURATOM formally signed, together with the European Community, an agreement with IAEA for the implementation of NPT safeguards.

Concerning non-military nuclear installations, a similar agreement was concluded in 1976 among the IAEA, the Community and the United Kingdom. The

15 Grégoire Mallard, a.a.O.

United Kingdom deliberately had offered to accept the IAEA safeguards for the UK non-military nuclear plants.¹⁶

France only acceded to the NPT in 1992, in the same year as China did. Before that and after the NPT entered into force, France not being a party to the NPT, signed a similar three party agreement with the EURATOM Community and the IAEA which foresaw the application of IAEA safeguards in a manner similar to the above agreements but, *“limited, however, to those materials which France wants to put under such safeguards. (...) Thus we now find in Western Europe a unique situation in the field of safeguards due to the fact that there exists a regional safeguards authority invested with supranational rights which at the same time not only fulfils, within the framework of the IAEA system, the tasks normally assigned to a national system of accounting and control, but also collaborates with the IAEA in inspections in a way which permits the latter to draw its own independent conclusions.”*¹⁷

3 Activities and sectors governed by EURATOM

When screening EURATOM following modern, scientific and established rules on circular economy legislation, EURATOM again fails to deliver further underlining its status as a *“failed community”*.¹⁸ An example is its limited provisions on planning and permitting procedures which fail to include operation, safe operation, ore supply, dismantling and safe final storage of radioactive waste.

Existing secondary legislation under EURATOM, which covers issues such as waste, were in some cases helped by a progressive interpretation of the European Court rather than by the EURATOM treaty itself with the limited scope of its concerned Chapter (Chapter 3 on Health and safety), as will be reflected on below.

In consequence, EURATOM, following its beginnings and its undercurrent of opposing interests, particularly those of the one Nuclear Weapon State (NWS) (France) and the other EURATOM founding members, emerges as a ‘skeleton treaty’ unable of consequently regulating the diverse elements of nuclear power including

16 Schleicher, H.W. (1980), (former Director of the EURATOM Safeguards Directorate, Commission of the European Communities). Nuclear Safeguards in the European Community – a Regional Approach, IAEA Bulletin 22 (3/§) p 45.

17 Schleicher, H.W., *ibid.* page 45.

18 See Wolf, Sebastian, EURATOM, the European Court of Justice, and the limits of Nuclear integration in Europe, German Law Journal 12 (2011), 8, p. 1638 and referring to Weilemann, Peter, die Anfänge der Europäischen Atomgemeinschaft, p. 157.

uranium mining, supply, shipment, use and processing and final dismantling of nuclear installations.

EURATOM's objective is prominently established in the EURATOM treaty:

“Article 1

By this Treaty the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM). It shall be the task of the Community to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries.”

Art. 2 lists the responsibilities and tasks for the EURATOM Community:

Major objectives are to promote research and ensure the dissemination of technical information and to establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied; facilitate and ensure investment, particularly by encouraging ventures on the part of undertakings; Chapter 3 EURATOM, entitled, ‘Health and Safety’, outlines content and limitation of the power of the Community with its Art. 30:

According to EURATOM, basic standards shall be laid down within the Community for the protection of the health of workers and the general public against the dangers arising from ionizing radiations. However, this provision does not give any right to the Community to directly safeguard Nuclear Power stations: *“It essentially provides for the Community to establish a series of dose limits for exposure of human beings to radiation. (This has been done, usually following the line established by the International Commission for Radiological Protection (ICRP)). But it does not provide any competence to EURATOM either with respect to possible damage to the natural environment caused by radiation, and perhaps even more remarkably, it provides no EURATOM Community competence with respect to the safety of nuclear reactors”*.¹⁹

The main European objectives under EURATOM outlined in Art. 2 and detailed for safety and health aspects in Chapter 2, are:

- the establishment of the basic installations necessary for the development of nuclear energy in the Community;
- to ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;
- to make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended;

19 O’ Driscoll, Mervyn, *The European Parliament and the EURATOM Treaty: past, present and future*, p. 17.

- to exercise the right of ownership conferred upon it with respect to special fissile materials; details of the property ownership in this sense are further laid down in Chapter VII of the EURATOM treaty. However, while the Community has the property rights, Art. 87 makes it clear that Member States, persons and undertakings shall have the unlimited right of use and consumption of fissile materials in lawful possession.

In reality, these fissile material property rights of the Community have proved of little practical consequence within the European Community, as will again be outlined below.

EURATOM should, under Art. 2, ensure wide commercial outlets and access to the best technical facilities through the creation of a common market in specialised materials and equipment, through the free movement of capital for investment in the field of nuclear energy and through freedom of employment for specialists within the Community.

Another point which was to be a future point of contention as to its scope was the provision under Art. 2 that EURATOM should establish with other countries and international organizations similar relations as it will further progress on the peaceful uses of nuclear energy.

4 The EURATOM Supply Agency

Chapter 6 of Title II EURATOM establishes the EURATOM Supply Agency (ESA) and confers upon it an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside or from outside of the Community. Chapter 8 established the property ownership rules where -as laid down in Art. 86 Para 1 EURATOM- the special fissile materials shall be the property of the Community.

The ESA conceived would own and control the supply of all fissile materials in the Community. Art. 86 and 87 EURATOM are perfect examples of a bizarre and redundant legal position of the Community: the provisions under Art. 86 EURATOM declare the Community as being holder of the property right on special fissile materials, and defines a “*right of ownership*” to “*all special fissile materials which are produced or imported by a Member State, a person or an undertaking*” and which are subject to the safeguard clauses under Chapter 7 EURATOM. Despite this principle, the Community has no **real** right of ownership since use is clearly curtailed via the provisions under Art. 87 EURATOM, according to which Member

States, persons or undertakings have unlimited rights over use and consumption of this material. The European Supply Agency reflects the ambiguous and incomplete community framework of EURATOM.

It is the EURATOM Community / the Commission that controls the distribution of patent rights and production licenses for a series of reactor designs and fuel cycle technologies to be developed by the Joint Nuclear Research Centre (JNRC). Important conditions are set for research (Art. 7) and international agreements (Art. 101), e.g. on ensuring access to fissile materials.

These tasks and responsibilities by the Community are, to a large extent, kept away from serious control by the European Parliament in the sense of modern legislative power and supervision over the executive or, as was put pointedly: “Control by democratically elected Parliaments was not exactly a significant feature of the nuclear sector in the 1950s”.²⁰ And this democracy-excluding oversight was never reformed by a modernisation of EURATOM as has been the case in other areas via the various reform treaties leading to the Lisbon treaty.

When it comes to uranium supply, the reality of nuclear supply substantially mirrors the existing situation on gas import dependence in Europe. All sourcing is done outside the EU and mostly from former Soviet Union countries, e.g. from Russia. One might question the sustainability of this supply route, a worrying fact also outlined by the European Commission itself.²¹ Another point of unease is the fact that Russia is nowadays pushing to supply new nuclear power stations to Europe, such as the one just recently constructed in Hungary named Paks II – a new installation with procurement and state aid authorised by the European Commission.

20 O’ Driscoll, Mervyn, *The European Parliament and the EURATOM Treaty: past, present and future*, p.6.

21 The EU Commission outlined in its Communication COM (2014) 330 final “European Energy Security Strategy” of 28th of May 2014, p.16: “ The worldwide uranium supply market is stable and well diversified but the EU is nonetheless completely dependent on external supplies. There are only a few entities in the world that are able to transform of uranium into fuel for the nuclear reactors, but EU industry has technological leadership on the whole chain, including enrichment and reprocessing. “...However, Russia is a key competitor in nuclear fuel production, and offers integrated packages for investments in the whole nuclear chain. Therefore, particular attention should be paid to investments in new nuclear power plants to be built in the EU using non-EU technology, to ensure that these plants are not dependent only on Russia for the supply of the nuclear fuel: the possibility of fuel supply diversification needs to be a condition for any new investment, to be ensured by the EURATOM Supply Agency. Furthermore, an overall diversified portfolio of fuel supply is needed for all plant operators.”

4.1 The reality of supply channels and long term supply contracts

Chapter 6 of Title II EURATOM opens with mention to, and a request for, a common supply policy concerning the sourcing of source and special fissile materials and conveys to the supply agency an exclusive right to conclude contracts relating to the supply of ores, source materials and special fissile materials coming from inside or outside the Community. Strangely enough, Chapter 6 seems to be respected or applied very little and “*many articles have apparently either not been implemented at all, or only partially implemented or applied.*”²²

The same is valid for the Special Fissile Materials Financial Account as a transaction balancing and auditing tool: Art. 89, para. 4 under Chapter 8 of EURATOM foresees that the Agency could undertake transactions for its own account and shall in this context “be deemed to be an undertaking”. This provision for a European nuclear undertaking has never been implemented.

The Supplies Agency exists, but rather worked as an observer than as an active buyer and supplier of fissile material. Until at least 2005 the Agency never itself used its purchase power and there is no publicly documented evidence for direct activities in purchasing, supplying and stockpiling of material.

In 2005, a report on Security of supply, published by an advisory task force to the EURATOM Supply Agency, parted from this past experience, that security of supply concerns in the nuclear fuel cycle result from the fact that primary production of natural uranium covers only some 60% of world demand while the remaining part comes from historical production (inventories and weapons dismantling) and from the re-enrichment of tails of depleted uranium resulting from the enrichment process.²³ This task force of the major Western nuclear operators at that time and the nuclear energy and fuels company, British Nuclear Fuels plc (BNFL), several times outlined the question of stocks but always clearly and self-evidently defined and described the stocks as those kept by the nuclear operators. The report mentioned the possibility that the Agency could act under Art. 72 EURATOM and establish a stockpile, but in no way referred to this as an option near to reality. This is clearly illustrated in the following analysis in the report, underlining that there “*is a decrease of stocks in many countries as part of this reduction of operational costs for utilities.*”

22 O’ Driscoll, Mervyn, The European Parliament and the EURATOM Treaty: past, present and future, p. 13

23 See Analysis of the Nuclear Fuel Availability at EU Level from a Security of Supply Perspective, EURATOM Supply Agency – Advisory Committee Task Force on Security of Supply Final Report of the Task Force, June 2005, page 5.

The appropriate level of stocks and the entire fuel procurement policy depends on the size and electricity generation pattern of each utility”.²⁴ Also, the recommendation in case of shortages does not mention in any way a role for the Agency to execute its right and even objective under EURATOM in stockpiling capability.²⁵

The European Court of Auditors has apparently regularly asked what the Supplies Agency could actually be doing. France, over many years, has displayed an attitude of not caring at all about the Agency.²⁶

When it comes to national policies and contracts with third countries, an international organisation or a national of a third State (e.g. an energy company or supplier), the line between competencies of the State and of EURATOM remained unclear and was several times subject to European Court decisions. The Member States clearly remain sovereign to bilaterally conclude those international agreements. EURATOM steps in when “*matters within the purview*” of EURATOM are concerned, as laid down under Art. 103 EURATOM.²⁷ This wording creates ground for uncertainty and thus underlines the reality that there is no unique EURATOM competence, even in matters where the ownership of the fissile material is explicitly given to the EURATOM community under the treaty but where use and

24 See, Analysis, *ibid.* page 5.

25 See, Analysis, *ibid.*, page 16: “Against long term risks (not susceptible to happen in less than a year or two) remedies are more mixed, e.g. exploration and investments in new production facilities, diversification, long term contracting, and partnerships. In any case, an effective monitoring of the supply and demand situation at EU and world levels and its likely evolution would be a very important tool for the Commission’s analysis in view of the EURATOM Community’s responsibilities in the EU energy security of supply, as well as for the nuclear industry. The ESA which already has a unique insight into the market through its concurrence privilege, could be this monitoring tool, but would benefit from accurate information from all nuclear industries operating in the EU, on their sources and commitments as well as their stocks of nuclear material (including their quantity, form and location).”

26 O’ Driscoll, Mervyn, *The European Parliament and the EURATOM Treaty: past, present and future*, European Parliament, Directorate-General for Research, Working paper, 2002, (ENER 114 EN), page 17: “The Court of Auditors has regularly asked what the Supplies Agency actually does. France appears in the past to have sometimes largely ignored the very existence of the Agency, considering that France is exempt from most of the provisions of Chapter 6 (which it has also challenged the legitimacy of in the European Court of Justice – so far unsuccessfully).”

27 See for example: European Court, Ruling 1/78 of 14. 11. 1978 following an application of the Kingdom of Belgium pursuant to Art. 103 EURATOM, asking as to whether in the absence of the concurrent participation of the Community, Belgium may adhere to the Convention on the Physical Protection of Nuclear Materials, Facilities and Transport under the IAEA regime.

management is kept with the Member States. This limitation is also important in questions around who can sign which kinds of agreements at international level.

In 2016, a recommendation by the Commission was needed on the interpretation of Art. 103 EURATOM. The recommendation tries to establish more clarity around fuel supply contracts but outlines a dilemma: *“In the event that a draft agreement or contract concerned by the present Recommendation includes also provisions on supply matters, its assessment by the Commission pursuant to Article 103 should be without prejudice to the exclusive right of the Agency to conclude supply contracts; co-signature of supply contracts by the Agency on the other hand is without prejudice to the assessment by the Commission of the compatibility of Member States’ draft agreements or contracts with the provisions of the Treaty and its secondary legislation.”*²⁸

The EURATOM Supply Agency is hesitant, when it comes to agreeing to long-term supply contracts with nuclear fuel.

In a recent decision, the Commission acting as the EURATOM Supply Agency refused to co-sign a Nuclear Fuel Supply (NFS) Contract on nuclear fuel supply and spent fuel storage and treatment for future Units 5 and 6 to be built at the site of the existing Paks nuclear power plant in Hungary. The Hungarian company Paks II and the Russian company Nizhny Novgorod Engineering Company «Atomenergoproekt» had signed the NFS Contract on 9 December 2014. Following its signature, the NFS Contract was submitted to the “Agency” on 23 December 2014 pursuant to Art. 52 of the EURATOM Treaty and screened under the procedure of Art. 103. By letter of 13 January 2015, after extensive discussions with the Paks II consortium and Hungary, the “Agency” notified its refusal to co-sign the NFS Contract, reasoning that the clauses of the contract *“de facto prevent diversification of fuel supply”*.²⁹ Under this contract, Rosatom, the Russian State Atomic Energy Corporation, is mandated to provide the technology and the supply of nuclear fuel (and assemblies) and offered the option of managing the spent nuclear fuel for at least 20 years through its subsidiary “NIAEP”. The financing of the project is aimed to be ensured mainly via a loan granted by the Russian Federation to the Hungarian State for which the state gives various guarantees. The state aid part of the deal was recently authorised by the European Commission in view of Art. 2 (c) EURATOM³⁰

28 See C(2016) 1168 final COMMISSION RECOMMENDATION of 4.4.2016 on the application of Article 103 of the EURATOM Treaty, para 13.

29 See (declassified part of) COMMISSION DECISION of 2.3.2015 (CÇ2015) 1398 final) relating to a procedure in application of the second paragraph of Art. 53 of the EURATOM Treaty, Para 4.

30 Art. 2 c) EURATOM: (In order to perform its tasks, the Community shall, as provided in this Treaty:..)“(c) facilitate investment and ensure, particularly by encouraging ventures

and its view that there is a common European interest in promoting the creation of new nuclear power stations.³¹ On the fuel supply and waste management contract, the Agency was more wary. A problematic reality has appeared: Hungary is to complete a new state aid-supported construction of the Paks II nuclear power plant, with supply and management provided by Rosatom where the Commission itself has acknowledged an almost full import of fissile material from Russia.

Concluding, it is obvious that major executive provisions for the Agency under Chapter 6 and 8 of EURATOM are not mirrored in reality even though they were designed to represent its pillars. They seem to never have really been destined to have a dominant role enshrined to the EURATOM Community and its control agencies: France and Western Germany at the time of the Spaak Committee³² and the preparation of a Treaty gave a green light for a somewhat inventive definition, concerning “property” and “control” .

To recall: In view of France’s insistence as sovereign NWS, the Spaak Committee explained that “control” for the Community when it comes to fissile material means a “control of conformity”. “*The EURATOM Community would be granted “property” of all nuclear fuels used for peaceful ends within the EURATOM territory (therefore leaving the property of fuels used for French military ends to the French government); but this notion of property was defined “as a “property sui generis,” an old notion which differed from the common notion in Roman Law, since the property of fuels by the EURATOM Community granted no rights to its owner during normal times”.*³³

And in line with the above task force’s report, not only France but none of the nuclear operators in any Member State attributed any real power of property and supreme control to the Community.

This mismatch once again underlines the already drawn conclusion from the late 1990s that “EURATOM never got off the ground”.³⁴

on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community; “.

- 31 SA.38454 – 2015/C (ex 2015/N) Commission decision of 6.3.2017 on state aid which Hungary is planning to implement for supporting the development of two new nuclear reactors at Paks II nuclear power station.
- 32 The Spaak Committee was an Intergovernmental Committee set up by the Foreign Ministers of the six Member States of the European Coal and Steel Community (ECSC) as a result of the Messina Conference of 1955.
- 33 Mallard, Grégoire, *The European Nuclear Force, An Obscure Object of Desire*, Princeton University and Université Paris-Est (LATTS) (2009), page 19.
- 34 Trachtenberg, Marc, 1999. *A Constructed Peace: The Making of the European Settlement*. Princeton: Princeton University Press. Page 205.

5 The relationship of the European treaties towards each other

The Merger Treaty, or “Brussels Treaty”, which entered into force on 1 July, 1967 created a Single Commission and a Single Council of and for the three European Communities, meaning the executive bodies of the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). The institutions of the EEC would manage all institutional responsibilities under EEC, ECSC and EURATOM. All three were, after the Brussels treaty, denominated as the European Communities but from a legal point of view all three continued to exist separately under their respective treaties. As a consequence, since 1967, the Council and the Commission of the EEC replaced the Commission and Council of EURATOM and the High Authority and Council of the ECSC. Although each Community remained legally independent, they shared common institutions.

In 1993, the Maastricht Treaty created the European Union, which absorbed the three Communities, yet EURATOM and the ECSC kept their legal personality.

The Maastricht treaty was repealed by the Amsterdam Treaty, which was signed in 1997. With the Lisbon Treaty of 2009, the European Union replaced the original European Communities but the structures and legal conditions at the communities’ bases as specific treaties remained unchanged. This was due to lack of support in many EU Member States to create a European Constitution as had previously been conceived by the Maastricht treaty. Therefore, the European law is still established by the two international Treaties, minus the ECSC, which had a deadline and expired after 50 years in 2002. The Treaty establishing the European Community was renamed the “Treaty on the Functioning of the EU” (TFEU).

During the finalised 1995 enlargement of the European Union, Austria, Finland and Sweden acceded to the European Union (EU). All these States had already established links to the Union with the European Free Trade Association (EFTA).

6 The role of the European Parliament and of the European Court of Justice

A major headache for the European Parliament and the democratic community in the EU in general is its very limited role in all EURATOM based legal projects since its position is restricted to that of an advisory institution under Art. 31 EURATOM rather than as a legislator. Back in 1988, and two years after the Chernobyl

disaster, the European Parliament contested in an annulment procedure before the European Court that Council Regulation (EURATOM) No. 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feeding stuffs following a nuclear accident or any other case of a radiological emergency was wrongly based on Art. 31 EURATOM, which provides that the Parliament is to only be consulted, whereas it should have been based on Art. 100a of the EEC Treaty which requires cooperation with the Parliament implementation of the procedure.³⁵

The European Court of Justice (ECJ) declared the case as admissible despite an opinion of the Council asserting that the European parliament did not have the legal personality under (former) Art. 173 EEC treaty or Art. 146 EURATOM since it is not included among the institutions which, like the Member States, bring an action for annulment against any measure of another institution before the Court.³⁶

The Court accepted the fact that the Parliament is not mentioned in both articles and thus the Court could not include the Parliament among the institutions, which may bring an action per se as institution but “*being required to demonstrate an interest in bringing an action*”.³⁷

But the Court saw its “*duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament’s prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner*”.³⁸

According to the Court, such a procedural gap cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities, thus referring to all Treaties. Therefore and insofar as the Parliament disagrees with the Council’s choice of legal basis for the contested Council regulation, this led to a breach of Parliament’s prerogatives by denying it the possibility of participating in the drafting more actively than it could under the EURATOM consultation procedure.

In consequence, the Court dismissed the Council’s objection of inadmissibility and allowed the proceedings to be continued with regard to the substance of the case.

On the substance, though, the Parliament lost the case. The Court did not follow the arguments of the European Parliament that the regulation was also a harmonisation measure within the meaning of Art. 100a of the EEC Treaty. For the Court

35 ECJ Case C-70/88, (interlocutory judgment of 22.05.1990), Para 39.

36 Case C-70/88,(Interlocutory judgment) Para 13.

37 Case C-70/88, (Interlocutory judgment) Para 24.

38 Case C- 70/88, (Interlocutory judgment) Para 25.

the prohibition of marketing provided for in Art. 6(1) of that Regulation was “*only one condition for the effectiveness of the application of the maximum permitted levels. The regulation therefore has only the incidental effect of harmonising the conditions for the free movement of goods within the Community inasmuch as, by means of the adoption of uniform protective measures, it avoids the need for trade in foodstuffs and feedingstuffs which have undergone radioactive contamination to be made the subject of unilateral national measures.*”³⁹

Over the ensuing years, the European Parliament has had some success nonetheless in this respect, but it is restricted to very few decisions.⁴⁰

An interesting case in this context may also be the ECJ judgment in C-490/10 of 06.02.2012 concerning an Action for annulment in view of Regulation (EU, EURATOM) No. 617/2010, especially concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and the choice of the legal basis of this Regulation, meaning Article 187 EURATOM versus Article 337 TFEU, in view of Article 194 TFEU.

The case concerned an action introduced in October 2010 by the European Parliament against the Council, where France and the Commission intervened on the side of the Council. The Parliament demanded the ECJ to annul Council Regulation (EU, EURATOM) No 617/2010 of 24 June 2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) No 736/96.⁴¹ In 2009, the Commission had

39 CASE C-70/88, JUDGMENT OF 4. 10. 1991 Para 17.

40 Recently, the European Parliament voted a resolution of 13 September 2017 on the draft Commission Implementing Regulation amending Commission Implementing Regulation (EU) 2016/6 as regards feed and food subjected to special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station (D051561/01 – 2017/2837(RSP)) urging the Commission not to loosen restrictions on imports. The Parliament argues that it is very difficult to verify whether the measures proposed are sufficient to protect the health of Union citizen, especially in view that the responsible Japanese utility Tokyo Electric Power Company (TEPCO) has officially requested permission from the Japanese Government to dump into the Pacific Ocean almost one million tonnes of highly radioactive water related to the clean-up of the nuclear accident. The Parliament sees the draft Commission implementing regulation inconsistent with Union law in that it is not compatible with the aim and general principles laid down in Regulation (EC) No 178/2002 of providing the basis for ensuring a high level of protection of human life and health, animal health and welfare, the environment and consumer interests; the Parliament calls on the Commission to go back to the drawing board and present together with a new proposal.

41 Council Regulation (EU, EURATOM) No 617/2010 of 24 June 2010 concerning the notification to the Commission of investment projects in energy infrastructure within

submitted a proposal for this Regulation to the Council. The proposal was based on Art. 284 EC and Art. 187 EURATOM.⁴² These provisions did not provide for any involvement by the Parliament in the decision-making process, but the Council decided to consult it as it had done when adopting previous Regulation No 736/96. Since the entering into force of the Lisbon treaty in December 2009, the European Parliament asked for a review of the legal basis for the draft Council Regulation so that it would henceforward be based on Art. 194 TFEU⁴³, instead of Art. 284 EC (which became Art. 337 TFEU) and Art. 187 EURATOM.

The Parliament argued that Art. 337 TFEU and Art. 187 EURATOM were now substituted with Art. 194 (1) and (2) TFEU as legal basis to be observed for this draft Regulation. The Regulation focused on data collection in the energy market and the newly introduced shared responsibility for energy under the Lisbon treaty would make Art. 194 TFEU the relevant bases thus ensuring the Parliament's legislative role as defined in the new co-decision procedure. The Court's judgment not only agreed with the view of the European Parliament, that Art. 187 EURATOM would in this case not take precedence over Art. 194, but that the latter remained the sole basis for the envisaged Regulation, underlining that the contested Regulation con-

the European Union and repealing Regulation (EC) No 736/96 (OJ L 180, 15.7.2010, p. 7).

42 Art. 187 EURATOM: "The Commission may, within the limits and under the conditions laid down by the Council in accordance with the provision of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it."

43 Art. 194 TFEU:

"1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Art. 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature."

cerns the notification by all Member States of the aggregated data and information relating to all investment projects in energy infrastructure.⁴⁴

The Court came to the conclusion, that it is “*appropriate to find that the contested [R]egulation, in so far as it was based on Art. 187 EURATOM, was adopted on an incorrect legal basis and it should have been based solely on Art. 194(2) TFEU*”.⁴⁵ The Court annulled the contested Regulation on this ground.

This leads to the conclusion that EURATOM is “*lex specialis*” only for those objectives which are explicitly and specially regulated by it and only if clear restrictions respectively excluding nuclear matters from general energy policy or other policy fields in the Union with consequence to the energy sector are outlined.

The European Parliament has the right for co-decision in areas that touch upon EURATOM issues when the legal basis is predominately the general TFEU. But the conflict often arises about the legal bases for energy legislation which affects nuclear matters in the energy market. In a recent decision by the ECJ it did not follow a similar annulment request by the European Parliament concerning the legal basis in view of Council Directive 2013/51/EURATOM⁴⁶ on the protection of the health of the general public with regard to radioactive substances in water intended for human consumption, underlining EURATOM’s specific sphere of application.⁴⁷ The choice of legal basis in this case excluded application of the co-decision procedure and thus any substantial involvement of the Parliament.

As has been outlined, the main provisions of the EURATOM Treaty have never been amended since it entered into force on 1 January 1958, which is a sign of a monolithic or static situation, strangely detached from national energy reality and the European objective of a single European Energy market, which was defined in the mid-eighties of last century.

Clear sign of this stagnation is the limited number of judgments of the European Court of Justice on cases with respect to the EURATOM Treaty, most concerning violation of the safeguard provisions under Art. 77. EURATOM. Based on specific research by Wolf, there seem to be no more than 31 cases until 2009 before the European Court of Justice which have secondary legislation based on EURATOM as its object.⁴⁸ Most of these cases refer to infringement problems in view of the

44 ECJ, C-490/10, *European Parliament v. Council*, para 84.

45 *Ibid*, Para 86.

46 O.J. L296/12/2013.

47 Case C 48/14, action for annulment under Art. 263 TFEU and Art. 106a(1) EA brought on 30 January 2014, *European Parliament v. Council*.

48 See Wolf, Sebastian (2011): EURATOM Before the Court: A Political Theory of Legal Non-Integration, *European Integration online Papers (EIoP)*, Vol. 15, Art. 10 <http://>

possibilities for sanctions foreseen under Art. 83 EURATOM. Nonetheless, in contrast to the above, the European Court of Justice has intervened several times to deny a broad range of applications of EURATOM's basic articles.

7 Secondary legislation as timid opening towards a broader scope

The inability of the European Member States to produce a common European approach rather than individual national mandates can also be seen in the difficulties of the European Commission when proposing legislation under the EURATOM Treaty, especially concerning nuclear safety. Countries with a plan to phase out nuclear, such as Germany, are reluctant to cede too much control to the Community because they fear a dilution of their safety standards following a European compromise and therefore remain adamant that the key authority in respect to nuclear power is the nation and not the Community. On the other side are Member States seeming reluctant to any interference when calling a different security standard than their own. Jointly, this situation creates a very hesitant European policy approach to EURATOM-based secondary legislation.

Major secondary legislative work is carried out on the basis of Art. 30 EURATOM. Art. 30 and Art. 31 provide for the establishment in the Community of basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations. Art. 30 provides a definition of the basic standards and Art. 31 describes the procedure for the adoption and enforcement of those standards.

Art. 33 EURATOM particularly states:

“Each Member State shall lay down the appropriate provisions, whether by legislation, regulation or administrative action, to ensure compliance with the basic standards which have been established and shall take the necessary measures with regard to teaching, education and vocational training.

The Commission shall make appropriate recommendations for harmonising the provisions applicable in this field in the Member States.

eiop.or.at/eiop/texte/2011-010a.htm, page 9: “The result of this research for data is a compilation of only 30 cases which mainly concern EAEC primary and/or secondary law (see Table 2 for the full list). Given the sheer mass of ECJ cases, this small number already can be interpreted as another indicator of the rather meagre legal development of the EAEC.”

To this end, the Member States shall communicate to the Commission the provisions applicable at the date of entry into force of this Treaty and any subsequent draft provisions of the same kind.”

The following examples suggest a move towards a more European approach to regulation under EURATOM:

7.1 Directive 2009/71/EURATOM establishing a Community framework for the nuclear safety of nuclear installations and its amendment, Directive 2014/87/EURATOM

It should be underlined that the European Commission over the years has worked intensively to reach a high safety standard within EURATOM to improve safety in the respective Member States. This initiative is once again limited by the EURATOM provisions which state that the responsibility for the safety of nuclear installations is solely attributed to the Member States and the nuclear utilities and other respective license holders on their territory.

Subparagraph (b) of Art. 2 EURATOM provides for the establishment of uniform safety standards to protect the health of workers and of the general public. Art. 30 EURATOM defines “*basic standards*” for the protection of the health of workers and the general public against the dangers arising from ionising radiations.

Pursuant to Art. 30, Art. 31 and Art. 218 EURATOM, the Community initially, in 1959, issued basic safety standards with Council Directive of 2 February 1959 laying down rules and standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations.⁴⁹

These standard rules were revised fairly regularly: in 1962 by Directive of 5 March 1962, in 1966 by Council Directive 66/45/EURATOM, in 1976 by Council Directive 76/579/EURATOM, in 1979 by Council Directive 79/343/EURATOM, in 1980 by Council Directive 80/836/EURATOM and in 1984 by Council Directive 84/467/EURATOM.

In 1996 the basic standards Directives as revised were replaced by Council Directive 96/29/EURATOM of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation (‘the Basic Standards Directive’)⁵⁰ which repealed the previously applicable rules as of 1 of May 2000.

49 OJ, English Special Edition, 1959–1962, (I), p. 7.

50 OJ 1996, L 158, p. 1.

Nuclear Safety Directive 2009/71/EC regulates that the Member States are required to submit certain practices involving a hazard from ionising radiation to a system of reporting and prior authorisation and to ensure protection from radiation for the population in normal circumstances.

The Directive comprises provisions for the establishment of a national legislative and regulatory framework for nuclear safety of nuclear installations, for the organisation, duties and responsibilities of the competent regulatory authorities, for the obligations of the licence-holders, for the education and training of all parties' staff and for the provision of information to the public. In terms of the organisation of the competent regulatory authorities, it constitutes the separation principle, which indicates that the competent regulatory authorities must be functionally separate from any other body or organisation concerned with the promotion or utilisation of nuclear energy. In addition, Member States shall arrange at least every ten years for periodic self-assessments of their national framework and competent regulatory authorities and invite an international peer review of relevant segments of their national framework and/or authorities. Outcomes of any peer review shall be reported to the Member States and the Commission.

Recital 9 of the Directive underlined that each Member State may decide on its energy mix in strict accordance with its relevant national policies and Recital 8 again put forward the principle of national responsibility as well as the principle of the prime responsibility of the respective license holder under national supervision.

7.2 A long and winding road towards the 2009/71/EURATOM Directive of the Council

Again, the road towards Council Directive 2009/71/EURATOM was littered with conflicts between the Commission and the Council, with Member States not wishing to lose any sovereignty over their nuclear energy and their power of oversight there over beyond what could not be denied under EURATOM.

The Commission started to work on a proposal for a joint Nuclear Safety regime in 2003⁵¹ which it finally withdrew in 2010, having given up on finding a compromise with the Council.⁵²

Council Directive 2009/71/EURATOM transfers major provisions from the International Convention on Nuclear Safety (CNS) of July 1994 and further safety

51 COM (2003) 32 – 1: Proposal for a Council (EURATOM) Directive Setting out basic obligations and general principles on the safety of nuclear installations.

52 Withdrawal of obsolete Commission Proposals (2010/C 252/04), O.J. C 252/7, 18.9.2010.

principles into European EURATOM legislation. Its basic structure mirrors the Convention's.⁵³ The CNS entered into force the year of and as a result of the Chernobyl nuclear disaster and is designed to protect individuals, society and the environment from harm by establishing and maintaining effective defences against radiological hazards in nuclear installations. As sharply outlined by Dehousse, the CNS, despite the catastrophe in the middle of the European continent, does not contain any mandatory provisions for safety control.⁵⁴

Directive 2009/71/EC could not have seen the light of day, especially as unanimous as it was actually voted in the Council, without a preceding permissive decision by the European Court of Justice in 2002. It was the ECJ that laid the ground for the Commission's legal initiatives in this field.

In the background of the specific conflict between the Commission and the Council before the ECJ was Council action of December 1998 that declared the accession of EURATOM to the CNS but also a reservation of the applicability of some provisions of the CNS for EURATOM. The Commission had proposed the original text of such restricting declaration but with far fewer reservations.

The possibility for the Community to derogate from certain provisions of the CNS follows from Art. 30, para. 4 CNS. Para. 4 regulates accession to the treaty for *inter alia* regional organisations. These organisations, reflecting their mandate, shall under Art. 30, para. 4 (iii) CNS "*communicate to the Depositary (...) a declaration indicating which States are members thereof, which articles of this Convention apply to it, and the extent of its competence in the field covered by those articles*".

The Commission requested annulment of that specific part of the Council declaration detailing the reservation to the IAEA "*on the ground that, by limiting the scope of that paragraph, the Council sought to establish that the Community's competence in the fields covered by the Convention is limited to Articles 15 and 16(2) thereof and does not extend to the fields covered by Articles 1 to 5, 7, 14, 16(1) and (3) and 17 to 19 of the Convention.*"⁵⁵

The Commission argued that the third paragraph of the declaration infringes Community law in that it does not refer to all the competences of the EURATOM Community in the fields covered by the Convention and that that provision, and not

53 Dehousse Franklin, *The Nuclear Safety Framework in the European Union after Fukushima*, Egmont Paper 73 (2014), p. 17; Dehousse saw the following reason for the similarity of structure: "This was meant to distinguish clearly between the objectives and the obligations of the Member States. This, however, has not been fully achieved since there is an 'essential overlap between the scope of application, the definitions and the operational articles."

54 Dehousse, Franklin, *ibid.* p. 15.

55 ECJ Case C-29/99, para 2 (I-11283).

the whole decision of accession to the CNS, should therefore be annulled based on Art. 146 EURATOM. The European Commission accepted the limited competence of EURATOM but maintained that even if EURATOM would not have a specific right for regulation on the opening and operation of nuclear installations, it is competent concerning the risk resulting from the operation of such installations. The Council kept its positions of national sovereignty as principle where no specific rules were established in the EURATOM treaty and underlined its view that “*no article of the EURATOM Treaty bestows on the Community the competence to regulate the opening and operation of nuclear facilities. That competence was retained by the Member States. The Community would have competence only when it concerns the protection of the general public, and in consequence all the articles of the Convention which concern that protection were explicitly referred to in the above declaration*”.⁵⁶

Council and Commission were in agreement that the Community possesses shared competences to take, subject to Art. 15 CNS, the appropriate steps to ensure that in all operational states that the exposure of the workers and the public to radiation caused by a nuclear installation be kept as low as reasonably achievable and that no individual be exposed to radiation doses which exceeds prescribed national dose limits. The same agreement concerned Art. 16(2) of the Convention and its details on the appropriate steps to ensure that in an emergency where radiation could endanger the population, the competent authorities of the States in the vicinity of the nuclear installation are provided with appropriate information for emergency planning and response.

In essence, the Court had to judge whether the Community possesses other competences in the fields covered by the Convention on Nuclear Safety.

The Court underlined that “*the EURATOM Treaty does not contain a title relating to installations for the production of nuclear energy*”, and needed to review if an interpretation of the provisions in Title II, Chapter 3 (Health and Safety) EURATOM could lead to a broader competence for the Community then authorised by the Council in its limiting decision.⁵⁷

Interestingly, the Court upheld this definition and exercised of a broad interpretation of EURATOM.⁵⁸ The Court referred to its previous judgements under EURATOM. According to the Court, such interpretation had to be carried out in the light of the objective set out in the preamble to the EURATOM Treaty to “*create the conditions of safety necessary to eliminate hazards to the life and health of the public*”. The Court took into account the fact that Title II, Chapter 3 of the EUR-

56 Case C 29/99, para 65 (I-11305).

57 Case C 29/99, para 74 (I-11221).

58 Case C 29/99, para 78 (I-11308).

ATOM Treaty implements Art. 2(b), which instructs the Community to establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied. The Court deduced from this that the objective for protection cannot be achieved without controlling the sources of harmful radiation. But it also outlined that on “*the other hand, the Community’s activities in the field of health protection must observe the competences of the Member States defined, inter alia, in Title II, Chapter 3, of the EURATOM Treaty itself*”.⁵⁹

In the end, the Council correctly introduced a new reservation to the IAEA, reflecting the Court’s judgment.⁶⁰

In the end of 2008, the Commission started to rekindle a legislative process for a nuclear safety Directive.⁶¹ For the Commission, this revised proposal aimed to build on: “*a) the technical work of the Western European Nuclear Regulators Association (WENRA) completed in 2006 for existing nuclear installations, with the participation of all European nuclear safety regulators; b) the principle that only strong and independent regulators can ensure the continued safe operation of the nuclear power plants in the EU; c) enshrining in the Community legislation the principles of the main international instruments available, namely the Convention on Nuclear Safety (CNS), concluded under the auspices of the International Atomic Energy Agency (IAEA), and the safety work carried out by the IAEA*”.⁶²

59 Case C-29/99, para 75 (I-11307).

60 See IAEA, “Declaration by the European Atomic Energy Community according to the provisions of Art. 30 (4)(iii) of the Convention on Nuclear Safety:

“The Community declares that Articles 15 and 16 (2) of the Convention apply to it. Articles 1 to 5,

Art. 7 (1), Art. 14 (ii) and Articles 20 to 35 also apply to it only in so far as the fields covered by

Articles 15 and 16 (2) are concerned. The Community possesses competence, shared with the above-mentioned Member States, in the fields covered by Articles 15 and 16 (2) of the Convention as provided for by the Treaty establishing the European Atomic Energy Community in Art. 2 (b) and the relevant Articles of Title II, Chapter 3 entitled “Health and Safety.”

61 COM(2008) 790 final Proposal for a COUNCIL DIRECTIVE (EURATOM) setting up a Community framework for nuclear safety: “The present draft Directive setting up a Community framework on Nuclear Safety aims at restarting the process of establishing a common EU framework on nuclear safety, by updating and replacing the Commission proposal for a Council (EURATOM) Directive setting out basic obligations and general principles on the safety of nuclear installations, included in the initial Nuclear Safety Package.” (of 2003).

62 See EU Commission, Proposal for a Council Directive (Euratom) setting up a Community framework for nuclear safety, Brussels, 26.11.2008, COM(2008) 790 final, Explanatory memorandum, page 2

The final text of Directive 2009/71/EC ultimately adopted by the Council echoed the fact that Europe, with this Directive and despite following the structure of the CNS, remained below the rules on nuclear safety under the IAEA's Nuclear Safety Convention. The ball remained strictly in national courts.

The Directive entered into force on 22 July 2009 and all EU Member States had till 22 July 2011 to implement its contents in to their national laws. Member States' first reports on the implementation of the Directive were to be submitted to the Commission by 22 July 2014.

The Fukushima nuclear accident in March 2011 strengthened the initiatives of the European Commission to increase security and safety standards in the Union, but, again there was no change towards a unified European stance or interest on nuclear. The amending of Directive 2014/87/EURATOM reviewed the EU framework on nuclear safety in the light of the Fukushima accident in 2011 and the findings of the Commission triggered EU stress test exercises.

The amended Directive, which came into force in August 2014 and which had to be transposed into Member States' legislation by 2017, reinforces the provisions of the existing Directive.⁶³

Five years after the Fukushima disaster, during a scientific workshop at Cambridge, Ludo Veuchelen, who had worked during his career at the Belgian Nuclear Research Centre and was Chairman of the Working Group on Safety and Regulation of the International Nuclear Law Association, criticised the entanglement of EURATOM with industry and underlined that the organisation had too much power for a single body. He added that a self-fulfilling interest of the civil servants working under EURATOM was propping up the system. He deplored e.g. a lack of democracy (control) and a lack of decisive power and control by the EU Parliament.⁶⁴

63 The main objectives envisaged were :a stronger role and clearer independence of the national regulatory authority; the introduction of an EU-wide nuclear safety objective, focusing on accident prevention and risks of significant radioactive releases; a European system of regular topical peer reviews and regular safety reassessments of nuclear installations; more transparency on nuclear safety matters (information and cooperation obligations and involvement of the public) enhancing accident management and on-site emergency preparedness and response arrangements and procedures; promoting nuclear safety culture in the workplace.

64 Report (J. WEITZDÖRFER, Fukushima Five Years On – Legal Fallout in Japan, Lessons for the EU Workshop at the University of Cambridge on 4 and 5 March 2016, p 303, <https://www.law.cam.ac.uk/press/events/2015/11/expert-workshop-fukushima-five-years-legal-fallout-japan-lessons-eu> .

8 Accessing to the Union without access to EURATOM- Leaving EURATOM without leaving the EU Treaty- BREXIT as game changer?

On 1 January 1973 the United Kingdom (UK) became member of the EURATOM, and of the European Community.

As has been outlined above, EURATOM and the Communities shared some institutions since 1958. In 1967, the so-called Merger Treaty⁶⁵ brought together the separate Councils' and Commissions' institutions which the three Communities (the EEC, EURATOM and the European Coal and Steel Community) had kept separated until then.

Since that point, the provisions on the institutions in the EURATOM Treaty have been updated every time the corresponding rules in the EEC Treaty were amended. Those institutional rules are now split between the TFEU and the TEU. The constitutional link is now established in Art. 106a of the EURATOM Treaty, which was inserted by the Treaty of Lisbon.

Subparagraph 1 of this Article reads as follows:

“1. Article 7, Articles 13 to 19, Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union, and Article 15, Articles 223 to 236, Articles 237 to 244, Article 245, Articles 246 to 270, Article 272, 273 and 274, Articles 277 to 281, Articles 285 to 304, Articles 310 to 320, Articles 322 to 325 and Articles 336, 342 and 344 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.”

8.1 Exit à la carte- the process before Lisbon

Over the last decades, the European Commission clearly denied the possibility that any nation in Europe could access full membership of the Union if they do not also accede to the EURATOM Treaty.

In a request for a written answer, MEP Franz Obermayr (NI) in 2010 had asked the EU Commission *inter alia* as follows:

“1. According to an Austrian report commissioned by the Austrian Greens before the 1994 referendum on membership of the EU, it would not be necessary for Austria to

65 Treaty establishing a Single Council and a Single Commission of the European Communities (8 April 1965), signed in Brussels on 8 April 1965 entered into force on 1 July 1967.

join EURATOM if it acceded to the European Union. Can the Commission endorse this report from the point of view of European law?(...)

3. Since the Lisbon Treaty entered into force, a new legal situation has arisen as regards the possibility of withdrawing from EURATOM: as Article 49a of the Lisbon Treaty⁶⁶ also applies to the EURATOM Treaty, it must be possible de jure for an EU Member State to withdraw unilaterally from it. Does the Commission anticipate that one or more Member States will withdraw de facto? What are the practical arrangements for implementing this clause?⁶⁷

In his answer, Commissioner Oettinger outlined on behalf of the Commission that no path would have been open for Austria e.g. to access the EU without acceding EURATOM in answering just with “No.” to the above question of the MEP. On selective withdrawal from EURATOM the Commission was a bit more detailed in its answer. Overall, the EU Commission is of the opinion that a Member State cannot withdraw just from the EURATOM Treaty under the new provisions of Art. 50 Lisbon Treaty.⁶⁸

66 He seems to refer to Art. 50 Lisbon Treaty:

“1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Art. 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Art. 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Art. 49.”

67 E-8740/2010, Parliamentary questions 26 October 2010 – Question for written answer to the Commission/Rule 117, Franz Obermayr (NI)

68 E-8740/2010 6 December 201; Answer given by Mr Oettinger on behalf of the Commission: “1. No.... 3. According to Article 50 of the Treaty on European Union, any Member State may decide to withdraw from the European Union in accordance with its own

It seems safe to say that the Union is of the opinion that one can only accede to all treaties, meaning that a departure from the Union membership invokes a dissolution from all treaties including the EURATOM treaty. A ‘half divorce’ does not appear to be an option.

In September 2002, the Secretariat of the Convention sent a discussion paper to its Praesidium (under former French President Giscard d’Estaing) for information concerning the beginning of the “*simplification procedure*”. Some Member States did not want to see the occasion used to reopen discussion on matters that were firmly established: EURATOM was in this respect a particularly sensitive point.

In March 2003, the Praesidium published a paper ‘*Suggested approach for the EURATOM Treaty*’. This approach explicitly did not think it “*appropriate*” to become involved in an operation “*to amend the EURATOM Treaty substantially*”.⁶⁹ The Praesidium instead favored amendment of the EURATOM Treaty allowing it to continue to exist independently.

8.2 The European Parliament calling for sunset

In 2002, the European Parliament passed a resolution that included a call for the EURATOM Treaty to be abandoned by 2007. If this proposal were adopted, it would have enabled the Convention and its subsequent Intergovernmental Conference to acknowledge that a fundamental reform of EURATOM was necessary but allowing more time for the process of assessing which parts of the Treaty should remain and in what framework.⁷⁰

In 2003, several Convention Members called for more reform:

constitutional requirements. This Article also applies to the European Atomic Energy Community (Article 106a EURATOM Treaty). The EU and EURATOM share the same institutions, the same budget and staff, and are designed to function together with the same number of Member States. Hence, there appears to be no ‘à la carte’ withdrawal only from the EURATOM Treaty...’.

69 See: Fouquet, Doerte, Froggatt, Antony” Options for the EURATOM Treaty in the framework of a New European Constitution” May 2003.

70 See: Barnes, Pamela, Going forward into the past: the resurrection of the EURATOM Treaty, EUSA 0507 EURATOM Treaty, Tenth Biennial International Conference, Montreal, Canada, May 17th-19th 2007

“We wish to make the following recommendations to the Convention in relation to the EURATOM Treaty:

The Convention has already achieved consensus on the following points: There should be a single constitution treaty. The Union should have a single legal personality and a single institutional structure.

Therefore it is necessary to repeal the EURATOM Treaty. We argue here that it is now appropriate -to abolish the ‘special economic zone’ that the EURATOM created, and to respect the principles of fair competition and the creation of a level playing field for different energy sources, thereby ceasing to give nuclear energy undue advantages over its rivals. We offer an analysis of the present functions of EURATOM and make proposals concerning their transposition into the Part Two of the Constitution (see Praesidium preliminary draft Constitutional Treaty (CONV 369/02)), while proposing that others be simply repealed.”⁷¹

8.3 The declaration of reform-minded Member States

The Treaty establishing a Constitution for Europe as signed in Rome on 29 October 2004 and published in the Official Journal of the European Union on 16 December 2004 contained an important formal declaration which unfortunately subsequently fell into oblivion, until today. Declaration No. 54 made by the Federal Republic of Germany, Ireland, the Republic of Hungary, the Republic of Austria and the Kingdom of Sweden and annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007; reads as follows:

“Germany, Ireland, Hungary, Austria and Sweden note that the core provisions of the Treaty establishing the European Atomic Energy Community have not been substantially amended since its entry into force and need to be brought up to date. They therefore support the idea of a Conference of the Representatives of the Governments of the Member States, which should be convened as soon as possible”⁷²

Brexit may be the right moment to rekindle this initiative.

71 Official statement by Convention Members: Marie Nagy, Renee Wagner, Neil Mac-Cormick Contribution to the Convention; THE EUROPEAN CONVENTION –THE SECRETARIAT -Brussels, 18 February 2003-, CONV 563/03 – Contribution 250.

72 Consolidated Version of the Treaty on the Functioning of the European Union, 26.10.2012, Official Journal of the European Union, C 326/47.

8.4 The Reform of EURATOM debate- to be rekindled in the light of BREXIT

Art. 208 EURATOM stipulates that the treaty is concluded for an unlimited period.

The questions of whether EURATOM is an “eternal treaty” or if it can be phased out in view of a changed energy system, or if it should at least be adapted to the current reality of the energy market and be stripped of a certain allegiance to and promotion of nuclear technology may be rekindled by the current BREXIT debate. For such a move, Member States would finally need to commit to a new, specific EURATOM reform convention process.

As the Nuclear Monitor described in 2007: *“Obviously, EURATOM was meant to be for eternity. And its fathers were not even aware of nuclear’s eternity problem since there are no explicit provisions for nuclear waste in the EURATOM Treaty!”*⁷³

8.5 The Withdrawal option since Lisbon

Art. 50 of the Treaty on European Union sets out the procedure for a Member State to withdraw from the European Union should it wish to do so. It was first introduced by the Lisbon Treaty in 2007.

The corresponding Article, integrating e.g. Art. 50 TEU as also applicable for EURATOM, is Art. 106a EURATOM, introduced under Title III (Institutional and financial provisions)

In general, a Member State must notify the European Council of its intention to leave. The withdrawal agreement must be negotiated in accordance with Art. 218 (3) TFEU.

The UK government in its White Paper on BREXIT in February 2017 outlined very briefly that for the government, invoking Art. 50 TEU would also mean invoking the exit from EURATOM:

“When we invoke Article 50, we will be leaving EURATOM as well as the EU. Although EURATOM was established in a treaty separate to EU agreements and treaties, it uses the same institutions as the EU including the Commission, Council of Ministers and the Court of Justice. The European Union (Amendment) Act 2008 makes clear that, in UK law, references to the EU include EURATOM. The EURATOM Treaty imports Article 50 into its provisions. ...As the Prime Minister has said, we want to collaborate with our EU partners on matters relating to science and research, and nuclear energy is a key part of this. So our precise relationship with EURATOM, and the means by

73 See EURATOM: Countries free to step out, Nuclear Monitor Issue: #658, 13/07/2007.

which we cooperate on nuclear matters, will be a matter for the negotiations – but it is an important priority for us – the nuclear industry remains of key strategic importance to the UK and leaving EURATOM does not affect our clear aim of seeking to maintain close and effective arrangements for civil nuclear cooperation, safeguards, safety and trade with Europe and our international partners. Furthermore, the UK is a world leader in nuclear research and development and there is no intention to reduce our ambition in this important area. The UK fully recognises the importance of international collaboration in nuclear research and development and we will ensure this continues by seeking alternative arrangements.⁷⁴

The United Kingdom's White Paper on the exit from and new partnership with the EU says that the European Union (Amendment) Act 2008 "*makes clear*" that, in UK law, references to the EU include EURATOM. The EURATOM Treaty "*imports Article 50 into its provisions*".

The tasks for the UK when leaving the Union and EURATOM are enormous: Falling out of all European funded or co-funded research is one issue. UK needs to set up a new national regulatory system and re-negotiate contracts to ensure supply of nuclear fuel, ores and fissile materials, not only for nuclear energy and indirectly military use,⁷⁵ but also for disrupting time-sensitive supply chains, which transit radioisotopes used in the diagnosis and treatment of cancer. Around 500,000 scans are performed in the UK every year using imported radioisotopes.

The UK does not have any reactors capable of producing these isotopes and at present must rely on a continuous supply from reactors in France, Belgium and the Netherlands.

This situation may force Member States to decide to use the task of separation from the UK in order to straighten out issues in EURATOM by e.g. increased democratisation of EURATOM, the need of a level playing field in the internal energy market, clarity on responsibility over the entire life cycle of an installation, full responsibility of the nuclear industry in case of accidents, phase out of old nuclear power plants in a coordinated and secure fashion, waste management and overall the urgent recognition that there is no common interest in promoting new nuclear energy in the Union.

74 HM Government, The United Kingdom's exit from and new partnership with the European Union, February 2017, page 44

75 At present, UK maintains a fleet of four nuclear-armed submarines in Scotland, each carrying 16 Trident missiles. The UK parliament voted in 2016 to overhaul its nuclear forces and for building four new nuclear-powered submarines to carry US Trident missiles armed with modernized nuclear warheads for the next decades. At present UK has approx. 215 warheads; see

9 The subsidy question – or how to shelter any public nuclear investment in a liberalised market?

9.1 The Hinkley Point C State Aid case

At present, Austria, supported by Luxemburg, pleaded to the European Court⁷⁶ to annul a positive state aid decision of the European Commission authorising substantial state aid for a new nuclear power plant at Hinkley Point in Somerset.⁷⁷ The case is now in appeal before the European Court of Justice (ECJ). There are several grounds on which Austria is fighting the decision of the European Commission. I will concentrate on Austria's argument on the notion that the promotion of nuclear power is an objective of Common Interest under EURATOM.

After the preliminary examination of the state aid package, the Commission had doubts as to the legality of the aid and opened a formal investigation.⁷⁸ But in October 2014, almost a year later, after intense back and forth between many stakeholders and the Commission (e.g. from EU independent power producers many using renewable energy as well as traders⁷⁹) the, exiting, Commission under President Barroso gave a positive decision.⁸⁰

The most pertinent argument of the European Commission to allow the UK subsidy regime, its Feed-in Tariff option via the so-called Contract for Difference for Nuclear, combined with state guarantees, was in its view due to the fact that, EURATOM with its technology promotion approach in Article 2, describes a common European interest in the promotion of building new nuclear power stations.

76 Austria v Commission Case T-356/15

77 State Aid procedure SA. 34947 (2013/C) (ex 2013/N) – United Kingdom- Investment Contract (early Contract for Difference) for the Hinkley Point C New Nuclear Power Station

78 Commission Decisions State aid SA. 34947 to initiate the formal investigation procedure, Brussels, 18.12.2013 C(2013) 9073 final

79 In view of EURATOM, their main arguments are summarised by the Commission as follows: "Several parties commented that the aid measures are incompatible with the Altmark criteria, whereby electricity generation would be a standard economic activity and thus nuclear energy should compete with other electricity sources in a liberalised internal electricity market; the measure lacks an objective of common interest; there appears to be no objective criterion for justifying the duration of 35 years; it treats differently nuclear power and renewable energy sources; it is based on unknown parameters and there is a lack of a cost-benefit analysis." See Decision Brussels, 08.10.2014C(2014) 7142 final cor

80 Press Release IP/14/1093, full text of decision published in 2015:O.J. L 109/44 of 28.04.2015

In view of the above analysis and in view of the arguments put forward by Austria and supported by Luxembourg before the Court, this Commission's view does not reflect the reality of the development under the EURATOM treaty and its limitations versus the development of an internal energy market. The European Commission takes the position that the EURATOM Treaty establishes in Art. 2(c) that the Community shall "*facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community*" and points out to Art. 40 EURATOM which envisages the Community publishing of illustrative programs "*to stimulate investment, indicating production targets*".

The Commission correctly describes its obligation under Art.107 TFEU to investigate aid granted by Member States that distorts competition or threatens to do so. In addition, especially "*in the context of liberalised and increasingly competitive markets, the role of State aid control is increasingly important in EU electricity markets. The commitment of the European Union to promote investment into nuclear must be carried out in ways which do not distort competition.*"

In the case of the UK aid mechanisms for Hinkley Point C, the Commission concluded that no distortion exists.⁸¹ The Commission seems to see itself bound by the objectives of EURATOM: "*The Commission however accepted that the measure was in line with the EURATOM Treaty. As recognised in past Commission decisions, the EURATOM Treaty aims at creating the "conditions necessary for the development of a powerful nuclear industry, which will provide extensive energy sources."* This objective is further reiterated in Art 1 of the EURATOM Treaty, which establishes that "*it shall be the task of the Community to contribute to the raising of the standard of living in the Member States (...) by creating the conditions necessary for the speedy establishment and growth of nuclear industries.*" On this basis, the EURATOM Treaty establishes the EURATOM Community, foreseeing the necessary instruments and attribution of responsibilities to achieve these objectives. The Commission must ensure that the provisions of this Treaty are applied"⁸²

The European General Court recently decided on the annulment plea by Austria. and with its judgment in effect underlying that there exists a compelling case to reform the EURATOM treaty and to clarify that there is no common interest to promote further nuclear power projects in the Union.

It was not only Austria and Luxembourg that addressed the Court over a decision by the EU Commission. Several German communal energy utilities as well as an Austrian and a German Green electricity producer and trader introduced an

81 See Decision Brussels, 08.10.2014C(2014) 7142 final cor

82 See Decision, Brussels, 08.10.2014C(2014) 7142 final cor, Rn 394 cons.

annulment procedure before the European General Court.⁸³ The Court declared their case as inadmissible, in line with its (in the majority of cases) restrictive view on access to justice for applicants concerning Commission decisions on state aid directed to a Member State granting aid to a competitor in the internal energy market. This adds to the effect of nuclear being a sheltered species within an internal EU energy market.

The General Court in its judgment gave full support to the Commission for its decision, especially on its points concerning EURATOM Treaty provisions as legal bases for the justification of a common European interest under Art. 107 (3) (c) TFEU. The General Court supported the assessment of the Commission that the state aid measure contributes to the long-term security of supply in particular “based on capacity forecasts and the role which Hinkley Point C’s supply of electricity will play when it is expected to start operating”.

The General Court decided that the Euratom Treaty would underline the promotion of building and operating new nuclear power plants in the general interest, and that the authorisation of State aid within this argumentation would also be applicable by a Member State even if that public interest of one Member State is not shared by all the Member States.⁸⁴

The General Court followed and supported the views of the Commission and the United Kingdom that the Euratom Treaty gives the legal basis for state support for the construction and operation of nuclear power stations and this specific UK aid package considering that a specific nuclear market failure would allow for aid mechanisms in the common interest.

It remains unclear whether the General Court is trying to enlarge the current established definition of “common” or European Union interest under Art. 107 (3) (c) TFEU in suggesting that the Euratom Treaty, via a quite lenient interpretation of Art. 2 (c) in Recital 97, equates the building of nuclear power plants as in the common interest. This view of the General Court following the Commission seems a quite novel interpretation of Art. 2 (c) which from its wording does not at all tackle the promotion of investment into nuclear power plants but rather seeks to define the performance of the Euratom community as to “facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the

83 See Ordinance/Beschluss, Rechtssache T-382/15 Greenpeace Energy eG mit Sitz in Hamburg (Deutschland) und die weiteren im Anhang namentlich aufgeführten Klägerinnen Prozessbevollmächtigte: Rechtsanwältinnen D. Fouquet und J. Nysten

84 For the following and an analysis in detail see: D. Fouquet, *The Hinkley Point C Judgment of the General Court in view of a changing internal electricity market RELP Volume 9 Issue 1 2018*, p.35 cons..

establishment of the basic installations necessary for the development of nuclear energy in the Community”. The Euratom Treaty itself then clarifies what is meant with the concrete execution of this investment policy under Art. 40. Specific instruments such as the illustrative programmes under Article 40 and the publication of projects under Article 44 are examples but there is no mention to the promotion of investment of nuclear power plants. The building of nuclear power plants remained, from the first day of the Euratom Treaty, solely in the competence of a sovereign national State. The Euratom Treaty, one might say, facilitates the groundwork for nuclear research and safety policies but certainly does not establish a Community project of investment facilitation into nuclear power plant builds.

9.2 The European Commission and the Hungarian Nuclear Build Case

In the same line as the Hinkley Point case, the Commission has also given a green light and recently accepted a state aid package by Hungary for a new Russian-built nuclear power reactor in Paks, Hungary. This is all the more astonishing as Russian involvement in a large part of European electricity could see, in principle, the same security concern arise that the Union has in the field of gas supply from Russia. A situation which has led to the adoption of serious safety regulations in the gas field in the Union. Moreover, the situation around Rosatom and waste export issues from Hungary to a country which seems set to not allow open and access to its waste processing and storage facilities adds significantly to security considerations. Concerns on security of supply lead the European Union to introduce a specific energy security strategy and one of the major reasons for such was its on Russia.⁸⁵

The Russian Federation and Hungary signed in January 2014 a specific inter-governmental agreement (IGA) on a nuclear programme.⁸⁶ Based on the IGA,

85 The Commission underlines the security issues and needs for a strategy in view of “geopolitical events, i.e. the crisis in Ukraine. Temporary disruptions of gas supplies in the winters of 2006 and 2009 already provided a wake-up call for the EU, underlining the need of infrastructure development, increased cooperation and of a common European energy policy. Since then, the EU has done a lot to strengthen its energy security in terms of gas supply. However, the work is not completed yet and further steps are needed. “, see European Commission, Memo, Questions and answers on security of energy supply in the EU, 28 May 2014

86 Agreement between the Government of the Russian Federation and the Government of Hungary on cooperation on peaceful use of nuclear energy, concluded on 14 January 2014 and ratified in Hungary by Act II of 2014 of the Hungarian Parliament (2014. évi

both countries shall cooperate in the maintenance and further development of the current Paks nuclear power plant (Paks NPP). This includes the design, construction, commissioning and decommissioning of two new power units 5 and 6 with VVER (water-cooled water moderated) type reactors with a combined capacity of at least 1 000 MW in addition to the existing power units 1–4. The operation of units 5 and 6 is intended to compensate for the loss in capacity when units 1–4 (2 000 MW altogether) retire. Hungary submitted that units 1–4 will be in operation until the end of 2032, 2034, 2036 and 2037 respectively, without envisaged prospect of further lifetime extension.

However, the Commission seems doomed to repeat the Hinkley Point reasoning for the Paks State aid package:

The Commission again underlined that under the EU Treaties, Member States are free to determine their energy mix and have the choice to invest in nuclear technology. The Commission's role would only be to ensure that when public funds are used to support companies, this is done in line with EU state aid rules which aim to preserve competition in the Single Market.

The Commission's state aid investigation defined and concluded that in view of a waiver by the Hungarian state to ask for a higher return of its investment than a private investor would ask for, the mechanisms constitutes State aid within the meaning of Article 107(1) TFEU. These rules require state aid to be limited and proportionate to the objectives pursued in order to be approved.

According to the Commission, Hungary had proven that the measure avoids undue distortions of the Hungarian energy market. In particular, it has made a number of substantial commitments to limit potential distortions of competition⁸⁷:

II. törvény a Magyarország Kormánya és az Oroszországi Föderáció Kormánya közötti nukleáris energia békés célú felhasználása terén folytatandó együttműködésről szóló Egyezmény kihirdetéséről), quoted in EU Commission decision COMMISSION DECISION (EU) 2017/2112 of 6 March 2017, published in Official Journal L 317/45 on 1st of December 2017 on the measure/aid scheme/State aid SA.38454 — 2015/C (ex 2015/N) which Hungary is planning to implement for supporting the development of two new nuclear reactors at Paks II nuclear power station

87 The main observations and arguments for the decision of the Commission when it comes to proportionality were as follows:

To avoid overcompensation of the operator of Paks II, any potential profits earned by Paks II will either be used to pay back Hungary for its investment or to cover normal costs for the operation of Paks II. Profits cannot be used to reinvest in the construction or acquisition of additional generation capacity. To avoid market concentration, Paks II will be functionally and legally separated from the operator of the Paks nuclear power plant (the incumbent MVM Group) and any of its successors or other state-owned energy companies. To ensure market liquidity, Paks II will sell at least 30% of its total electricity

In its argumentation during the investigation procedure, Hungary even compared the EURATOM Treaty with the former European Coal and Steel (ECSC) Treaty on the basis that they both are of a sectoral nature and that the ECSC Treaty contains a far-reaching prohibition against State aid which was, in practice, aligned with Art. 107 TFEU by virtue of Art. 67 and Art. 95 of the ECSC Treaty. Hungary stated that in applying the rules on State aid laid down in the TFEU the Commission would misconstrue the regulatory goal pursued by the drafters of the EURATOM Treaty, which lacks any specific State aid provisions.⁸⁸

Many who gave comments during the full investigation procedure (Austria, IG Windkraft, OekoStrom AG, Greenpeace Energy and others) outlined once again, in this spectacular state aid case for nuclear power, that subsidising the construction and operation of new nuclear power plants is not provided for under the principles laid down in Article 107(3) TFEU as being compatible with the internal market. Nuclear power was clearly defined as not being a new, innovative or sustainable technology for electricity generation capable of contributing to achieving the EU goal: increasing the proportion of energy generated by renewable technologies. Moreover and once again, as especially underlined by Austria, neither Article 2(c) nor Article 40 EURATOM would allow for the promotion of new nuclear investments to be considered as an objective of common interest due to the fact that no common interest within the meaning of Article 107(3) TFEU could be derived or integrated from the EURATOM Treaty. In addition, it was stressed by Austria and others, also once again, that such an objective would be in conflict with other principles of the Union under TFEU, namely the precautionary principle under Article 191 TFEU and the sustainability principle of the Union.

Again, the Commission upheld the applicability of State aid rules in support of nuclear power; but remained somewhat true to its view that “*in fact, whilst Article 2(c) of the EURATOM Treaty creates an obligation on the Union to facilitate investments in the field of nuclear energy and Article 40 of the EURATOM Treaty obliges the Union to publish illustrative programmes in order to facilitate the development of nuclear investments, the EURATOM Treaty does not foresee any specific rules to control the financing, by a Member State, of such investments. According to Article 106a (3) of the EURATOM Treaty, the provisions of the TFEU shall not derogate from the provisions of the EURATOM Treaty*”.⁸⁹

output on the open power exchange. The rest of Paks II's total electricity output will be sold by Paks II on objective, transparent and non-discriminatory terms by way of auctions, see. European Commission, press release of 6 March 2017- IP/17/464

88 See published EU Commission decision, in Official Journal L 317/45, para 122.

89 See published EU Commission decision, in Official Journal L 317/45 para 277.

It seems that (and in case the European Court does not accept Austria's plea) the need to reform EURATOM remains a pressing necessity. Without a reform of EURATOM, there cannot be a level playing field in the Union for other energy technologies and modern energy services with renewable energy producers being especially concerned.

10 Conclusion

From the above, it is clear that EURATOM never was a harmonising treaty for a joint common approach and objective. It was, from the beginning hampered, by interferences from the nuclear weapon state France and later the UK, when joining EURATOM, in order not to hinder their own national interests in nuclear weapon planning and development.

The EURATOM Treaty and its original objective of promoting and guaranteeing nuclear energy development no longer corresponds to modern reality and is now completely outdated.

The EURATOM Treaty does not fit in the actual internal energy market driven by consumers' interests. The technology it was established to support is no longer economically competitive in electricity generation. There is now a multitude of players to guarantee security of supply without the risks and internalised burdens associated with nuclear energy production, storage and radioactive waste.

Without heavy state aid and guarantees, new nuclear power has no leg to stand on.

After more than 60 years of industrial production of nuclear power plants, now is the time to say goodbye and to ensure the safe dismantling of all obsolete nuclear power stations as well as safe final storage of all waste in and within the European Union.

European Nuclear policy will, in the coming years, have to manage nuclear risks, decommissioning of reactors and nuclear waste management. This is not covered by the treaty.

As it does not appear legally feasible for EU Member States to exit EURATOM without leaving the EU, there is an urgent need to revise the treaty in accordance with the modern environmental, social and economic objectives of the European Union.

A paramount task for Europe!

In an EU with a nuclear legacy of hundreds of old nuclear power plants, an understanding between those Member States that still want nuclear energy as part of their energy mix and those who are phasing out or never had nuclear energy as a source may be appropriate. This agreement, in light of a reform of the EURATOM

treaty, should see the creation of a European dismantling and safe storage support mechanism which integrates the whole life cycle approach and full responsibility of the nuclear power producers. It should establish a progressive European liability regime and the reform needs to remove any mention from the archaic preamble of the EURATOM treaty of a promotional objective while fully opening the treaty to democratic scrutiny and a legislative process that are totally commonplace in a parliamentary democracy. After such reform of EURATOM, any new nuclear power will need to face the full market conditions and would not be able to hide behind its ancient subterfuge. After more than 60 years, there is no time better than the present.

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