

LEGAL OPINION

EURATOM-Reform

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Section 1 Introduction

A. The reason behind the report

Austria's tradition of having a sustainable non-nuclear energy supply has repeatedly led the country to question the structure and content of the EURATOM Treaty.

Its current efforts to reform the Treaty stem from the following key considerations: There are basically two "reform options" on the table: first, to integrate the Treaty's meaningful and necessary provisions into the TFEU and, second, to hold on to the EURATOM Treaty, albeit in a reformed form.

Austria has developed and consistently advocated three main approaches to reforming EURATOM:

- the removal of the democratic deficit,
- the elimination of the promotion of nuclear energy as one of the Treaty's purposes, and
- improvements to the purpose of protecting populations against the dangers of nuclear energy

In 2018, the EU Commission published its "Communication on the future of EU Energy and Climate Policy, including on the future of the EURATOM Treaty"¹. Building on this, in April 2019 it went on to state the following in its Communication "for a more efficient and democratic decision-making in EU energy and climate policy" in relation to the EURATOM Treaty:

"A central aspect is the democratic accountability of EURATOM and in particular the involvement of the European Parliament and national Parliaments. The Treaty of Lisbon extended the ordinary legislative procedure to nearly all policy areas where the European Parliament previously only had a consultative role. While the ordinary legislative procedure also applies in general to the EURATOM Treaty, in practice the provisions of the Treaty regarding the adoption of legal acts do not foresee it. The European Parliament is only consulted on these provisions. Similarly, the Treaty of Lisbon introduced an enhanced role for the Parliament in the process for concluding international agreements, with Parliament's consent often necessary. This is not the case under the EURATOM Treaty where the European Parliament is not consulted on the conclusion of international agreements. Therefore, it may be useful to explore how to enhance the role of the European Parliament to improve the democratic legitimacy of decision-making under EURATOM."²

¹ Cf. <https://www.cleanenergywire.org/factsheets/whats-next-europe-timeline-european-climate-and-energy-policy>

² Cf. Brussels, 9.4.2019, COM(2019) 177 final "Communication from the Commission to the European Parliament, the European Council and The Council - A more efficient and democratic decision making in EU energy and climate policy, Page (p.) 9.) 9

Over the years, Austria has not been alone in its criticism of the EURATOM Treaty, with constellations of criticism coming from various Member States – and sometimes groups thereof – and also from the European Parliament.

We will be discussing this briefly, with a view to preparing the road to a meaningful reform, though without triggering a separate discussion on a reform.

In neighbouring Germany as well, there is unease with the EURATOM Treaty in the context of the European Union and the internal energy market. For the first time in history, the current coalition government has shown willingness to work on reforming EURATOM, as set forth in the coalition agreement for the 19th parliamentary term (lines 6,684 to 6,688):

"In the EU, we will work to ensure that the target provisions of the EURATOM Treaty regarding the use of nuclear energy are adapted to the challenges of the future. We are against any EU funding for new nuclear power stations. We want all state fund holdings in nuclear power plants abroad to be terminated."

This declaration has already led to motions in the Bundestag as well as discussions over a EURATOM reform within the framework of the Conference of German Environment Ministers (EMC).³

*"On 29 March 2017, the European Council received the notification by the United Kingdom of its intention to withdraw from the European Union and EURATOM. This allows for the opening of negotiations as foreseen by the Treaty. The United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption, in particular in the United Kingdom but also, to a lesser extent, in other Member States."*⁴

These lines from the Council's 29.04.2017 press release on the "European Council (Art. 50) guidelines for Brexit negotiations" could also be seen as an incentive to advance reforms of the European Treaties as a whole, and especially of the EURATOM Treaty.

In the following, an attempt is made to define the cornerstones for a new reform proposal. It should be clear from the start that achieving the necessary majority for opening the reform process is not going to be easy. Nevertheless, from the author's point of view, success is currently very much within grasp, in contrast to the past.

³ The author assisted the Rhineland-Palatinate Ministry of Environment, Energy, Food and Forestry in preparing a draft on EURATOM- for a "fireside chat" on the margins of the 90th EMC in May 2018. Proposals made in the context of this draft are also included in greater detail in this paper, cf. Preparation, 90th EMC fireside chat on the "Further development of the EURATOM Treaty including the liability regulations under the Brussels Additional Protocol", https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjGjqyZ6rjgAhU3wMQBHAEFB9sQFjAAegQIBRAC&url=https%3A%2F%2Fwww.umweltministerkonferenz.de%2Fdocuments%2Fprotokoll-der-61-ack_1530198131.pdf&usq=AOvVaw3lhY-NQoUb3ofVj6xQxqH8.

⁴ European Council, Press, 29/04/2017 13:50 Press release 220/17 Brexit.

B. The European Treaties – from Rome to Lisbon

I. The cornerstones of the European Union

One cornerstone of the European Union is the Treaty on the Functioning of the European Union (TFEU). Along with the Treaty on European Union (TEU), this is one of the three founding treaties of the European Union (EU).⁵ The TFEU and TEU constitute EU primary law. According to TFEU Article (Art.) 1, the two treaties have the same legal value.

The TFEU is the further development of the Treaty establishing the European Economic Community (EEC Treaty) concluded in Rome in 1957. The EEC Treaty and the EURATOM Treaty are known as "the Treaties of Rome". Europe's first Community, the European Coal and Steel Community (ECSC) had already been founded in 1951.

Based on the Treaty establishing the European Coal and Steel Community (Coal and Steel Treaty, ECSC), Europe's first Community, the ECSC, began its work in July 1952. The ECSC Treaty gave its founding Member States – Belgium, Germany, France, Italy, Luxembourg and the Netherlands – duty-free access to coal and steel resources. Concluded for a period of 50 years, the ECSC Treaty expired on 23 July 2002. Its regulatory principles were transposed into the EC Treaty or, since 2009, the TFEU.⁶

By contrast, the EURATOM Treaty has no expiry date (Art. 208 EURATOM: "*This Treaty is concluded for an unlimited period.*").

II. Legal developments in the European Treaties

The EEC Treaty was amended several times by Intergovernmental Conferences, in particular the Merger Treaty of 1965⁷ which merged the executive bodies of the three Communities (ECSC, EEC and EURATOM) into the European Community.

⁵ For neighbouring Germany: Adopted following the country's declared renunciation of nuclear weapons on 23 December 1959, the German Atomic Energy Act (AtG) has been amended several times. Its purpose is to protect life, health and property against the dangers of nuclear energy and the harmful effects of ionising radiation, to compensate for any damage caused, to terminate the use of nuclear energy for the commercial generation of electricity in an orderly manner and to ensure the orderly operation of nuclear power plants until termination. A further purpose is to prevent the use of nuclear energy from endangering the country's internal or external security. The AtG also serves to fulfil Germany's international obligations in the field of nuclear energy and radiation protection. (BMU 2019).

⁶ With regard to the ECSC's assets and their management, the Member States agreed that, on expiry of the Treaty, the assets and liabilities would be transferred to the other Communities, represented by the Commission, and that the ECSC's assets would be known as the 'assets of the ECSC in liquidation'. The Member States also stipulated that any change relating to the purpose for which these funds were made available had to be decided unanimously. With regard to the organisation and financing of research activities, guidelines were established by the Member States; See Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 27 February 2002 on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel, OJ L79/42 of 22.3.2002.

⁷ Cf. OJ 152/2 of 13 July 1967, Treaty establishing a Single Council and a Single Commission of the European Communities, Treaty establishing the European Community.

Important changes were brought about by the Single European Act (SEA) of 28 February 1986⁸. Through the SEA, the Treaties establishing the European Community were amended by the then 12 Member States to establish codified European Political Cooperation, which could be considered as a preliminary stage on the path to the European Union. With the entry into force of the SEA, the "European Parliament", which had already been introduced politically in the early 1960s, was confirmed in primary law.

The SEA also extended the legislative powers of the European Parliament (EP) in the EEC Treaty by introducing the co-decision and cooperation procedures, but not in the EURATOM Treaty. This goes against democracy, especially with regard to citizens' access to information and to the EP's participation in the legislative process.

III. The ossified framework

By way of introduction, reference is made to recital (5) of the Commission's "Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents. of 28.1.2000", i.e. more than 40 years after the EURATOM Treaty came into force: "*Since the question of access to documents is not covered by provisions of the ECSC and EURATOM Treaties, this Regulation will apply to documents concerning the activities covered by those two Treaties. This was confirmed by Declaration No 41 attached to the Final Act of the Treaty of Amsterdam.*"⁹ In the finally adopted regulation, this became more of an appeal to EURATOM: "...*(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the*

⁸ Cf. OJ No L 169/1 of 29.6.87.

⁹ Cf. (2000/C 177 E/10) COM(2000) 30 final. 2000/0032(COD), OJ C 177E/70 of 27. 6. 2000. The proposal was not based on any provision of the Euratom Treaty, but on Article 255(2) of the EC Treaty. Art. 255 read:

(ex-Art. 191a).

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

*Treaty of Amsterdam*¹⁰, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties."¹¹

This fork in the road between democratisation and recurrent reforms of the European Treaties and the exceptional or dead-end position of the EURATOM Treaty has steadily reinforced the ossification of the EURATOM Treaty over the years.

EURATOM quickly became somewhat overshadowed by the EEC¹² and later by the European Union (EU). This did not however mean that it became insignificant, as underlined in particular by the eastward enlargement of the European Union and the question of the safety of the Russian-built nuclear power plants there as well as the renaissance of state aid for the construction of new nuclear plants, as seen in Great Britain or Hungary. As will be shown, the EURATOM Treaty contains, in particular, a well-defined goal of promoting nuclear energy. Nevertheless, it should be stressed that no funds were ever earmarked, either in the EURATOM Framework Programme or in the EU budget, to support the construction and operation of nuclear power plants in the EU or in neighbouring¹³ countries. In the Multiannual Financial Framework for 2014-2020, there

¹⁰ "Declaration on the provisions relating to transparency, access to documents and the fight against fraud: The Conference considers that the European Parliament, the Council and the Commission, when they act in pursuance of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, should draw guidance from the provisions relating to transparency, access to documents and the fight against fraud in force within the framework of the Treaty establishing the European Community."

¹¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

¹² See Wiegler, Danyel, Deutscher Bundestag, Fachbereich Europa, 18. Wahlperiode, Die römischen Verträge und ihre Wurzeln: "Given the euphoria surrounding nuclear energy in the 1950s, the EURATOM Treaty was intended to create the conditions necessary for the rapid development of the nuclear industry. However, all the Member States went their own ways in this respect, with the result that EURATOM subsequently failed to develop its originally intended significance and subsequently became overshadowed by the EEC."

¹³ However, on 19 September 1997, the European Union became a member of KEDO, the Korean Peninsula Energy Development Organisation (KEDO) for the promotion of nuclear safety in North Korea. In accordance with the Accession Agreement, the EU acted as a full member of the Executive Board under the Euratom Treaty, alongside the founding members (South Korea, Japan and the USA), with a view to achieving the KEDO's objectives. The EU earmarked a contribution of ECU 75 million over five years, roughly corresponding to the amount contributed by the US. The KEDO was established in March 1995 in the face of rising security concerns about nuclear proliferation related to North Korea's nuclear energy programme. This commitment was intended to supply North Korea with light-water reactors - offsetting the country's capability to produce nuclear-weapon-capable material - featuring a higher level of technology and with improved safety facilities. The KEDO funds were also used to supply heavy fuel oil as an energy alternative. The EU participated within the framework of the Euratom Treaty, even if the agreement makes no reference to a specific article of the EURATOM Treaty. "Agreement on terms and conditions of the accession of the European Atomic Energy Community to the Korean Peninsula Energy Development Organisation (98/185/Euratom)"; OJ L 70/10, 10.03.1998); The KEDO agreement had an expiry date of 31. 5. 2015. By that time, it had become clear that the light-water reactor project was not feasible for North Korea. Thus, although the Agreement was "superseded" by a new Agreement dated 19.11.2018 but not published until 26.11.2019, retroactive to the period from June 1, 2015, to May 11, 2018, and with the possibility of renewal after May 31, 2018; cf. Council Decision (EU, Euratom) 2019/1946 of 19 November 2018 approving the conclusion, by the European Commission, of the Agreement between the European Atomic

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is just one, albeit significant, EUR 225.32 million budget line earmarked for nuclear decommissioning assistance programmes in Lithuania, Bulgaria and Slovakia¹⁴. It should be stressed here that ¹⁵ Art. 203 EURATOM¹⁶ was chosen in 2007 as the legal basis for one of these regulations.

As described to a certain extent depth in the literature¹⁷, the EURATOM Treaty has never undergone a fundamental reform, instead still upholding the pioneering spirit of the period following the Second World War, closely linked to the "Atoms for Peace Doctrine" of the US government under President Eisenhower¹⁸. The doctrine was an expression of the already strong competition between US and French nuclear power technology, as reflected in the discussions on the EURATOM Treaty in its formative and founding phases.¹⁹

C. Austria and EURATOM

Austria only joined the European Union on 1 January 1995. Permanently vetoed by the Soviet Union and against the background of a narrow interpretation of Art. 4 of the 1955 treaty²⁰ between Austria and the four allied states on the restoration of Austrian

Energy Community (Euratom) and the Korean Peninsula Energy Development Organisation (KEDO) Through its reference to Article 101(2) EURATOM, this decision gained an independent legal basis. No further funding was provided. The sole purpose of the Agreement was to help terminate the LWR programme.

¹⁴ Council Regulation (Euratom) No 1368/2013 of 13 December 2013 on Union support for the nuclear decommissioning assistance programmes in Bulgaria and Slovakia, and repealing Regulations (Euratom) No 549/2007 and (Euratom) No 647/2010, OJ L 346, 20.12.2013, p. 1; Council Regulation (Euratom) No 1369/2013 of 13 December 2013 on Union support for the nuclear decommissioning assistance programme in Lithuania, and repealing Regulation (EC) No 1990/2006, OJ L 346, 20.12.2013, p.7; Cf. Wissenschaftliche Dienste des deutschen Bundestages, WD 11-098/07 AI, Einzelfragen zur finanziellen Förderung der Kernenergie durch die Europäische Atomgemeinschaft bzw. die Europäische Union.

¹⁵Cf. Council Regulation (Euratom) No 549/2007 of 14 May 2007

on the implementation of Protocol No 9 on Unit 1 and Unit 2 of the Bohunice V1 nuclear power plant

in Slovakia to the Act concerning the conditions of accession to the European Union of the Czech Republic, Estonia, Cyprus, Latvia,

Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia

¹⁶ Article 203: "If action by the Community should prove necessary to attain one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

¹⁷ Wolf, Sebastian. "Zur Zukunft Des EURATOM-Vertrags." *Integration*, vol. 29, no. 4, 2006, pp. 297–302. JSTOR, www.jstor.org/stable/24221445.

¹⁸ This was also the title of President Dwight D. Eisenhower's ground-breaking speech on 8 December 1953 before the UN General Assembly in New York City, in which he colourfully presented the ideas of his government for the peaceful use of nuclear energy, while at the same time presenting the new international atomic energy agency within the UN framework (the International Atomic Energy Agency IAEA, founded on 29 July 1957 and thus shortly after the conclusion of the EURATOM Treaty).

¹⁹ See in greater depth: Dörte Fouquet, *Nuclear Policy in the EU from a Legal and Institutional Point-of-View*, in: Reinhard Haas, Lutz Mez and Amela Ajanovic, "The Technological and Economic Future of Nuclear Power.", p. 169 ff.

²⁰ Treaty for the re-establishment of an independent and democratic Austria (Austrian State Treaty); signed on 15 May 1955 among the Allied occupying powers (France, the United Kingdom,

sovereignty, Austria had to wait until the end of the Soviet Union before being able to accede to the European treaties. This is why Austria was unable to participate in the initial important intergovernmental conferences on the amendment of the EEC Treaty in particular and on the institutional "merger", and why it was also unable to bring in its clear position, held since 1978, against the civilian use of nuclear energy with regard to the EURATOM Treaty and possible reforms. Its membership of the European Free Trade Association (EFTA) did not, of course, open up any avenues here.

Following the referendum in Austria against the commissioning of the nuclear power plant built in Zwentendorf, the Federal Act of 15 December 1978 banning the use of nuclear fission for energy supply in Austria was passed on 19 December 1978. The simple law contained only the following articles:

"The National Council has adopted the following resolution:

§ 1. Power plants intended to generate electricity through nuclear fission as a source of public energy are not to be constructed in Austria. Where such plants already exist, they are not to be put into service.

§ 2. Application of this federal act shall be the responsibility of the federal government."

In 1999, the Act was superseded by the Constitutional Act for a nuclear-free Austria²¹. Like its predecessor, this Act is short and to the point: No nuclear weapons are to be built, stored, tested or transported in Austria. The construction and operation of nuclear power plants remain prohibited. With the exception of the peaceful use of fissile material for purposes other than energy production, its transport and storage are prohibited.

The Act requires the government to ensure that any damage caused in Austria by a nuclear accident is adequately compensated and that such compensation claims may, wherever possible, also be enforced against foreign damaging parties.

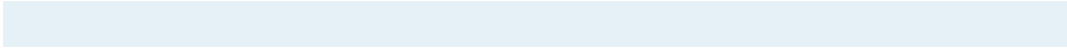
The Federal Act on Civil Liability for Damage Caused by Radioactivity (Atomic Liability Act) of 1 January 1999²² meets these requirements for the strict (non-causal) liability of operators of installations and carriers of nuclear material. The principle of unlimited liability applies, together with the obligation to provide insurance coverage. There is a direct right of action. The principle of the place where the damage arises applies, meaning that Austrian jurisdiction and Austrian law apply to any damage occurring in Austria. The individual principles will be discussed later in the report.

the United States, and the Soviet Union) and the Austrian government, it came into force on 27 July 1955.

²¹ BGBl. I Nr. 149/1999.

²² BGBl. I Nr. 170/1998 (NR: GP XX RV 1357 AB 1415 S. 141. BR: AB 5788 p. 645.), Amendments: BGBl. I Nr. 98/2001 (NR: GP XXI RV 621 AB 704 p. 75. BR: 6398 AB 6424 p. 679.) BGBl. I Nr. 33/2003 (NR: GP XXII RV 27 AB 68 S. 12. BR: AB 6786 p. 696.).

Austria's entire, by now historic and consistent, development away from non-sustainable energy is already in contradiction to the EURATOM Treaty with its specific promotion of nuclear energy.



Section 2 The EURATOM Treaty – its basic principles

The EURATOM Treaty originally consisted of 234 articles in six titles (following the Preamble which has never been amended)²³.

As a result of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community²⁴, which entered into force on 1 December 2009, the EURATOM Treaty was cut back to 177 articles.

Its core mission regarding the civil and peaceful use of nuclear energy has however never been pruned.

Title I sets down key conditions for the promotion of the nuclear industry; as seen in Art. 1, p. 2 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 EURATOM describes the tasks as follows:

- (a) promote research and ensure the dissemination of technical information;
- (b) establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied;
- (c) 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;
- (d) ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;
- (e) make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended;
- (f) exercise the right of ownership conferred upon it with respect to special fissile materials;
- (g) ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialised materials and equipment,

²³ RECOGNISING that nuclear energy represents an essential resource for the development and invigoration of industry and will permit the advancement of the cause of peace, CONVINCED that only a joint effort undertaken without delay can offer the prospect of achievements commensurate with the creative capacities of their countries, RESOLVED to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples, ANXIOUS to create the conditions of safety necessary to eliminate hazards to the life and health of the public, DESIRING to associate other countries with their work and to cooperate with international organisations concerned with the peaceful development of atomic energy, HAVE DECIDED to create a EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM) and to this end have designated as their Plenipotentiaries:

²⁴OJ C 306, 17.12.2007.

- by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community;
- (h) establish with other countries and international organisations such relations as will foster progress in the peaceful uses of nuclear energy.

Several promotional tasks for the EURATOM Community are listed in Title I.

The second title regulates the conditions for encouraging progress in the field of nuclear energy (promotion of research, dissemination of information, health and safety, investment, joint undertakings, supplies, safeguards, property ownership, the nuclear common market and external relations).

The third title covers the EURATOM institutions and financial provisions. Its contents were later adapted to the Treaty amending the EU Treaty and the EC Treaty signed in December 2007.

The fourth title deals with specific financial provisions, while the fifth and sixth titles deal with how the EURATOM Community is organised.

The EURATOM Treaty currently has four valid annexes: Annex I concerning the fields of research referred to in EURATOM Article 4; Annex II concerning the industrial activities referred to in EURATOM Article 41; Annex III, concerning the advantages which may be conferred on Joint Undertakings under EURATOM Article 48; and Annex IV listing the goods and products subject to the provisions of Chapter 9 on the nuclear common market

Several protocols²⁵ are annexed to the EURATOM Treaty.

The Luxembourg-based EURATOM Supply Agency established pursuant to Article 52 of the EURATOM²⁶Treaty and the EURATOM Directorate for Nuclear Safety & Security both support EURATOM.

EURATOM Article 52, which sets provisions for ensuring a regular and equitable supply of nuclear materials to users in the EU countries through a common supply policy, constitutes the legal basis of the EURATOM Supply Agency (ESA).

The EURATOM Supply Agency has the exclusive right to “conclude” (i.e. countersign) contracts for the supply of nuclear materials (see above) originating from within or outside the EU. Under the EURATOM Treaty, it also has the right of option to purchase

²⁵ Protocol on the role of national parliaments in the European Union; Protocol on the Statute of the Court of Justice of the European Union; Protocol on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union; Protocol on the privileges and immunities of the European Union; Protocol on Article 40.3.3 of the Constitution of Ireland; Protocol on transitional provisions.

²⁶ The Euratom Supply Agency is the body responsible in the EU for managing the supply and demand of: ores; source material (e.g. natural uranium); special fissile material (e.g. enriched uranium and plutonium).

nuclear materials, and has legal personality²⁷. Its importance in practical terms is limited; it has tended to be disregarded – particularly by France – and has often been the subject of criticism by the European Court of Auditors²⁸. Overall, its effectiveness is at least doubtful.²⁹

The EURATOM Safeguards Office (ESO) is also based in Luxembourg. It is tasked with exercising control over the use of nuclear materials for peaceful purposes by means of book and stock checks on the use of the more than 500 tonnes of plutonium, more than 9 tonnes of highly enriched uranium and some 3,000 tonnes of low-enriched uranium present on the territory of the EU at the beginning of this millennium, distributed among the approximately 800 nuclear installations in the European Union.³⁰ According to the latest Nuclear Waste Report, the quantity of European nuclear waste is estimated as follows: "the estimated total amount of nuclear waste from operation and spent nuclear fuel produced by the European nuclear fleet (excluding Russia and Slovakia) over its lifetime is around 5.2 million m³. After all of Europe's reactors are decommissioned, the European nuclear fleet is estimated to have produced around 6.6 million m³ of nuclear waste over its lifetime. With a share of 30 percent, France would be Europe's greatest producer of low- and intermediate level waste, followed by the UK (20 percent), the Ukraine (18 percent), and Germany (8 percent). These four countries account for more than 75 percent of the European nuclear waste."³¹

²⁷ For more information on its tasks and scope, see also Decision 2008/114/EC, Euratom- on the Statutes of the Euratom Supply Agency.

²⁸ Cf. 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)."

²⁹ For more details, see: Dörte Fouquet, *Nuclear Policy in the EU from a Legal and Institutional Point-of-View*, in: Reinhard Haas, Lutz Mez and Amela Ajanovic, "The Technological and Economic Future of Nuclear Power.", p. 169 ff).

³⁰ Cf. Münchmeyer, Tobias, *EURATOM- – im Schatten der Öffentlichkeit* (2002).

³¹ Manan Besnard, Marcos Buser, Ian Fairlie, Allison M. Macfarelane, Gordon Mackerron, Yves Marignac, Ben Wealer and Arne Jungjohann, *The World Nuclear Waste Report 2019, Focus Europe.*, p. 36

Section 3 The internal energy market in the Lisbon Treaty

The Lisbon Treaty was the first to give the European Union co-decision powers in energy matters.

Art.194 of the Treaty on the Functioning of the European Union (TFEU) creates a specific legal basis in the energy sector, thereby giving primary law status to energy matters. Since this reform, the EU has been able to take specific action in the field of energy through shared competence, without having to resort to internal market or environmental regulations:

"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."

In addition, "2. 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. 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."

Furthermore, the Lisbon Treaty states that the EU can only intervene in a Member State's choice between different energy sources unanimously and for environmental reasons (cf. TFEU Art. 192). Moreover, under the subsidiarity principle, the EU can only act if it is able to do so more effectively than individual Member States. In line with the principle of "national energy policy autonomy", the decision to commission or decommission nuclear power plants thus remains the responsibility of the Member States.³²

A. The road to a competitive internal energy market – disrupted by the EURATOM Treaty and its interpretation

The development of the European Union towards a strong, sustainable and competitive internal market is overshadowed by the EURATOM Treaty with its own Nuclear Common Market (Chapter 9) and its basically unchanged structure.

³² Scheuing, Europarechtliche Aspekte einer Beendigung der Kernenergienutzung in der Bundesrepublik Deutschland, EuR 2000, S. 1 (2 ff.).

In the mid-1990s, at a time when the Lisbon Treaty and the shared competence in the energy sector under TFEU Art. 194 were still unknown, the EU, against the background of the internal market principles, started calling for national energy markets – i.e. moving away from the territorial and other supply monopolies – as a first step towards gradual establishing an internal (EU-wide) energy market and competition.

The first liberalisation directives (the first Energy Package) for electricity and gas were adopted in 1996 and 1998 respectively and were to be transposed into the laws of the Member States by 1998 and 2000 respectively. The second Energy Package was adopted in 2003, with the relevant directives to be transposed into national law by 2004. Business and private customers were given the right and opportunity to choose their gas and electricity suppliers from a wider range of suppliers. Adopted in April 2009, the third Energy Package further liberalised the internal market for electricity and gas, amending the Second Package and laying the foundations for further implementing the internal energy market. In June 2019, the fourth Energy Package was adopted, consisting of Directive (EU) 2019/944 on common rules for the internal market for electricity and three regulations, namely the Regulation on the internal market for electricity (Regulation (EU) 2019/943), the Regulation on risk-preparedness in the electricity sector (Regulation (EU) 2019/941) and the Regulation establishing a European Union Agency for the Cooperation of Energy Regulators (Regulation (EU) 2019/942). The fourth Energy Package introduced new rules for the electricity market, taking account of renewable energy sources and aimed at attracting investment. It created incentives for consumers and introduced a new emissions cap, solely below which conventional power plants were eligible for state aid under capacity mechanisms for guaranteeing supply security. It also requires Member States to draw up contingency plans for possible electricity supply crises and extends the ACER's powers in the area of cross-border regulatory cooperation where there is a risk of national and regional fragmentation. As shown in this paper, democratic principles and modern consumer rights, as increasingly found in the internal market principles adopted in recent years, are unknown in the Nuclear Common Market. The EURATOM Treaty governing this market has thus remained a child of its time and, in its present form, a disruptive factor in the EU internal energy market.

B. Sustainable financing – taxonomy, climate protection and nuclear power

In recent years, European environmental and climate protection and, more generally, the path towards sustainable economic policies have passed further milestones, not least under the new Green Deal announced by the current Commission Presidency. This consists of a number of policies and programmes with the overarching goal of achieving virtually zero greenhouse gas (GHG) emissions in the EU by 2050. Under the heading "New Green Deal"³³, the current EU Commission, led by President Ursula von der Leyen, has presented a series of ambitious legislative proposals and financing mechanisms. Several climate change initiatives have been put forward, to be followed by further legislative review proposals in 2021.

³³ Communication from the Commission, 08.07.2020, COM 2020/C 224/02.

One important step is the current legislative proposal for a first European climate law. Following the publication of its first proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 in early March 2020, the EU Commission has recently amended it to ensure an even stronger focus on climate neutrality by 2050.³⁴

On 22 June 2020, the Council and the European Parliament adopted Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. Introducing a single classification system for sustainable business ("taxonomy"), this constitutes the framework for the establishment of a "green list" of economic activities, while also containing extended disclosure obligations for market participants.

This taxonomy is intended to create transparency regarding the degree of sustainability of companies and financial products. Sustainability and the transition to a safe, climate-neutral, climate-resilient, more resource-efficient and circular economy are crucial to ensuring the long-term competitiveness of the Union economy. Sustainability has long been central to the Union project, and the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) reflect its social and environmental dimensions.³⁵

Nuclear energy and the question of its inclusion under the taxonomy criteria has been the subject of hot debates in recent months. A Technical Expert Group (TEG) on Sustainable Finance officially advising the Commission on the taxonomy concluded in the annex³⁶ to its final report of March 2020 in preparation of the Regulation that "it was not possible for TEG, nor its members, to conclude that the nuclear energy value chain does not cause significant harm to other environmental objectives on the time scales in question. The TEG has therefore not recommended the inclusion of nuclear energy in the Taxonomy at this stage. Further, the TEG recommends that more extensive technical work is undertaken on the DNSH aspects of nuclear energy in future and by a group with in-depth technical expertise on nuclear life cycle technologies and the existing and potential environmental impacts across all objectives. "For economic activities to be considered environmentally sustainable according to the taxonomy, they must contribute to at least one of the following EU environmental objectives under the new regulation:

climate protection,

adaptation to climate change,

³⁴ Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM (2020) 563 final, 17.09.2020,

³⁵ See recital 4, Regulation (EU) 2020/852.

³⁶ TEG, Taxonomy Report, Technical Annex, Updated methodology & Updated Technical Screening Criteria March 2020, p. 211

protection of water and marine resources,
transition to a circular economy, waste prevention and recycling,
pollution avoidance or reduction; or
the protection of ecosystems.

Furthermore, they must avoid significant harm to other environmental objectives. Looking just at the unresolved waste problem, this seems to be an unachievable criterion for nuclear energy. The regulation explicitly emphasises that solely renewables are, in principle, eligible for taxonomy: According to the Regulation, the technical screening criteria "shall also include criteria for activities related to the clean energy transition consistent with a pathway to limit the temperature increase to 1.5 °C above pre-industrial levels, in particular energy efficiency and renewable energy, to the extent that those activities substantially contribute to any of the environmental objectives."³⁷.

This means that nuclear energy is not (yet) considered as a sustainable energy source in the regulation. Nevertheless, further classification work, led by the Commission's Joint Research Centre's (JRC) panel of experts, could nevertheless develop criteria enabling nuclear energy to be considered as sustainable.

In the following we argue that the weaknesses of the EURATOM Treaty and the *de facto* privileging of state aid for new nuclear power plant construction, justified by the established objective of promoting nuclear energy as set forth in the EURATOM Treaty, lead to permanent preferential yet inappropriate state support for nuclear power compared to the high support requirements for renewables and efficiency improvements. This constitutes a chronic imbalance within the EU energy system. Having nuclear energy classified as environmentally sustainable according to the taxonomy via the work of the JRC and the Expert Group would only reinforce this circumstance.

C. The problem of authorising state aid for the construction of new nuclear power stations

Pursuant to TFEU Art. 107.3 (c), both the EU Commission and the European General Court (GCEU) – and subsequently the CJEU – consider state aid for the construction of new nuclear power plants to be justifiable under the principle of the common European interest with reference to Art. 1 and Art. 2 (c) as well as Art. 40 of the EURATOM Treaty³⁸. This does not tie in with an increasingly liberalised internal energy market in the EU.

³⁷ Cf. Art. 19(2) Regulation (EU) 2020/85

³⁸ COMMISSION Decision of 08.10.2014 on the Aid Measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for Support to the Hinkley Point C Nuclear Power Station (Commission Decision SA.4947), §§ 550, 372 and 374. TFEU Article 107(3) (b): "The following may be considered to be compatible with the internal market:

In the proceedings for the approval of UK state aid for the construction of the new Hinkley Point nuclear power plant, in which Austria was particularly involved, the EU Commission had doubts as to whether ensuring supply security through the construction of this power plant would meet the criteria for approval ("a common interest") under EU state aid law. However, following the main investigation procedure, the Commission considered this characteristic to be fulfilled in accordance with the EURATOM Treaty on account of the fourth recital of the preamble³⁹ and Article 1 of the EURATOM Treaty, and also against the background that it was the task of the EU Commission to ensure that the provisions of the EURATOM Treaty were applied.⁴⁰ The EU Commission also made special reference to the nuclear common market under Chapter 9 of the EURATOM Treaty as a special market that can experience particular market failings and may require state intervention for special risks.⁴¹

The European General Court dismissed Austria's action against the EU Commission for annulment⁴², sharing the EU Commission's view, leading to Austria lodging an appeal against this decision with the CJEU⁴³.

In its subsequent ruling on this appeal (Case C-594/18P), the CJEU essentially upheld the General Court's judgment on 22.9.2020. The CJEU ruling thus in no way follows the arguments put forward by Austria and Luxembourg. The CJEU ruled that TFEU Article 107(3) (c)⁴⁴, which is applicable in this state aid assessment, does not require that the

b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State".

³⁹ The fourth recital reads: "RESOLVED to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples"

⁴⁰ See Commission Decision SA.4947, §§ 370 and 371: "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 applicable.

⁴¹ §§ 381, 382.

⁴² Case T-356/15, Republic of Austria v. European Commission, judgment of 12.7. 2018. Detailed review: Dörte Fouquet, The Hinkley Point C Judgment of the General Court in view of a changing internal electricity market, RELP, Volume 9, Issue 1 December 2018, S.35 ff.

⁴³ Case C- 594/18 P Austria v Commission — an appeal against the General Court's judgment of 12.7.018 in the Case T-356/15, lodged on 21. 12. 2018 C-594/18 P

⁴⁴ TFEU Article 107(3): "The following may be considered to be compatible with the internal market:

a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

proposed aid must pursue an objective of common interest in order to be declared compatible with the internal market.⁴⁵

With reference to EURATOM Art 2(c), the CJEU went on to conclude: "It follows that the objectives pursued by the EURATOM Treaty cover the construction of nuclear power stations or the creation of new nuclear energy generating capacity, with the result that the grant of State aid for them is not contrary to those objectives." Furthermore, the CJEU "held that, when identifying the negative effects of the measures at issue, the Commission did not have to take into account the extent to which those measures were detrimental to the implementation of the principle of protection of the environment, and this applied equally to the precautionary principle, the 'polluter pays' principle and the principle of sustainability relied on by the Republic of Austria." As regards health and safety, the CJEU had this to say: "In relation to environmental protection, the EURATOM Treaty, in Chapter 3, entitled 'Health and safety', contains only provisions relating, inter alia, to basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations, to continuous monitoring of the level of radioactivity in the air, water and soil and to ensuring compliance with the basic standards."⁴⁶ It follows that the objectives pursued by the EURATOM Treaty cover the construction of nuclear power stations or the creation of new nuclear energy generating capacity, with the result that the grant of State aid for them is not contrary to those objectives.⁴⁷ In this respect, the CJEU corrected the view of the General Court: "The General Court therefore wrongly rejected, in paragraph 517 of the judgment under appeal, the Republic of Austria's argument that the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability preclude the grant of State aid for the construction or operation of a nuclear power plant on the ground that such an interpretation would be contrary to Article 106a(3) of the EURATOM Treaty."⁴⁸ However, the General Court's judgment can be shown to be correct on legal grounds other than this erroneous ground. ⁴⁹The CJEU went on to uphold the General Court's judgment with reference in particular to security of energy supply and a Member State's "right to determine its own energy mix and to maintain nuclear energy as a source in that mix, which follows from the second subparagraph of Article 194(2) TFEU". ⁵⁰

As will be described in greater detail below⁵¹, the CJEU has, on the one hand, at least made it clear that the provisions of the TFEU also apply in principle to the EURATOM sector, in line with the TFEU's environmental protection considerations. At the same

c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."

⁴⁵ CJEU, Judgment of 22 September 2020, Case C-594/18/P, § 20.

⁴⁶ CJEU judgment, op .cit. §§ 40, 41

⁴⁷ CJEU, op. cit. § 33

⁴⁸ CJEU, op. cit., § 46

⁴⁹ CJEU, op. cit., § 47

⁵⁰ CJEU, op. cit., § 48 ff

⁵¹ See Part V

time, however, the judgment also makes it clear, with regard to the EURATOM Treaty's promotion of nuclear energy, that this also includes the construction of new power plants. Furthermore, this CJEU judgment cements the special role of the EURATOM Treaty *per se* and thus the lack of a clear parliamentary co-decision power as well as a "level playing field" in the energy sector.

A fundamental reform of the EURATOM Treaty is therefore imperative. In the following, past reform efforts are presented in order to draw lessons and suggestions for a possible new reform path.

Section 4 Analysis of past reform initiatives

A. Overview

In the following, an overview of past reform initiatives is developed⁵², with a particular focus on the proposals made within the framework of the negotiations in the Constitutional Convention for the preparation of the *Intergovernmental Conference* (IGC) under the then Convention President Giscard d'Estaing on the basis of the initiative decision of the European Council of Nice. In accordance with Declaration No 23 annexed to the Treaty of Nice, the Laeken European Council of 14 and 15 December 2001 decided to organise a Convention to debate the future of the European Union⁵³. The work of the Convention and the public debate also dealt intensively with issues surrounding the future of the EURATOM Treaty. Key results and analyses serving as input to the discussion are presented in the concrete proposals made at that time, with particular attention paid to the contributions of the Austrian members of the Constitutional Convention. The European Parliament has also expressed its views on EURATOM reform on several occasions.

I. The demand put forward by of the European Parliament

In its unanimously adopted resolution⁵⁴ and at the proposal of Austrian *rapporteur* MEP Paul Rübig (EPP) on the Commission report to the European Parliament and the Council entitled "Operation of the EURATOM Safeguards Office 1999-2000"⁵⁵, the Parliament started by emphasising, inter alia,

"... whereas the general public is concerned about the risk of accidents with release of radioactivity in one of the very many nuclear installations in the Member States and in the applicant countries, ..."

"... whereas the risk of attack to nuclear installation by either criminal organisations or terroristic groups is greatly increased after the 11 September 2001 events" and "... whereas there is no EURATOM Directive establishing safety and security standards for the design,

⁵² On the reform initiatives, see also Franklin Dehousse, with the collaboration of Didier Verhoeven, *The Nuclear Safety Framework in the European Union after Fukushima*, Egmont Paper 73, 2014; Pamela Barnes, *The EURATOM- Treaty – A flawed instrument to deliver sustainable development?*, 2008..

⁵³ Alongside the Chairman and his two Vice-Chairmen, the Convention was made up of 15 representatives of Member State (MS) heads of state or government (one representative per MS), 30 members from national parliaments (two per MS), 16 MEPs and two Commission representatives, i.e. a total of 66 full members. In addition, the 13 then candidate countries took part in the discussions. They were similarly each represented by a government representative and two members from the national parliament. The Convention thus had 105 members. Observers were also invited: three from the Economic and Social Committee and three from the European social partners, six from the Committee of the Regions, along with the European Ombudsman. The President of the CJEU and the President of the Court of Auditors were able to address the Convention at the invitation of the Praesidium.

⁵⁴ Resolution, A5-0196/2002 of 29.5.2002.

⁵⁵ (COM(2001) 436 - C5-0535/2001 - 2001/2214(COS)).

construction and operation of nuclear installations in the EU. This competence remains with the Member States". ⁵⁶

With regard to the European Convention and EURATOM, the Parliament called "for the European Convention to modify the EURATOM Treaty in order to bring Nuclear Safety and Security under the responsibility of a Community authority, as Nuclear Safeguards are under the responsibility of ESO", stating "*that the European Convention might give thought to the role of the EURATOM Treaty in the context of the forthcoming reform of the Community institutions;*"⁵⁷

II. The PENELOPE draft document

At the beginning of the Convention process for a European Constitution, Commission President Romano Prodi, in agreement with Commissioners António Vitorino and Michel Barnier, mandated a working group⁵⁸ to develop a feasibility study as a working document entitled "Contribution to a preliminary draft Constitution of the European Union"⁵⁹. It became known as the Penelope document.

The main conclusions in the document are set out in a separate chapter:

"4. The EURATOM Treaty

The EURATOM Treaty has been substantially slimmed down by removing a series of provisions which:

- duplicated those already included in the Constitution (and previously in the Treaty establishing the European Community), i.e. the chapters on the promotion of research and dissemination of information, on the institutions and on external relations; or*
- were obsolete and had never been applied: this is the case in particular of part of the chapter on supplies, especially the provisions on the right of option on ores and the chapter on property ownership, which has never been applied.*

Conversely, the provisions retained are those on the setting of standards (Chapter III on health and safety) with small adjustments to incorporate nuclear safety, Chapter IV on investments (with more explicit authorisation power), Chapter V on joint undertakings and

⁵⁶ Resolution, A5-0196/2002 of 29.5. 2002, recitals E to G.

⁵⁷Resolution A5-0196/2002 of 29.5.2002, paragraphs 16 and 17.

⁵⁸Members of the working group headed by François LAMOUREUX were: Marie LAGARRIGUE, Paolo STANCANELLI, Pieter VAN NUFFEL, Alain VAN SOLINGE and Marguerite GAZZE.

⁵⁹available on the EU Parliament website

https://www.europarl.europa.eu/meetdocs/committees/afco/20021217/consto51202_en.pdf.

https://www.google.com/search?q=%22Contribution+to+a+preliminary+draft+Constitution+of+the+European+Union%22&rlz=1C1GCEB_enDE8q6DE9o6&oq=%22Contribution+to+a+preliminary+draft+Constitution+of+the+European+Union%22&aqs=chrome..69i57.5054j0j4&sourceid=chrome&ie=UTF-8

Chapter VII on safeguards. These chapters, which contain some of the best drafting of the existing treaties, have hardly been changed and are included in an Additional Act.

Parliament is restored to the institutional system, as it is given the power to adopt, with the Council, "Laws" for basic standards whereas at present it is very much outside the decision-making process. There remain only a few cases where the Council would decide on its own, on a proposal from the Commission, for instance where specific rules concerning the non-disclosure of confidential information apply

III. The Hänsch-Duhamel initiative in the Convention

In July 2002, members of the Convention, on the initiative in particular of Klaus Hänsch⁶⁰, Olivier Duhamel and others⁶¹, called for policies "... to reinforce nuclear safety, promotion of research and external relations policies in this field, the EURATOM Treaty will have to be revised, brought up to date and integrated into the constitutional Treaty. At the same time, the democratic deficit must be reduced by introducing the co-decision procedure."

IV. The first Farnleitner proposal on legal personality and EURATOM

On 22 October 2002, the Convention Secretariat published the contribution of the Austrian members Hannes Farnleitner⁶², Caspar Einem⁶³ and Reinhard Eugen Bösch⁶⁴ on the single legal personality and the future of EURATOM.⁶⁵ The proposal called for the creation of a "... consistent codecision competence of the European Parliament within the European Atomic Energy Community". As neither the EC nor the EURATOM Treaty were considered to be explicit legal bases for the necessary creation of high common safety standards, the authors specifically recommended a new article: "*The Council shall, acting in accordance with the procedure referred to in Art. 251, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States in the field of nuclear installation safety. The Council will take as a base a high level of protection.*" The Convention members underlined Member States' autonomous decision-making in their choice of energy sources, but stressed that the background to energy market liberalisation was a "level playing field" for all energy sources, with uniform rules for all market participants.

⁶⁰ MEP (until 2009), SPD, former President of the EP.

⁶¹ See <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00189.en02.pdf>; Cover note, from Secretariat to The Convention Subject: Contribution from certain members of the Convention: The Secretary General of the Convention has received the contribution annexed hereto from: Klaus HÄNSCH, Olivier DUHAMEL, Luís MARINHO, Linda McAVAN and Anne VAN LANCKER, members, and Pervenche BERÈS, Maria BERGER, Carlos CARNERO GONZÁLEZ, Elena PACIOTTI and Helle THORNING-SCHMIDT, alternate members of the Conv

⁶² Dr. Hannes Farnleitner, at that time Convention representative of the Austrian Federal Government, former Federal Minister for Economic Affairs (19.06.1996 - 04.02.2000).

⁶³ Convention member and Austrian SPÖ MP.

⁶⁴ Convention member, long-standing FPÖ MP.

⁶⁵ CONV 358/02, CONTRIB 123.

V. The Hänsch analysis - the Future of the EURATOM Treaty

With his contribution CONV 344/02, Klaus Hänsch provided his own document on the "Future of the EURATOM Treaty"⁶⁶. This contained a concise weakness analysis, to which little can be added, even from today's point of view, whereby the Commission proposals addressed there have since been transposed into EU law and will be dealt with later:

"The EURATOM Treaty does not grant the European Parliament any codecision powers, merely an advisory role. The Council is not formally required by the Treaty to consult Parliament on substantive issues. Under Article 101 of the EURATOM Treaty, moreover, Parliament has no say at all regarding international agreements;

the EURATOM Treaty leaves open many important issues, e.g. making no provision whatever on such important subjects as safety of installations or temporary and final disposal;

some of the Treaty's key provisions remain wholly or partly unimplemented (e.g. Chapters 6 and 8 regarding property ownership; nor has the Supply Agency ever taken on its intended role);

there are no provisions on construction and operation of installations or uniform European safety standards. The Treaty only lays down rules regarding worker protection and impact on the local public. It is left to Member States to establish their own safety requirements. The Council has acknowledged the need for coordination and cooperation, in two Resolutions on nuclear safety matters (Nos 722/75 and 618/92) and at the Laeken summit. The standardisation brought about up to now by way of international agreements and the best-practice method is inadequate. (The Commission is preparing draft directives on control of high-activity radioactive sources (as regards safety of nuclear installations, disposal of nuclear waste and decommissioning of nuclear plants), to be submitted in autumn 2002.);

European rules also need to be arrived at on temporary, intermediate and final disposal. The lack of relevant rules assumes particular significance with eastward enlargement in prospect;

the European Union's signing of the Kyoto Protocol sets the course for future policy, thus increasing the need to place a coordinated European energy policy on a new footing.

In the same contribution, MEP Klaus Hänsch warns against a simple dissolution of the EURATOM Treaty, as this would lead to renationalisation, making coordination in areas such as safety and waste disposal more difficult or even impossible.

Rather, he prioritised the following options:

"1. A new energy chapter in the Treaty

⁶⁶ See <http://european-convention.europa.eu/pdf/reg/en/02/cvoo/cvoo358.eno2.pdf>, Cover note, 14 October 2002, CONV 344/02, CONTRIB 121.

A chapter on energy would be included in a constitution or a revised operational Treaty. The EURATOM Treaty could be annexed to that Treaty.

2. Introduction of the codecision procedure

The minimum to be aimed for should be democratisation of the Treaty, i.e. involvement of the European Parliament. It would make sense to introduce codecision as a rule, with exceptions possible in certain areas.

Codecision by the European Parliament must include specific programmes under the EU research budget (with the EURATOM framework programme for 2002-2006 having a budget of EUR 1,23 billion), for which the consultation procedure is currently applicable.

3. Additions to the Treaty

Subjects such as nuclear safety and disposal of nuclear waste would be added to the Treaty.

4. Conversion of the EURATOM Treaty into an energy treaty

The conversion of the Treaty into an European energy or climate treaty, also to include renewable energy sources, would be a forward-looking move in response to the challenges of our age. Post-Kyoto climate policy would provide both a constant theme in and the legitimacy for such an energy treaty. This would give the EURATOM Treaty, with its at times old-world air, a new modernity and purposefulness."⁶⁷

VI. The proposals of Borrel, Nagy, Wagner and MacCormick in the Convention

In December 2002, a contribution by Josep Borrel and others to a "*European Constitution for peace, solidarity and human rights*"⁶⁸ again demanded (in its chapter on sustainable development) "*... to reinforce policies on nuclear safety, promote research and foreign relations, revise and update the EURATOM Treaty.*"

In February 2003, a further reform proposal was made by Convention members Marie Nagy, Renée Wagner and Neil MacCormick on the "Future of the EURATOM Treaty in the framework of the European Constitution"⁶⁹. The authors stated:

"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.

⁶⁷ Klaus Hänsch, op. cit.

⁶⁸ Brussels, 11 December 2002, Contrib 169, CONV 455/02, page 26; Available at <http://european-convention.europa.eu/pdf/reg/en/02/cvoo/cvoo455.eno2.pdf>; (Last accessed 29/06/2021).

⁶⁹ Brussels, 18 February 2003 (20.02), (OR. en), CONV 563/03, CONTRIB 250, available at <http://european-convention.europa.eu/pdf/reg/en/02/cvoo/cvoo563.eno2.pdf>; (last accessed 29/06/2021).

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."

Looking at the nine "key functions" of the EURATOM Treaty, the authors made the following proposals:

- Articles 1-3⁷⁰ outline the tasks of the EURATOM Treaty and as such should be deleted from a future Constitution.
 - Chapters I (Promotion of Research) and II (Dissemination of Information) (articles 4-29) should not be transposed into the Constitution, but should be simply repealed.
 - The intent of Chapter III (Health & Safety) (Articles 30-39) should be subsumed in the new Constitution to conform with EU environmental and health legislation in line with similar directives for hazardous activities based on present article 174.
 - Chapter IV (Investment) (articles 40-44) and articles 2C, 173 and 203 should not be transposed into the Constitution, but should be simply repealed
 - Chapter V (Joint Undertakings) (articles 45-51) should not be transposed into the Constitution, but should be simply repealed
 - The elements of Chapter VI (Supplies) relating to the safeguards and non-proliferation should be included in a new article (see point G below), but all other elements of Chapter VI should not be transposed into the Constitution, but should be simply repealed.
 - To cover the points in the present Chapter VII (articles 77-85), a special article of the Constitution should be established to provide for Nuclear Safeguards and Non-Proliferation.
- Chapter VIII (Property Ownership) (articles 86-91) should be included in a special article on Safeguards and Non-Proliferation.
- Chapter IX (Nuclear Common Market) (articles 92-100) should not be transposed into the Constitution, but should be simply repealed.⁷¹
 - Chapter X (External relations) (articles 101-106) should not be transposed into the Constitution, but should be simply repealed.⁷²

⁷⁰Article 3 has been deleted from the EURATOM Treaty.

⁷¹ Articles 94, 95 and 100 have been deleted from the EURATOM Treaty.

⁷² The authors emphasised that Chapter 10 "enables the Commission to negotiate directly with third countries on nuclear issues. Such agreements do not require approval of the European Parliament and in some cases can be entered into without the approval of the Council. Such agreements should be included with other external relations issues of a future EU Constitution, and do not require specific articles in the Constitution. They can be dealt with in a similar way to that involved in Energy co-operation agreements with (for example) Russia."

VII. Constitution of the European Union – the discussion paper submitted by Elmar Brok

In the discussion paper presented to the Convention by MEP Elmar Brok on 8 October 2002⁷³, Brok wanted to integrate the core area of the EURATOM Treaty into the Constitution in a modernised form and proposed a Title IV "Peaceful uses of nuclear energy" with 38 articles. The proposal contained modernised provisions on radiation protection, investment, joint undertakings, supply and safety. Basically speaking, it borrowed heavily from the PENELOPE paper and contained no reform proposals on research funding, dissemination of knowledge, common property, the nuclear common market or external relations under the EURATOM Treaty.

VIII. The Praesidium wins: the Farnleitner proposal II

A few months before the end of the discussions, the Praesidium published its own suggested approach for the EURATOM Treaty,⁷⁴ assuming that the mandate for the Convention did not include any in-depth reform of the EURATOM Treaty. Examining the possible options for adapting the EURATOM Treaty to the new constitutional provisions, the Praesidium saw the following options as being available:

"a) the incorporation of the EURATOM Treaty into the Constitutional Treaty (in Part Two or in a Protocol);

b) the amendment of the EURATOM Treaty, allowing it to continue to exist independently.

Two sub-options were envisaged:

(i) adjustment by means of a treaty separate to and independent of the Constitutional Treaty, or (ii) adjustment by means of a Protocol annexed to the Constitutional Treaty.

The Praesidium favoured the second sub-option. In the Annex *"Elements for drafting a separate treaty or a protocol amending the EURATOM Treaty"*, it proposed *"repealing Titles III and IV and replacing them by a general referral clause"*. However, this proposal related solely to technical adjustments and did not adopt any of the substantive changes proposed in the Convention and the Penelope draft. *"Given the Convention's terms of reference and its timetable, the Praesidium believes that there is no basis for the Convention to become involved in an operation to amend the EURATOM Treaty substantially, nor would it be appropriate for it to do so."*⁷⁵

On 2.4.2003, Convention members Caspar Einem, Hannes Farnleitner, and alternate Convention members Maria Berger, Reinhard Rack and Gerhard Tusek supplemented their previous contribution and commented on the proposal put forward by the

⁷³ CON 325/2/02 REV2 Contrib 111 "Constitution of the European Union".

⁷⁴ Praesidium: Suggested approach for the Euratom Treaty, CONV 621/03.

⁷⁵ Praesidium: Suggested approach for the Euratom Treaty, CONV 621/03, p.1.

Praesidium.⁷⁶ The authors stressed that the Laeken mandate did cover the EURATOM Treaty, even if it did not ask specific questions. The Laeken mandate referred to "four Treaties" and the questions relating to the EURATOM Treaty were *"to be considered as part of the general questions"*⁷⁷. The Laeken mandate similarly did not contain any specific questions regarding the CJEU or the financial constitution, yet the Praesidium was nevertheless right to include them in the Convention's work programme. They reiterated the need for a *"level playing field"* in the internal energy market, integration into the generally applicable target provisions and into the energy- and environment-related objectives of the new Constitutional Treaty, adaptation of the forms of action to the new Constitutional Treaty, and integration of EURATOM research into the general framework programme for research and development. The conclusion of international agreements was also to be brought into line with the generally applicable procedure.

The guiding principles behind these proposals were set out as follows:

- That the general and specific objectives of the Constitutional Treaty be also valid for policies in the area of the EURATOM Treaty,
- Codecision procedure,
- the provisions set forth in the Constitutional Treaty (Parts I and II) concerning the conclusion of international agreements, the budgetary procedure and competition and state aid law should also apply to the EURATOM Treaty,
- EURATOM research to become part of the general research policy and the EU Framework Programmes for Research and Development,
- The introduction of a legal basis for comprehensive legislation to protect life, health and the environment.

Obsolete sections of the EURATOM Treaty were to be explicitly repealed.

Despite these many efforts within the Convention, and certainly within the Praesidium itself, no substantive reform or inclusion of a streamlined EURATOM Treaty in the constitutional proposal succeeded.⁷⁸

Within the Praesidium, there was a clear majority of representatives of national governments and the European Commission, with just four of the twelve voting members parliamentarians. France was represented by seven full members and the other three large Member States (Germany, the United Kingdom and Italy) by six full

⁷⁶Contribution by Mr Caspar Einem and Mr Hannes Farnleitner, members of the Convention, and Ms Maria Berger, Mr Reinhard Rack and Mr Gerhard Tusek, alternate members of the Convention: "Praesidium's suggested approach for the Euratom Treaty (CONV 621/03)" (CONV 621/03)" Brussels, 2.4.2003 CONV 666/03 CONTRIB 297
⁷⁷op. cit. p. 2

⁷⁸For a summary of the Convention's work, see Joint Documentation of the Conference of European Churches, the German Office of the Evangelical Church and the Commission of the Bishop's Conferences of the European Community Joint Documentation, The evolution of a Constitution for Europe Convention, The Reports on the plenary sessions February 2002-July 2003 of the European Convention.

members.⁷⁹ The Praesidium appointed working groups, decided on motions for amendments and established any consensus at Convention meetings. Its President Giscard d'Estaing in particular, but also the body as a whole, were often accused of lacking transparency. Not even the Convention members had access to the minutes of Praesidium meetings, which were held in camera anyway.⁸⁰

What remained were formal legal alignments in the EURATOM Treaty, no integration into the new Constitution and a joint declaration by a group of Member States that is still valid:

„54. Declaration by the Federal Republic of Germany, Ireland, the Republic of Hungary, the Republic of Austria and the Kingdom of Sweden: 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.“¹⁸¹

Shortly after the Convention's draft Constitution was presented to the Thessaloniki European Council on 20.6.2003, the European Parliament gave its opinion on the draft on the basis of a report by the Committee on Constitutional Affairs. Its resolution of 24 September 2003 welcomed the fact that the Union would acquire a single legal personality. Moreover, the Parliament welcomed, *inter alia*

"the separation of the EURATOM Treaty from the legal structure of the future Constitution; urges the Intergovernmental Conference to convene a Treaty revision conference in order to repeal the obsolete and outdated provisions of that Treaty, especially those relating to the promotion of nuclear energy and the lack of democratic decision-making procedures.“¹⁸²

⁷⁹ On the power structure within the Convention, see Ben Crum, Centre for European Policy Studies, Brussels, Politics and Power in the European Convention, Politics: 2004 Vol 24 (1), 1-11

⁸⁰ See Wagener, Sascha, Europa in schlechter Verfassung, Juni 2005, S. 5 ff.

⁸¹ Declaration No 54 annexed to the Treaty on European Union (consolidated version) 54. OJ C 326/358 of 26.10.2012.

⁸² European Parliament resolution on the draft Treaty establishing a Constitution for Europe and the European Parliament's opinion on the convening of the Intergovernmental Conference, paragraph 11.

Section 5 The key points for reform in respect of Austria's main concerns – an analysis of the strengths and weaknesses of European nuclear policy in the context of the EURATOM Treaty

A. Introduction

When looking at the question of preparing a reform path for EURATOM, we need to briefly present both strengths and weaknesses. It should be noted at the outset that the strengths, in particular via the EURATOM directives and CJEU case law, but also the weaknesses and limitations of the EURATOM Treaty, highlight in particular the lack of certain requirements in the Treaty, the lack of a say for the European Parliament and the lack of harmonisation of European nuclear legislation with a strong role played by the Commission.

B. The strengths of European safety regulations

Over the past twenty years, Europe has undeniably moved towards a specific European liability law, although its enforcement remains greatly dependent on Member State policies.

One of the strengths of European nuclear legislation – via secondary legislation – is that the weaknesses of the EURATOM Treaty, particularly in the area of environmental protection, have been mitigated by CJEU case law. While Europe has developed internationally exemplary safety guidelines, unfortunately this is no answer to the chronic shortcomings of the EURATOM Treaty, notably the lack of an explicit legal basis in the EURATOM Treaty and the lack of parliamentary co-decision. Nevertheless, it must be stressed that the progressive legislation that does exist needs to be preserved at all costs, and not jeopardised or watered down via a reform of the EURATOM Treaty, in whatever form.

The strengths of nuclear legislation, in particular via the development of directives, include – as recognised by the Court of Justice in its case-law – the requirement imposed on the EURATOM Community⁸³ *"to establish uniform safety standards to protect the health of workers and of the general public do not preclude, unless explicitly stated in those standards, a Member State from providing for more stringent measures of protection. Since this Directive provides for minimum rules, Member States should be free to adopt or maintain more stringent measures in the field covered by this Directive, without prejudice to the free movement of goods in the internal market as defined by the case-law of the Court of Justice."*⁸⁴.

⁸³ Pursuant to Art. 2 b) of the EURATOM Treaty.

⁸⁴ See Council Directive 2013/51/Euratom of 22 October 2013 laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption, recital (6). OJ No L 296/12 of 7.11.2013.

http://www.joint-project.org/upload/file/Joint_Project_Nuclear_Waste_Report_v4_o_2020-07-27.pdf

I. Examples

The following EU directives and recommendations are highlighted as examples⁸⁵:

1) Directive 2003/122/EURATOM and its successors

Council Directive 2003/122/EURATOM of 22 December 2003 on the control of high-activity sealed radioactive sources and orphan sources⁸⁶ deals with the control of high-activity sealed radioactive sources and orphan sources, including spent sources. In line with the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, the International Atomic Energy Agency (IAEA) Code of Conduct on the Safety and Security of Radioactive Sources and industry practice, spent sealed sources may be reused, recycled or disposed of. In many cases, this requires that the source or the equipment containing the source be returned to a supplier or manufacturer for re-qualification or processing.

This Directive has since been replaced by Council Directive 2013/59/EURATOM of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/EURATOM, 90/641/EURATOM, 96/29/EURATOM, 97/43/EURATOM and 2003/122/EURATOM. The specific and, in the interest of safety standards, positive role of the Court of Justice in adjudicating and interpreting the EURATOM Treaty in search of high safety standards is discussed below. Directive 2013/59/EURATOM explicitly takes this development into account already in its recital (5): "As recognised by the Court of Justice of the European Union in its case-law, the tasks imposed on the Community by point (b) of Article 2 of the EURATOM Treaty to lay down uniform safety standards to protect the health of workers and the general public does not preclude, unless explicitly stated in the standards, a Member State from providing for more stringent measures of protection. As this Directive provides for minimum rules, Member States should be free to adopt or maintain more stringent measures in the subject-matter covered by this Directive, without prejudice to the free movement of goods and services in the internal market as defined by the case-law of the Court of Justice."

2) Directive 2006/117/EURATOM

Council Directive 2006/117/EURATOM of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel⁸⁷ lays down a Community system of supervision and control of transboundary shipments of radioactive waste and spent fuel, so as to guarantee an adequate protection of the population. This Directive has been supplemented in particular by Commission Recommendation

⁸⁵ A comprehensive overview of directives, regulations, communications and recommendations is to be found in the Annex.

⁸⁶ OJ No L 346/57 of 31.12.2003.

⁸⁷ OJ No L 337/21 of 5.12.2006.

2008/956/EURATOM of 4 December 2008 on criteria for exports of radioactive waste and spent fuel to third countries⁸⁸.

3) Recommendation 2006/851/EURATOM

Commission Recommendation of 24 October 2006 on the management of financial resources for the decommissioning of nuclear installations, spent fuel and radioactive waste⁸⁹ deals with the security and funding adequacy as well as financial security and transparency in order to ensure that financial resources are used exclusively for decommissioning.

4) Commission Recommendation of 11 October 2010 on the application of Article 37 of the EURATOM Treaty

Article 37 requires that each Member State provides the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State. The Commission is to deliver its opinion within six months, after consulting the group of experts referred to in Article 31. Article 37 EURATOM is intended to ensure the most effective and complete EU-wide health protection against the dangers of ionising radiation.⁹⁰

Since 1960, the EU Commission has published a series of recommendations⁹¹ on the application of Art. 37 EURATOM, the most recent being the Recommendation of 11 October 2010 (2010/635/EURATOM).⁹²

Although Commission recommendations are not binding, Member States apparently recognise a binding effect. According to the CJEU case law in the "Cattenom" case⁹³,

⁸⁸ OJ No L 338/69 of 17.12.2008.

⁸⁹ OJ No L 330/31 of 28.11.2006.

⁹⁰ See also Schärf, Wolf Georg, *Europäisches Nuklearrecht* (2008), p. 257 ff.

⁹¹ Recommendation of 16 November 1960, OJ 81 of 21.12.1960, p. 1893/60; Recommendation 82/181/EURATOM, OJ L 83 of 29.3.1982, p. 15; Recommendation, 91/4/EURATOM - OJ L 6 of 9.1.1991, p. 16; Recommendation 99/829/EURATOM, OJ L 324 of 16.12.1999, p. 23.

⁹² OJ No L 279/36 of 23.10.2010.

⁹³ CJEU, Judgment of 22. 9. 1988 - Case C-187/87 Reference for a preliminary ruling by the Tribunal administratif de Strasbourg (Administrative Court of Strasbourg) on the interpretation of Article 37 of the Euratom Treaty referred to the Court under Article 150 of the EAEC Treaty. The Saarland, various German local authorities, French and Luxembourg associations for the protection of the Moselle valley and the environment and private individuals challenged the French interministerial decrees of 21 February 1986 authorising, on the one hand, the discharge of liquid radioactive effluents and, on the other, the discharge of gaseous radioactive effluents from four units of the Cattenom nuclear power station in Moselle. These decrees marked the end of an administrative procedure during which, first, on 11 October 1978, the works necessary for the construction of a nuclear power station with two 900 megawatt units and two 1 300 megawatt units at Cattenom were declared to be in the public interest, and second, between 6 July 1979 and 31 March 1982, building permits were granted for said units and, finally, between 23 June 1982 and 29 February 1984, decrees were issued authorising the construction of four 1 300 megawatt units at Cattenom. In the view of the applicants, the French Government had infringed Article 37 of the Euratom

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Member States cannot implement any measure before a Commission decision to that effect has been adopted pursuant to Article 37 of the EURATOM Treaty.

In the opinion of the CJEU, "In the light of that purpose of Article 37, the guidance which the Commission, assisted by highly qualified groups of experts, can give to the Member State concerned is of very great importance, owing, in particular, to the Commission's unique overview of developments in the nuclear power industry throughout the territory of the Community. In order to prevent the risk of radioactive contamination, it must therefore be possible for the Commission's opinion, particularly in those cases where it suggests a modification to the plan or the adoption of safety measures involving collaboration between two or more Member States, to be examined in detail by the Member State concerned, under conditions such that the Commission's suggestions can still be taken into account by that State, even if it is not legally obliged to conform with the opinion."⁹⁴

In combination with the Commission recommendations, Art. 37 EURATOM thus provides a clear framework for the precautionary principle, the meaning and strength of which must be preserved in the reform process.

5) Directive 2009/71/EURATOM & Directive 2014/87/EURATOM

Council Directive 2009/71/EURATOM of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations⁹⁵ imposes obligations on Member States to establish and maintain a national nuclear safety framework. Although the safety of nuclear installations is its key focus, the directive also highlights the importance of ensuring the safe management of spent fuel and radioactive waste, including in interim and final storage facilities. For those installations, which are covered by both Directive 2009/71/EURATOM and this Directive, no disproportionate or unnecessary obligations, in particular with regard to reporting, were to be introduced

It was amended by Directive 2014/87/EURATOM establishing a Community framework for the nuclear safety of nuclear installations of 14 August 2014⁹⁶. In contrast to the 2009 directive, the amending directive for the first time contains substantive technical provisions in the area of nuclear safety, in particular with regard to the safety objective, regulated in Art. 8a, which serves as a reference for Member States for implementing reasonably achievable safety improvements, also in existing installations.

Treaty by not communicating to the Commission the general data relating to the disposal of radioactive waste from the Cattenom nuclear power station until 29 April 1986, i.e. until after the contested decrees had been adopted, even though Article 37 of the Euratom Treaty requires that the matter be referred to the Commission before the competent authorities authorise the discharge.

⁹⁴ CJEU C-187/87, §§ 13, 14 and 16.

⁹⁵ OJ No L 172/18 of 2.7.2009.

⁹⁶ OJ No L 219/42 of 25.7.2014.

The Directive mainly concerns nuclear power plants, research reactors and interim storage facilities. However, it does not apply to final storage facilities for radioactive waste. Instead, the disposal principles are covered by Council Directive 2011/70/EURATOM of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste⁹⁷. Pursuant to Article 14 (2), Council Directive 2011/70/EURATOM also requires the European Commission to submit a report to both the Council and the Parliament every three years on the progress made in implementing this Directive and an inventory of radioactive waste and spent fuel elements present in the Community's territory and the future prospects.

Directive 2014/87/EURATOM contains provisions on the establishment of a legal and regulatory framework for nuclear safety, on the organisation and tasks of the nuclear authorities, on the obligations of nuclear installation operators, on the education and training of the staff of all parties involved and on information to the public. As regards the organisation of public authorities, the Directive emphasises the principle of functional separation. This principle means that the state functions for licensing and supervising nuclear facilities are to be functionally separated by state organisational measures from tasks associated with the promotion and use of nuclear energy. The intention here is to achieve the effective independence of the regulatory authority in making decisions on nuclear safety measures. In addition, Member States are required to perform regular self-assessments in the form of peer reviews of national legislative, enforcement and organisational frameworks and of competent authorities. Member States are to submit a report to the Commission on the implementation of this Directive by 22 July 2020 at the latest.

II. The long road to Directive 2009/71/EURATOM - a symptom of the weakness of the EURATOM Treaty

1) The conflicting competences of the EU Commission and the Council

The long road to Directives 2009/71/EURATOM and 2014/87/EURATOM clearly shows the limitations of the EURATOM Treaty and the conflict with general EU law, between blockades in the Council over safety standards for nuclear facilities and Commission competences, the role of the European Parliament and the extensive interpretation of the EURATOM Treaty by the CJEU.

a) The Commission's 2002 nuclear package

As part of its harmonisation efforts in the field of safety, the EU Commission had already presented a proposal for a comprehensive Community safety regime for plant safety and for the management of spent fuel and radioactive waste in 2003 in the so-called nuclear package, which it finally withdrew seven years later in 2010 after giving up on reaching a

⁹⁷ OJ No L 199/48 of 2.8.2011.

compromise with the Council.⁹⁸ Nevertheless, the nuclear package was still able to provide the framework leading to Directive 2009/71/EURATOM. It also highlighted the conflict over the scope of the EURATOM Treaty.⁹⁹

The nuclear package was considered "one of the most controversial legislative proposals in the energy sector." While the EU Commission wanted to achieve a common European approach to nuclear safety standards and radioactive waste management, a number of Member States questioned the Community's competence in this field. EU enlargement further complicated the debate, due to much lower safety standards and inadequate financial provisions for decommissioning plants in the new Member States. Built to old and less safe Soviet plans, the nuclear installations in five of the ten new Member States were obsolete.

In its communication on the nuclear package, the EU Commission stated that it was "no longer desirable to consider nuclear safety in a purely national perspective: *Only a common approach can guarantee the maintenance of a high level of nuclear safety in an enlarged EU with 28 Member States*".¹⁰⁰ Since this was an area concerning the use of nuclear energy, the legal basis was clearly to be found in the EURATOM Treaty. "*The Treaty's provisions concerning health protection provide a general framework containing the elements of a legal basis for Community responsibilities for nuclear safety*".¹⁰¹ Moreover, this competence, "*beyond the purely legal aspects*", was recognised by the Council¹⁰². The proposals strengthened the Commission's monitoring powers in the nuclear sector in all Member States. In Art. 9 of the draft Nuclear Safety Directive, the EU Commission called for decommissioning funds to be established. In the original version of 2002, the draft still required the Member States to prove that they had the necessary resources for decommissioning nuclear installations. In an amended version of the Commission from 2004, they should, according to Article 9 (2), only ensure "*...that financial resources sufficient to cover decommissioning costs of each nuclear installation, taking into account the length of time required, are available as decommissioning funds at the time envisaged. These funds must meet the minimum criteria set out in the annex*." For the EU Commission, it was important in 2002 with regard to decommissioning nuclear installations to have the Directive set Community rules for the establishment, management and use of decommissioning funds, ensuring that sufficient resources were available to carry out decommissioning measures under conditions guaranteeing the protection of the

⁹⁸ See COM (2003) 32 final 2003/0021(CNS), 2003/0022(CNS); Proposal for a COUNCIL (Euratom) DIRECTIVE setting out basic obligations and general principles on the safety of nuclear installations; Proposal for a COUNCIL DIRECTIVE (Euratom) on the management of spent nuclear fuel and radioactive waste; withdrawn 18.09.2010, see Withdrawal of obsolete Commission proposals (2010/C 252/04), OJ C 252/8, 18.9.2010.

⁹⁹ See also: Short legal opinion concerning the evaluation of the applicability of Articles 31 and 32 of the EC EURATOM Treaty as legal basis for the current different draft directive proposals of the European Commission, the "Nuclear Safety Package", prepared for The Greens / EFA Group of the European Parliament, December 2002, Dr. Dörte Fouquet, Kuhbier law firm.

¹⁰⁰ See COM (2002) 605: Communication from the Commission to the Council and the European Parliament - Nuclear safety in the European Union, p. 11.

¹⁰¹ Op. cit.

¹⁰² Op. cit.

population and the environment from ionising radiation. These funds, the amounts of which could in the opinion of the EU Commission be considerable, would have to be organised in such a way that their availability was guaranteed in all circumstances. The EU Commission insisted on Member States submitting regular reports and on the right of the EU Commission to take measures to remedy deficiencies, if necessary.¹⁰³

The Council refused. The conflict was put in words by Director General Jukka Laaksonen of the Finnish State Agency for Radiation and Nuclear Safety (STUK) in November 2002: *"In July this year, the Commission provided a draft nuclear safety directive informally to a limited number of experts for getting their first comments. The draft had been prepared by the Commission staff without any external support. Informal comments were asked from the national nuclear regulators through WENRA (Western European Nuclear Regulators Association). WENRA comments were very critical and did not support the proposed draft. Some WENRA members felt that it was not appropriate to give comments "behind the back of their Governments", although there was a wide consensus on the text of comments"*.¹⁰⁴ In a letter to the then President of the EU Commission, Romano Prodi, Germany and the UK jointly highlighted their concern that the Commission's nuclear initiatives would not lead to any real improvements in the field of nuclear safety, stating that nuclear safety and the planning of nuclear installations were the responsibility of individual Member States and criticising the detailed rules relating to the decommissioning funds proposed by the Commission as inappropriate and incompatible with the principle of subsidiarity.¹⁰⁵

b) The compromise on safety standards

The draft Directive 2009/71/EURATOM should therefore be seen as a watered-down attempt by the Commission to achieve uniform safety standards. In essence, the Directive mainly mirrors the implementation of the International Convention on Nuclear Safety of July 1994 (CNS), supplemented by further safety provisions.

aa) CJEU case law - C-29/99 on EURATOM competences

Directive 2009/71/EURATOM would not have seen the light of day without the prior, approving decision of the European Court of Justice in 2002. Indeed, it was the Court that laid the foundations for the Commission's legal initiatives in this area.

In its unpublished decision of 7.12.1998 approving the accession of the European Atomic Energy Community to the Convention on Nuclear Safety (CNS)¹⁰⁶, the Council initially

¹⁰³ See EU Commission press release of 6 November 2002, IP/02/1616.

¹⁰⁴ Presentation at the ATS seminar in November 2002; For more on the WENRA view, see also Georg Hermes, *Auf dem Weg zu einem europäischen Atomrecht?*, in ZUR 1/2004, pp. 12-14.

¹⁰⁵ Reference to the letter in <https://www.euractiv.de/section/energie-und-umwelt/linksdossier/nuklearpaket/>; see also Proposals for a Euratom Directive setting out the basic obligations and General Principles on the Safety of Nuclear Installations-Government Response from the Replies to the Dtl Consultation Document of 21 August 2003.

¹⁰⁶ Cf. text of the Convention in OJ L 318/21 of 11. 12. 1998.

upheld its positions of national sovereignty as a principle because, in its view, no article of the EURATOM Treaty conferred on the Community the competence to regulate, license and operate nuclear installations.¹⁰⁷

In the landmark judgment of the ECJ¹⁰⁸ on the partial action for annulment brought by the Commission against the Council concerning the above-mentioned Council Decision of 7 December 1998¹⁰⁹, the CJEU ruled against an attempt by the Council to interpret the safeguards of the EURATOM Treaty in a restrictive manner.

While the EURATOM Treaty did not confer upon the Community any competence to regulate the creation and operation of nuclear installations, the risk arising from such operations was seen to fall within the competence of the Community¹¹⁰. With regard to Article 7(2)(i)¹¹¹ of the Convention, the ECJ made it clear that, contrary to the Council's argumentation, this did not relate solely to national safety regulations and that said Article 7(2)(i) could not therefore be applied to the Community, since it only concerned the Member States. The ECJ, on the other hand, made the terse comment that, under Article 30(4)(ii) of the Convention, regional organisations must, in matters falling within their competence, fulfil the obligations which the Convention assigns to Member States. Therefore, Article 7 of the Convention should have been mentioned in the paragraph of the declaration specifying the Community's competences.

¹⁰⁷ WENRA, for example, is no exception.

¹⁰⁸ Cf. ECJ judgment of 10 December 2002, Case C-29/99; for a detailed analysis, see: Georg Hermes, *Aus dem Weg zu einem europäischen Atomrecht?* in ZUR 1/2004, S. 12 ff.

¹⁰⁹ The Convention on Nuclear Safety was approved on 17 June 1994 at a diplomatic conference convened by the International Atomic Energy Agency (IAEA) and opened for signature on 20 September 1994. It came into force on 24 October 1996. By 15 April 2002, 53 States, including all Community Member States, had ratified it. Its objectives are: to achieve and maintain a high level of nuclear safety worldwide through the enhancement of national measures and international co-operation including, where appropriate, safety-related technical co-operation; to establish and maintain effective defences in nuclear installations against potential radiological hazards in order to protect individuals, society and the environment from harmful effects of ionizing radiation from such installations; to prevent accidents with radiological consequences and to mitigate such consequences should they occur. The Convention contains a large number of reporting obligations and review meetings. These obligations also include that each Contracting Party submits to the triennial review meeting a report on the current status of nuclear safety or on the measures taken by the Contracting Party to fulfil each obligation, together with an accountability statement. The report is to be submitted to the Secretariat of the Convention on Nuclear Safety at the International Atomic Energy Agency (IAEA) in Vienna approximately six months before the start of the review meeting and will thus be made available to all Parties.

¹¹⁰ ECJ Case C 29/99 *Commission v Council*, § 89.

¹¹¹ Article 7. Legislative and Regulatory Framework: "(1) Each Contracting Party shall establish and maintain a legislative and regulatory framework to govern the safety of nuclear installations.

(2) The legislative and regulatory framework shall provide for:

i) the establishment of applicable national safety requirements and regulations;
ii) a system of licensing with regard to nuclear installations and the prohibition of the operation of a nuclear installation without a licence;
iii) a system of regulatory inspection and assessment of nuclear installations to ascertain compliance with applicable regulations and the terms of licences;
iv) The enforcement of applicable regulations and of the terms of licences, including suspension, modification or revocation."

The ECJ made it clear that the provisions of Chapter 3 of Title II of EURATOM, and consequently also the powers of the Community, were to be interpreted broadly in order to give practical effect to the provisions in the first place.¹¹² In doing so, it continued with its case law of broad interpretation, thereby giving practical effect to EURATOM Treaty Title II, Chapter 3.¹¹³ Judgment C-29/99 was important and valuable in that it enhanced the legal basis for a further protection competence at European level, thereby paving the way for the Commission's comprehensive nuclear package of 2003¹¹⁴. It brought clarity to the competence framework defined in EURATOM Treaty Articles 32 ff through extending the wording.

Nevertheless, the disadvantage of this extensive interpretation was that the primacy of Union law was diluted for areas not specifically regulated in the EURATOM Treaty, while the European Parliament continued to be left out of the legislative process.

bb) The original ECJ judgment on EURATOM interpretation rules (C-70/88)

In paragraph 80, the ECJ judgment in Case C-29/99 refers extensively to the judgment in Case C-70/88. The latter proceedings, brought by the European Parliament against the Council of the European Communities on the question of contamination of foodstuffs, concerned the admissibility, under Articles 173 of the EEC Treaty and 146 of the EAEC Treaty, of an action for annulment of Council Regulation (EURATOM) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency¹¹⁵. The contested legal basis for the regulation was Article 31 of the EURATOM Treaty, with Parliament seeking to have Article 100a of the EEC Treaty used as the basis.

The ECJ first rejected the Council's plea of inadmissibility concerning the Parliament's power to bring an action, since the Parliament claimed that its prerogatives had been impaired as a result of the choice of legal basis for the contested act and continued the proceedings on the main action.¹¹⁶

In its judgment in the main action, the ECJ emphasised that, according to settled case-law in the context of the Community jurisdictional regime, the choice of the legal basis of an act does not depend solely on what an institution considers to be the objective pursued, but must also be based on objective circumstances open to judicial review.

¹¹² ECJ judgment C-29/99.

¹¹³ See the previous ECJ Case 187/87 "relating to a case brought before the Court of Justice under Article 150 of the EAEC Treaty by the Tribunal administratif de Strasbourg in the proceedings pending before that court between Saarland and Others and Minister for Industry, Posts and Telecommunications and Tourism and Others".

¹¹⁴ Cf. Brussels, 7.1.2005 COM(2004) 861 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: Euratom Safety and Security - Activities in 2003

¹¹⁵ OJ L 371/11)

¹¹⁶ See ECJ judgment of 22 May 1990 on Case C-70/88.

These circumstances include, in particular, the aim and content of the act¹¹⁷. Parliament had argued that Articles 30 ff of the EAEC Treaty, on the one hand, did not cover so-called 'secondary radiation', i.e. radiation emanating from contaminated products, and, on the other, were aimed only at protecting persons directly affected by the nuclear industry. However, applying this jurisdictional regime, the ECJ concluded that the aim of EURATOM Articles 31 ff was to "...to ensure the consistent and effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source"¹¹⁸

cc) CJEU Judgment C-48/14 regarding the legal basis for Community action to protect against radioactive substances in water intended for human consumption

In another important and more recent case¹¹⁹ brought by the European Parliament against the Council of the European Union before the ECJ, the Parliament again sought annulment due to what it considered to be an incorrect legal basis for the already cited Council Directive 2013/51 EURATOM of 22 October 2013 laying down requirements for the protection of public health in relation to radioactive substances in water intended for human consumption. Instead of using Articles 31 and 32 EURATOM as a basis, Parliament considered that the Directive should have been based on Article 192 TFEU.

Parliament argued that the contested directive contained certain elements similar to those in Annex I, Part C, to Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, which in turn had been based at the time on Article 130s(1) TEC and, after Lisbon, would now certainly have been based on Article 192(1) TFEU, and thus on the co-decision procedure.

The ECJ ruled that the legal basis could validly be chosen from Article 31 EURATOM, stating that "it is clear from settled case-law that the choice of legal basis for a measure must rest on objective factors that are amenable to judicial review; these include the purpose and content of that measure."¹²⁰

The legal basis which has been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics is irrelevant in that regard, as the legal basis for a measure must be determined having regard to its purpose and content.

The purpose pursued by the contested Directive thus corresponds to the purpose of a basic standard within the meaning of Article 30 EA, which aims to protect the health of the general public against the dangers arising from ionising radiation."

¹¹⁷ See, for example, the ECJ judgment of 11.6.1991 in Case C-300/89, § 10.

¹¹⁸ ECJ judgment of 4.10.199 in Case C-70/88, § 14.

¹¹⁹ Case C-48/14, ECJ judgment of 12. 2. 2015.

¹²⁰ ECJ Judgment of 12.02.2015, C-48/14, § 29 f.

“As for the Parliament’s argument that the main objective of the contested Directive corresponds to that of EU policy in the field of the environment, listed in Article 191(1) TFEU, and that, accordingly, the contested Directive should have been based on Article 192(1) TFEU, it should admittedly be noted that under Article 191(1) TFEU, EU policy on the environment is to contribute to the pursuit, in particular, of the protection of human health. However, the Court has repeatedly held that the provisions of Chapter 3 of Title II of the EAEC Treaty are to be interpreted broadly in order to give them practical effect”.¹²¹ “In addition, if the Treaties contain a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision.”¹²²

III. Interim finding

Europe has nothing to hide in terms of developing strong safety principles in the field of secondary nuclear legislation.

Thanks to the extensive interpretation of the Treaty by the ECJ and clear initiatives by the EU Commission, the scope of application of EURATOM Chapter 3 (health protection) has been extended to include fields not originally regulated, such as waste.

On the other hand, the extensive interpretation by the ECJ has watered down demands for co-decision and reform, in particular from the European Parliament. In a sense, ECJ case law is further decoupling the EURATOM world of small steps towards harmonising and developing safety law from the development of EU law.

Despite the progress made in secondary legislation in important areas of nuclear safety and waste legislation, the EURATOM Treaty has the stigma of being a “*failed community*”, lagging behind developments in environmental protection and waste legislation under the TEU and TFEU, and not offering a holistic, life-cycle approach to the peaceful use of nuclear energy. What is missing is the necessary inclusion of all steps from resources, planning and licensing principles, via the operation of the plants, the questions of operating lifetime, the conditions for extending operating lifetimes, to the decommissioning of plants and the safe interim and final storage of radioactive waste, as well as a clear subordination to European environmental law, recognising that not just the protection of the population and workers is at stake, but also the protection of the environment and livelihoods. The EURATOM Treaty contains provisions – such as those in Chapter VI on supplies of fissile material – which have not been applied in practice in the Member States and in the work of the Commission. There are also deficits in the important provisions on the non-proliferation of nuclear material and related safeguards, as well as in health protection.

The SWOT analysis in particular has also shown that there is an urgent need to reform the EURATOM Treaty *per se*. As will be shown, the EURATOM Treaty – following the

¹²¹ Op. cit. § 34 f.

¹²² Op. cit. § 35 f.

proposals from and around the time of the Constitutional Convention – must on the one hand be slimmed down, with the provisions of the TFEU wherever possible applying in future. On the other hand, it should be examined whether the Treaty should contain new provisions in the areas of environmental protection, sustainability, radiation protection, waste management and final disposal, decommissioning and operating lifetime issues, as well as a uniform and progressive European liability law. The deficits of the EURATOM Treaty are discussed below.

C. The deficits

I. Overview

Those Member States in particular which, following the failure to reform the EURATOM Treaty during the constitutional negotiations in 2003 and 2004, had jointly expressed their will to initiate specific EURATOM reform negotiations, should, against the background of the clear shortcomings of the EURATOM Treaty and necessary (post-Brexit) negotiations with the United Kingdom pursuant to Art.106a EURATOM¹²³ in conjunction with Art. 48 TEU, start out on the road towards a constitutional reform of the EURATOM Treaty.

In this regard, the Stenographic Minutes of the Austrian Federal Council, Report of the Parliamentary Committee on Constitution and Federalism of 23 May 2005 are summarised below:

"...The EURATOM Treaty remains an independent treaty with its own legal personality. A protocol to the Constitutional Treaty will make only the indispensable technical adjustments with regard to the common Union budget and the common institutions. For reasons of simplification, transparency and efficiency, Austria has fully supported this reorganisation of the Treaty. From Austria's point of view, however, one major shortcoming is that a substantial reform of the EURATOM Treaty has not yet proved possible despite emphatic efforts to reach a consensus. Even so, Austria has succeeded in keeping open the prospect of a comprehensive reform of the EURATOM Treaty. A joint declaration by Austria, Germany, Ireland, Sweden and Hungary on the Final Act of the Constitutional Treaty maintains the objective of convening a EURATOM Review Conference as soon as possible."¹²⁴

¹²³ Article 3 of Protocol 2 (in conjunction with Article 5) of the Treaty of Lisbon of 13 December 2007 inserted the following Article: "Art. 106a (1) Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union and the Protocol on transitional provisions shall apply to this Treaty. (2) Within the framework of this Treaty, the references to the Union, to the 'Treaty on European Union', to the 'Treaty on the Functioning of the European Union' or to the 'Treaties' in the provisions referred to in paragraph 1 and those in the protocols annexed both to those Treaties and to this Treaty shall be taken, respectively, as references to the European Atomic Energy Community and to this Treaty.

(3) The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty."

¹²⁴ See No. 7.246 of the Annexes to the Stenographic Minutes of the Federal Council, Report of the Committee on Constitution and Federalism on the Resolution of the National Council of 11 May 2005 concerning a Treaty establishing a Constitution for Europe, including Protocols, page 44/98

Any reform will be able to build on the various reform proposals made within the Constitutional Convention outlined above, supplemented by areas not even touched upon in the EURATOM Treaty and not specifically discussed within the Convention.

The following key points should already be earmarked as tasks for a future convention on reforming the EURATOM Treaty:

- The introduction of international and cross-border environmental legal principles;
- Fundamental obligations regarding safety, decommissioning, dismantling and the safe final disposal of radioactive waste based on harmonised principles and clear responsibilities, and with a monitoring and coordinating role assigned to the EU Commission;
- The dissolution of the common nuclear market;
- The introduction of a single, harmonised European liability regime.

In view of the liberalised energy market principles¹²⁵, the current EURATOM Treaty contains largely obsolete provisions, starting with the concept and "leitmotif" of promoting the civilian use of nuclear energy. Against the background of the expiry of the European Coal and Steel Treaty, in recent years the idea of giving precedence to nuclear energy over any other energy source, in parallel with the liberalised energy market, is a constant obstacle to fair and open competition and a violation of the principle of a "*level playing field*" introduced by Mr Farnleitner and colleagues in the Convention.

II. Summary SWOT analysis

This paper can only provide an initial overview of the key points for the necessary SWOT analysis of the EURATOM Treaty and the subsequent secondary legislation.

It is clear that the preamble, the purpose of encouraging progress in the field of nuclear energy in general, the promotion of research, the dissemination of information, property ownership, the common nuclear market and external relations under the EURATOM

Annexes and Final Act; https://www.parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_07246/fnameorig_042089.html.

¹²⁵ Reference should also be made to the 1994 Act of Accession and to OJ C 241, 29/08/1994, p. 0382, and the Joint Declaration on the application of the Euratom Treaty in the context of the 'ACT concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, FINAL ACT - II. DECLARATIONS ADOPTED BY THE PLENIPOTENTIARIES'-Joint Declaration on the application of the Euratom Treaty: The Contracting Parties, recalling that the Treaties on which the European Union is founded apply to all Member States on a non-discriminatory basis and without prejudice to the rules governing the internal market, acknowledge that, as Contracting Parties to the Treaty establishing the European Atomic Energy Community, Member States decide to produce or not to produce nuclear energy according to their specific policy orientations. As regards the back end of the nuclear fuel cycle, it is the responsibility of each Member State to define its own policy."

Treaty can largely be deleted, in line with the approaches set forth in the Constitutional Convention.

1) Art. 203 and Art. 106a EURATOM - Questions of application, interpretation and competence as well as their limits

In its above-mentioned judgment on Case 29/99, the ECJ extended the scope of application of Art. 30 ff EURATOM in view of the fact that the Treaty itself does not explicitly contain any provisions regarding nuclear power plants. It was therefore considered necessary to develop rules of interpretation for Articles 30 ff in order to decide whether these articles could also be used as a legal basis for questions relating to accession to the Convention on Nuclear Safety. On the one hand, the ECJ's pragmatic and, from a safety point of view, welcome approach in the sense of the interpretative application of Art. 30 ff, and on the other hand the limitations of the Parliament's participation/co-decision rights and the limits of European safety supervision have already been discussed above.

The application of Article 203 EURATOM is similarly problematic. As shown above, Article 203 is also chosen as the legal basis in cases of doubt, despite the absence of explicit powers to act in the EURATOM Treaty. However, its application entails risks. Under no circumstances should this catch-all article be applied without it being clearly deducible that such a provision is intended to achieve one of the objectives of the EURATOM Treaty defined in its Article 2.

Any measures using Art. 203 as their legal basis must always specifically relate to a core area of the EURATOM Treaty. For example, Art. 203 cannot be used as a basis for regulations which de facto amount to an amendment of the Treaty without using the Treaty amendment procedure provided for this purpose. In particular, in the discussion on the 2002 Nuclear Package and on the EU Commission's proposal to set up a radioactive waste community with deadlines for Member States to set up, for example, final storage sites, the core competence of the EURATOM Treaty would not have been covered.¹²⁶

As outlined above, a reform of the EURATOM Treaty is necessary to bring it into line with the whole life cycle of regulation at European level. Against this background, it is clear that, without such a reform, a comprehensive and sustainable European radioactive waste management policy cannot be achieved, unless the entire chapter on health is deleted from the EURATOM Treaty and solely the TFEU applied in the future.

This leads to the third aspect in this context: the relationship between "*lex specialis*" and "*lex generalis*" since the adoption of the Lisbon Treaty.

¹²⁶ See Hermas, op. cit. p. 21 ff, especially p. 25: The "...field of nuclear waste management constitutes a task going beyond health protection, for which the nuclear community lacks both the operational and regulatory competence".

Under the legal situation existing prior to the Treaty of Lisbon, the specific EURATOM Treaty took precedence over the general rules of the EC Treaty, pursuant to the latter's Article 305(2). Insofar as the legal subject matter is conclusively regulated in the EURATOM Treaty, the latter takes precedence. While neither the TFEU nor the TEU contains a provision defining the primacy of the EURATOM Treaty,¹²⁷ the Lisbon Treaty introduced Article 106a EURATOM, paragraph 1 of which lists the TEU and TFEU articles applicable to the EURATOM Treaty¹²⁸.

2) The primacy of the promotion of nuclear technology

a) Overview

Set forth in Article 1 of the EURATOM Treaty, the Community's task of creating the conditions for the rapid establishment and growth of the nuclear industry can be used to justify corresponding research programmes, loans to the nuclear industry and state aid. This is contrary to the basic principle of liberalising energy markets within the competition framework defined in the EU Treaty.

Accordingly, Article 1 EURATOM and all subsequent regulations relating to promoting nuclear energy need to be deleted.

These include in particular – see also below – the following:

- parts of Article 2 EURATOM: , inter alia, the obligation to promote research and ensure the dissemination of technical information, and to ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels, and
- its entire Title II, which contains, in Articles 4 to 29, provisions regarding the promotion of research, the dissemination of knowledge and the granting of licences.

In this context, reference should also be made to the need to delete the entire chapter on the nuclear common market (Articles 92 ff). All these provisions together suggest the purpose of promoting nuclear energy.

¹²⁷ See also Severin Fischer, EURATOM und die Energiewende, SWP Working Paper EU Integration FG 1 2011/No. 03, October 2011, p. 5 f.

¹²⁸ Article 106a(1) reads: Article 106a(1) EURATOM reads:

(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.

b) The problem of authorising state aid for the construction of new nuclear power stations

Both the EU Commission and the European General Court (GCEU) consider state aid for the construction of new nuclear power plants to be justifiable under the principle of the common European interest with reference to Art. 1 and Art. 2 (c) as well as Art. 40 of the EURATOM Treaty, in line with TFEU Art. 107.3 (c). However, this does not tie in with an increasingly liberalised internal energy market in the EU.

In the proceedings for the approval of UK state aid for the construction of the new Hinkley Point nuclear power plant, in which Austria was particularly involved, the EU Commission had doubts as to whether ensuring supply security through the construction of this power plant would meet the criteria for approval ("a common interest") under EU state aid law. However, following the main investigation procedure, the Commission considered this characteristic to be fulfilled in accordance with the EURATOM Treaty on account of the fourth recital of the preamble¹²⁹ and Article 1 of the EURATOM Treaty, and also against the background that it was the task of the EU Commission to ensure that the provisions of the EURATOM Treaty were applied.¹³⁰ The EU Commission also made special reference to the nuclear common market under Chapter 9 of the EURATOM Treaty as a special market that can experience particular market failings and may require state intervention for special risks.¹³¹

As shown above, the CJEU essentially confirmed the decision of the European General Court.

c) The obsolete nuclear common market in the EURATOM Treaty

Chapter 9 EURATOM defining the nuclear common market and in particular Article 93 had a direct negative influence on Germany's decision (its 2001 amendment to its Atomic Energy Act) to completely pull out of the civil nuclear energy and not only to permanently shut down and dismantle its nuclear power plants over time, but also, from mid-2005

¹²⁹The third recital reads: „CONVINCED that only a joint effort undertaken without delay can offer the prospect of achievements commensurate with the creative capacities of their countries“; this is followed by the fourth recital: "RESOLVED to create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples"

¹³⁰See Commission Decision SA.4947, §§ 370 and 371: "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 EURATOME 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 applicable.

¹³¹ §§ 381, 382.

onwards, to prohibit the export of irradiated fuel elements for reprocessing to other European countries.

The German Bundestag passed the amendment to the Atomic Energy Act on 14 December 2001. Shortly before, on 12 December 2001, François Lamoureux, at that time Director General for Energy and Transport within the European Commission, had pointed out to the German government that, in his opinion, the regulations on the reprocessing of irradiated fuel elements contained therein were in breach of Article 93 of the EURATOM Treaty which requires Member States to remove all quantitative restrictions on imports and exports, including irradiated nuclear fuel elements. The export ban on irradiated fuel elements was therefore in breach of this Treaty provision.

The Commission was of the opinion that Article 93 prohibited Member States from imposing quantitative restrictions on the import and export of many nuclear products.¹³²

d) No exemptions from the free movement of nuclear goods

In the field of prohibiting restrictions under Art. 93 EURATOM, the Treaty lacks the exemption principle to the free movement of goods set forth in TFEU Articles 28 to 37. It contains no provision comparable to TFEU Article 36, an article stipulating that a restriction may be justified, with due regard for the principles of proportionality, in particular on grounds of "public morality, public policy or public security; the protection of health and life of humans, animals or plants".

In this context, Chapters 4 (Investments) and 5 (Joint Undertakings) also appear to be outdated and therefore candidates for deletion, again in line with the proposals made in the various Convention motions, for example the Borrel and Nagy-Wagner-MacCormick proposals¹³³.

e) Suggestion

Against this background, the proposal is to delete the above provisions relating to the promotion of nuclear energy as well as the entire Chapter 9 from the EURATOM Treaty.

3) Research

The EURATOM Research Programme, with its legal footing in Chapter II of the EURATOM Treaty, is the main European instrument for nuclear research with its own budget (period 2014 -2018, extended for 2019 and 2020).¹³⁴ The EURATOM Programme

¹³²Cf. <https://nuklearforum.ch/de/aktuell/e-bulletin/deutscher-atomausstieg-nicht-europakonform>

¹³³ See above under A.VI.

¹³⁴ Cf. Council Regulation (Euratom) 2018/1563 of 15 October 2018 on the Research and Training Programme of the European Atomic Energy Community (2019–2020) complementing the Horizon 2020 Framework Programme for Research and Innovation, and repealing Regulation (Euratom) No 1314/2013; OJ 19.10.2018, L 262/1.

sets the budget for direct and indirect measures, the research and development (R&D) objectives and the R&D funding instruments.

Article 9(6) of the 1997 Amsterdam Treaty established the principle of a general budget for the European Communities, i.e. the budgets of the then EC, ECSC and EURATOM Communities were merged into a single budget. Article 10 of Protocol No 2 to the Treaty of Lisbon perpetuates this principle for the current Treaty situation.

The intention behind the extension of the otherwise 5-year EURATOM research programmes was to ensure that EU-funded research and training activities in the field of nuclear science and technology would continue in 2019-2020, in close coordination with Horizon 2020.

According to the Commission's latest proposal, *"This approach will ensure the continuity and coherence of action throughout the full seven-year period, 2014-2020, and therefore greater coherence with the Horizon 2020 timeline. This is all the more important in view of the fact that the EURATOM programmes and Horizon 2020 pursue mutually reinforcing objectives."*¹³⁵

This coordination of research timelines will facilitate the overall removal of Chapters I and II under Title II. If necessary, a transition provision can be included in an Additional Protocol.

	2014	2015	2016
Verwaltungsausgaben im Bereich Forschung und Innovationsprogramme von Euratom	15.707.146	13.482.000	13.448.882
Verwaltungsausgaben im Programm Euratom – direkte Maßnahmen der GFS ⁵	9.409.510	9.541.097	12.400.000
Euratom Fusionsenergie	97.841.846	146.941.084	132.233.979
Euratom Kernspaltung und Strahlenschutz	417.357	30.875.121	59.135.715
Abschluss früherer Euratom-Programme ⁶	58.499.975	40.191.089	16.581.759
Finanzierungsanteil Deutschlands am EU-Haushalt (in %) ⁷	21,30	21,73	21,37

Source: German Bundestag; Übersicht der haushaltsmäßigen Umsetzung des EURATOM-Rahmenprogramms 2014-2018 für die Haushaltsjahre 2014-2016¹³⁶

¹³⁵ Cf. Proposal for a COUNCIL REGULATION on the Research and Training Programme of the European Atomic Energy Community (2019-2020) complementing the Horizon 2020 Framework Programme for Research and Innovation, COM/2017/0698 final/2, p. 2.

¹³⁶ German Bundestag, Wissenschaftlicher Dienst, Sachstand: Einzelfragen zur finanziellen Förderung der Kernenergie durch die Europäische Atomgemeinschaft bzw. die Europäische Union; WD 4 - 3000 - 101/16, 1.9.2016, S.5

There is no clear reason why the EURATOM Treaty should have its own research budget largely outside the competence of the European Parliament and with an opaque committee composition and role. This is especially true since the general budget "combines" the two budgets anyway, though without the European Parliament having a say on the content of the EURATOM part.

a) Background to the proposed deletion:

aa) Council and Commission dominance over research content

The democratic principle of the Union, enshrined in Art. 3 TEU, is diminished in particular by Council and Commission dominance in research matters relating to the EURATOM Treaty. Art. 4 EURATOM in conjunction with Art. 7 EURATOM clarifies that it is the sole responsibility of the Council to determine the research and training programmes, "acting unanimously on a proposal from the Commission, which shall consult the Scientific and Technical Committee". In practice, the European Economic and Social Committee is also consulted.¹³⁷

bb) The Scientific and Technical Committee

The Scientific and Technical Committee is regulated by Art. 134 EURATOM (in Chapter 2 on the Institutions of the Community and there in Section 3 (The Commission)), whereby Article 134 is the only remaining article in Chapter 2 apart from Art. 135¹³⁸. The Committee has an advisory role and consists of 42¹³⁹ members appointed by the Council after consultation with the EU Commission. "The Members of the Committee shall be appointed in their personal capacity for five years. Their appointment shall be renewable. They shall not be bound by any mandatory instructions."¹⁴⁰

b) Suggestion

As requested several times in the motions of Convention members, the whole of Chapter 1 (Promotion of research) and Chapter 2 (Dissemination of knowledge) (Articles 4 to 29) need to be deleted from the EURATOM Treaty.

¹³⁷ Cf. Council Regulation (Euratom) 2018/1563 of 15 October 2018 on the Research and Training Programme of the European Atomic Energy Community (2019–2020) complementing the Horizon 2020 Framework Programme for Research and Innovation, and repealing Regulation (Euratom) No 1314/2013.

¹³⁸ Article 135 EURATOM: "The Commission may undertake any consultations and establish any study groups necessary to the performance of its tasks."

¹³⁹ The Committee originally had 20 members, but with the Act of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (Act of Accession, OJ EU 2003 L 236, p. 33 ff), the number increased to 39. Following further EU enlargements (Bulgaria, Romania and Croatia), there are now 42 members.

¹⁴⁰ The author has not yet succeeded in finding a direct reference to a list of names on the EU Commission's website.

4) **Missing arrangements for cooperation in the field of nuclear safety and the absence of a strong role for the Commission**

a) **The need for improved cooperation**

The EURATOM Treaty does not in any way regulate cooperation between Member States and third countries in the field of nuclear safety.

Given the many ageing nuclear power plants on the borders of Member States and a certain powerlessness to avert dangers from them for populations and the environment in neighbouring states before any malfunction occurs, risks are increasing.¹⁴¹ This problem also affects the few new construction projects on the borders between Member States, particularly in relation to Austria's neighbours, the Czech Republic and Hungary, and on the external borders between Lithuania and Belarus.¹⁴²

In particular, extensions of the lifetimes of power plants close to the border without prior cross-border environmental impact assessments harbour conflicts. Neither the provisions of the EURATOM Treaty nor those of Council Directive 2013/59/EURATOM provide for a right to take defensive measures with regard to the safety of nuclear power plants close to the border in neighbouring states. It should be remembered that Art. 105 of the Directive requires Member States to ensure "that the competent authority has the power to require any individual or legal person to take action to remedy deficiencies and prevent their recurrence or *to withdraw, where appropriate, authorisation* when the results of a regulatory inspection or another regulatory assessment indicate that the exposure situation¹⁴³ is not in compliance with the provisions adopted pursuant to this Directive". However, the Article provides no legal entitlement for a Member State to require a neighbouring state to take action. Furthermore, the only possibility to enforce claims against third countries, in particular with regard to lifetime extensions, is under the cross-border environmental impact assessments (EIAs) provided for in the

¹⁴¹ With regard to this legal "powerlessness", reference should be made, for example, to the CJEU's decision in referral case C-115/08 *Land Oberösterreich/ČEZ*, in which it ruled that the Austrian courts dealing with a neighbour-law action by property owners for an injunction against the harmful effects caused by the Temelín nuclear power plant must take into account the operating licence granted by the Czech authorities.

¹⁴² Cf. especially Fouquet, *Dörte, Möglichkeiten für mehr Mitsprache bei grenznahen Atomkraftwerken; kurze gutachterliche Stellungnahme für Fraktion der Grünen, Bündnis 90, Deutscher Bundestag 2017; Wissenschaftliche Dienste Deutscher Bundestag, WD 2 - 3000-070/17: Die völkerrechtliche Haftung für grenzüberschreitende Schäden am Beispiel belgischer Atomkraftwerke.*

¹⁴³ "Exposure" means the act of exposing or condition of being exposed to ionising radiation emitted outside the body (external exposure) or within the body (internal exposure); see Art. 4, No. 37 of Council Directive 2013/59/EURATOM of 5 December 2013.

Conventions of Espoo¹⁴⁴ and Aarhus¹⁴⁵ and in the European Commission's EIA Directive.¹⁴⁶

It remains unsatisfactory that the European Union has to resort to a kind of crutch to justify action, as is evident in Recital 2 of Council Regulation (EURATOM) No 300/2007 of 19 February 2007 establishing an Instrument for Nuclear Safety Cooperation:

"The Chernobyl accident in 1986 highlighted the global importance of nuclear safety. In order to fulfil the objective of the Treaty establishing the European Atomic Energy Community (the 'EURATOM Treaty') to create the conditions of safety necessary to eliminate hazards to the life and health of the public, the European Atomic Energy Community (the 'Community') should be able to support nuclear safety in third countries."

Its successor, Council Regulation 237/2014, goes one step further in its Recital (3):

The Chernobyl accident in 1986 highlighted the global importance of nuclear safety. The Fukushima Daiichi accident in 2011 confirmed the need for continued efforts to improve nuclear safety and reach the highest standards. To create the conditions of safety necessary in order to eliminate hazards to the life and health of the public, the Community should be able to support nuclear safety in third countries."

¹⁴⁴ The Espoo Convention on Environmental Impact Assessment in a Transboundary Context is overseen by the UN/ECE, the UN Economic Commission for Europe, a subsidiary body of the UN Economic and Social Council (ECOSOC). The Convention ensures the participation of affected States and their populations in EIA procedures in other States for projects that may have significant transboundary impacts. The Espoo Convention entered into force on 10 September 1997. The Espoo (EIA) Convention sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries. As part of this EIA procedure, EIA documentation is to be prepared, including a description of the planned project and the environment likely to be affected by it, possible environmental effects and measures to reduce the effects. On the basis of this documentation, consultations are to be held with the potentially affected Party, in particular on the avoidance or reduction of the environmental effects. The population of the potentially affected area is to be informed of the proposed project.

¹⁴⁵ on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. The citizen participation rights enshrined in the Convention cover in particular: Access to environmental information, public participation in environmental protection, access to the courts in environmental matters.

¹⁴⁶ See in detail: Fouquet, Dörte, Gemeinsame Beauftragung juristisches Kurzgutachten / Laufzeitverlängerung der Atomkraftwerke in Doel 1 und 2 sowie Tihange 1-Schwerpunkt der Prüfung zu Umweltverträglichkeitsprüfung/ Art. 37 EURATOM-/ESPOO- Übersicht von rechtlichen Argumenten für eine Beschwerde der Bundesländer (Rheinland-Pfalz und Nordrhein-Westfalen an die Europäische Kommission) sowie an das ESPOO Sekretariat sowie kurze Übersicht zu möglichen Verletzungen des europäischen Beihilferechts, 2016, https://mueef.rlp.de/fileadmin/mwkel/Abteilung_6/Strahlenschutz/Kurzgutachten_zur_Laufzeitverlaenge-rung_der_belgischen_Atomkraftwerke_Tihange_1_sowie_Doel_1_und_Doel_2_7_.pdf.

What is interesting for our assessment is above all that there is no legal basis in the EURATOM Treaty for the cooperation identified as necessary, whether within the EU or internationally.

Art. 10 EURATOM contains a reference to third states, but solely with regard to empowering the EU Commission to contract out "certain parts of the Community research programme to Member States, persons or undertakings, or to third countries, international organisations or nationals of third countries." The article also refers to cooperation with the International Atomic Energy Agency.

This would allow the EU Commission to rely solely on Article 203 EURATOM as a legal basis in its proposal.

b) Suggestion

Any reform of the EURATOM Treaty should include principles for the planning, licensing and lifetime of plants, safety checks, the need to respect the EIA Directive and the Espoo and Aarhus Conventions for the nuclear sector, and rules for cooperation between Member States, in particular on the safety of power plants located close to borders.

Supranational safety issues can be set forth in a chapter aimed at promoting the same high level of safety in neighbouring third countries. However, it must also be made clear that responsibility and the "polluter-pays" principle are clearly observed. However, no improved regulation of the preventive cooperation principles between Member States with the involvement of the Commission can relieve a Member State within whose borders the nuclear plants are located of sole responsibility and impose co-responsibility on either the neighbouring state or the Community in cases where, despite coordination and joint supervision, any malfunction occurs.

5) Non-proliferation

a) Walking the tightrope

The EURATOM Treaty regulates the civil use of nuclear energy. Obviously, care must be taken to ensure that any reform of the Treaty clearly upholds this premise and contains no direct provisions regarding nuclear weapons. Nevertheless, the two uses are often referred to as "Siamese twins"¹⁴⁷, with little distinction made between the two with regard to storing spent nuclear material. Basically speaking, this is subject to IAEA control in states without nuclear weapons. However, within the EURATOM Member States, the EURATOM Community takes precedence over the IAEA in its responsibility for safeguards in civil nuclear facilities. The EURATOM Member States "*...thus cooperate multilaterally to control themselves. This also applies to MOX fuel production plants. Nuclear facilities in states possessing nuclear weapons are subject to international*

¹⁴⁷ See for example: Otfried Nassauer, *Atomwaffen und Atomenergie – Siamesische Zwillinge oder doppelte Null-Lösung?*, in *Mythos Atomkraft*, p. 142 ff. (187).

supervision only if the country concerned expressly agrees."¹⁴⁸ This constitutes a handicap for Europe, since the control function has not been formally transferred to the EU Commission, but has reverted to the Member States, as EURATOM does not provide for mandatory supervision by the EU Commission. Although the European Commission has been granted a de facto supervisory and control role in relation to the majority of Member States, this does not apply across the board to all Member States, in turn leading to difficulties in the cooperation with the IAEA.

On the other hand, Europe has been subject to great pressure since the dissolution of the Soviet Union, a country which failed to keep proper records on nuclear materials, where civil and military activities were interwoven and where nuclear arsenals were dismantled in a somewhat disorderly manner.¹⁴⁹ As a continent, Europe harbours sufficient potential danger in this area to require intensive coordination at EU level.

The EU Commission has therefore been extending "*...informal cooperation on an ad hoc basis to the Member States concerned*" since 1994.

The EURATOM Treaty *per se* seems to be a rather blunt instrument for making improvements, even if the Commission had already stated in 1994 that it should be examined "*...whether and for what specific area it would be beneficial to make use of Article 135 of the EURATOM Treaty (consultations and setting up of committees by the Commission)*".¹⁵⁰

b) The Treaty on the Non-Proliferation of Nuclear Weapons

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) constitutes the core of international efforts to reduce the world's nuclear arsenal. It commits the participating nuclear weapon states (USA, Russia, China, France, Great Britain) to the goal of full nuclear disarmament. In return, non-nuclear-weapon states undertake to refrain from acquiring nuclear weapons. The Treaty also regulates cooperation on the peaceful use of nuclear energy. The International Atomic Energy Agency (IAEA) is tasked with monitoring compliance with the Treaty's provisions. In the context of the NPT,¹⁵¹ EURATOM is responsible for safeguards and control measures vis-à-vis the Member States and provides technical assistance to developing countries outside Europe. However, this is no substitute for harmonised European legislation on strict non-proliferation, with the EU Commission given sufficiently effective monitoring capabilities. The EU Commission's dependence on Member State willingness to

¹⁴⁸ Otfried Nassauer, *Atomwaffen und Atomenergie – Siamesische Zwilling oder doppelte Null-Lösung?*, in *Mythos Atomkraft*, p. 142 ff. (151).

¹⁴⁹ See Communication from the Commission to the Council (COM (94)383 final): "The emergence in certain republics, including Russia, of very powerful criminal organizations adds to the risks of diversion. Such organizations could take advantage of the situation and establish export channels. In addition, where this traffic is conducted by organizations rather than isolated individuals, experience shows that the networks in question have branches throughout the entire world, and that the potential final users of the stolen materials are in all probability third countries or clandestine operators based outside the territory of the Union.

¹⁵⁰ Communication from the Commission to the Council (COM (94)383 final, p. 16).

¹⁵¹ IAEA documents INFCIRC/193 of September 1973 and INFCIRC/263 of October 1978.

cooperate in safeguards and control measures is inappropriate, despite excellent Commission regulations providing guidance on Member States' control obligations. The potential danger has been increasing for years and is considerable: In 2005, the Council recognised in its Common Position 2005/329/CFSP *"that serious nuclear proliferation events have occurred since the end of the 2000 Review Conference"*.¹⁵²

c) The European Union and its implementation of the non-proliferation principles

The European Union regards the *"Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as the cornerstone of the global nuclear non-proliferation regime, the essential foundation for the pursuit of nuclear disarmament in accordance with Article VI of the NPT and an important element in the further development of nuclear energy applications for peaceful purposes."*¹⁵³ In the opinion of the EU Commission, this principle is reflected, first, in Directive 2014/87/EURATOM on a Community framework for the nuclear safety of nuclear installations and, second, via the fundamental safety standards in the Union enshrined in the EURATOM Treaty, Chapter 3 (Health and Safety) Art. 30ff.¹⁵⁴

The corresponding Regulation (EURATOM) No 302/2005¹⁵⁵ of the EU Commission of 8 February 2005, amended by Regulation (EU) No 519/2013 of 21 February 2013¹⁵⁶ on the application of EURATOM safeguards, uses as its legal basis Articles 77, 78, 79 and 81 EURATOM, i.e. Chapter 7 on Safeguards.

The Agreement 78/164/EURATOM of 22.2.1978 between the EURATOM non-nuclear-weapon Member States and the International Atomic Energy Agency in implementation of Art. III, §§ 1 - 4 of the above-mentioned Treaty on the Non-Proliferation of Nuclear Weapons¹⁵⁷ leaves the competence in principle with the Member States. The EURATOM Community has "solely" a control function. This provision is also derived from the IAEA Statute. While the Trilateral Agreement (e.g. Infcirc 193) recognises the Community, the IAEA Statute does not. Even so, the reason why the control function is regulated in this way makes no change to the Commission's limited competence.

Reference should be made to the following two recitals:

"WHEREAS the States are members of the European Atomic Energy Community (EURATOM) (hereinafter referred to as 'the Community') and have assigned to institutions common to the European Communities regulatory, executive and judicial powers which

¹⁵² See Council Common Position 2005/329/PESC of 25 April 2005 relating to the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Article 2(b)(6).

¹⁵³ Council Common Position 2005/329/PESC of 25 April 2005 relating to the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Recital (1)

¹⁵⁴ See for example the Statement on Cluster III issues, Preparatory Committee for the 2020 NPT Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT, First session, Vienna, 2-12 May 2017, No. 8.

¹⁵⁵ OJ L 54/1, 28. 2. 2005.

¹⁵⁶ OJ L 158/74 of 10.06.2013.

¹⁵⁷ OJ L 51/1 of 22. 2. 1978.

these institutions exercise in their own right in those areas for which they are competent and which may take effect directly within the legal systems of the Member States;

WHEREAS, with this institutional framework, the Community has in particular the task of ensuring, through appropriate safeguards, that nuclear materials are not diverted to purposes other than those for which they were intended, and will, from the time of the entry into force of the Treaty within the territories of the States, thus be required to satisfy itself through the system of safeguards established by the EURATOM Treaty, that source and special fissionable material in all peaceful nuclear activities within the territories of the States is not diverted to nuclear weapons or other nuclear explosive devices".¹⁵⁸

The Community's limited competence is also reflected in the fact that, in order to ensure the application of Agreement 76/164/EURATOM in all EU Member States, all the Commission can do is to call on them to accede to the Agreement, as was the case with the Czech Republic on 31.1. 2008, when the European Commission sent a Reasoned Opinion to it regarding the accession to the Agreement with the International Atomic Energy Agency on the Non-Proliferation of Nuclear Weapons.¹⁵⁹

Sometimes a EURATOM provision slips almost unnoticed into the co-decision procedure under the TFEU, as seen with Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders¹⁶⁰ and their applicability to illicit trafficking in nuclear or radioactive substances (Art 3.26). The Regulation's legal basis is solely the provision on judicial cooperation set forth in Article 82(1) (a) TFEU¹⁶¹. Reference is made only briefly to Council Regulation (EEC, EURATOM) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits¹⁶², the legal basis of which is in turn the catch-all Article 203 EURATOM.

The current Chapter 8 (Property Ownership) of the EURATOM Treaty is also to be integrated into a revised chapter.

d) Suggestion

Any reform of the EURATOM Treaty should encompass the development of basic principles for co-operation and increased Commission competence, for ownership and control, leading to a revised Chapter 7 (Safeguards).

¹⁵⁸ Ibid.

¹⁵⁹ See Commission press release IP/08/161 of 31.1.2008.

¹⁶⁰ OJ No L 303/1 of 28.11.2018.

¹⁶¹ ART. 82 TFEU: 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

a) (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;".

¹⁶² See recital (29).

6) Inconsistency in the application of EU environmental and waste legislation to nuclear installations - health protection is not enough

a) The missing legal basis

The EURATOM Treaty does not cover the protection of the environment, but solely that of health in Title II, Chapter 3. Similarly, the term "waste" is only to be found in the annexes to the EURATOM Treaty¹⁶³. Within the body of the Treaty, the term is unknown.

At the time of its adoption, the EEC Treaty similarly did not contain any article on environmental protection. However, this changed when the Single European Act (SEA) of 1986 recast Art. 130r of the EEC Treaty to include the explicit declaration of environmental protection as a Community objective. Community law is based on a broad concept of the environment, covering health and social well-being of individuals as well as regional, European and global environmental problems. Art. 191 TFEU clearly establishes the Union's environmental policy,¹⁶⁴ while Article 192(1) provides the corresponding legal basis.¹⁶⁵

¹⁶³ See Annex I (Fields of Research concerning Nuclear Energy referred to in Article 4 of this Treaty), IV. Processing of radioactive material), 5. Concentration and storage of useless radioactive waste; Annex II (Industrial Activities referred to in Article 41 of this Treaty, 12 (Facilities for the industrial processing of radioactive waste, set up in conjunction with one or more of the facilities specified in this list). Annex IV (List of Goods and Products subject to the provisions of Chapter 9 on the Nuclear Common Market, List A2 -- waste-processing equipment.

¹⁶⁴ Article 191 TFEU:

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

¹⁶⁵ Article 192 TFEU:

Key EU directives and regulations have excluded the applicability of the relevant secondary legislation to the nuclear sector.

b) The EURATOM Treaty and environmental liability in the EU

One good example illustrating the weakness of European law in the field of EURATOM and the environment is environmental liability law.

Its key is Directive 2004/35/EC of the Council and of the European Parliament of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage¹⁶⁶. Revised several times, its latest consolidated version is Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013¹⁶⁷. Under Article 4 (Exceptions) of the original directive, §4(4) states that it "*shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof.*" Annex V lists the international instruments referred to in Article 4(4)¹⁶⁸:

c) Directive 2010/75/EU on industrial emissions and its relevance for EURATOM

In particular, Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) needs also to be mentioned.¹⁶⁹ The special provisions for waste incineration plants and waste co-incineration plants (Chapter IV) exclude installations for the treatment of radioactive waste in Article 42 (Scope), para. 2 a) ii).

A further regulation needing to be mentioned is Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste¹⁷⁰. The

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

¹⁶⁶ OJ L 143/56 of 30.04.2004.

¹⁶⁷ OJ L 178/66, 28. 6. 2013.

¹⁶⁸ Annex V: "International instruments referred to in Article 4(4):

(a) the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;

(b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage;

(c) the Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage;

(d) the Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention;

(e) the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

¹⁶⁹ OJ No L 334/17 of 17.12.2010.

¹⁷⁰ OJ L 190/1 of 12. 7. 2006: See Art. 1.3 (c) Shipments of radioactive waste as defined in Article 2 of Council Directive 92/3/Euratom of 3 February 1992 on the supervision and control of shipments of radioactive waste between Member States and into and out of the Community

successor Directive to Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the trans frontier shipment of hazardous waste, again it did not apply to radioactive waste¹⁷¹.

The more "specific" Council Directive 92/3/EURATOM of 3 February 1992 on the supervision and control of shipments of radioactive waste between Member States and into and out of the Community has its explicit legal basis in Articles 31 and 32 EURATOM, two articles which, as already illustrated several times, refer explicitly to health protection.

Given the primacy of environmental protection in the EU Treaties and the absence of an explicit environmental competence in the EURATOM Treaty, it is problematic that the Directive on shipments of radioactive waste was not based on general EU law with full co-decision powers accorded to the EU Parliament and in full respect of the obligations under the Aarhus and Espoo Conventions.

This leads to the problem of the further development of European nuclear law in environmental matters by the CJEU and the limits of Article 106a, to which reference has already been made.

d) Suggestion

Consideration should be given to deleting the whole of Chapter 3 – Health and Safety – from the EURATOM Treaty, thereby directly ensuring greater application of EU law.

At the very least, Chapter 3 should be aligned with the 'polluter-pays' principle and the EU environmental protection objective with its sustainability principles. The nuclear community must also become a waste management community. The potential impacts on health and the environment should be extended to the whole life cycle of the technology, materials from the mining of ores, enrichment, the respective transport steps, the planning, licensing and monitoring of facilities, dismantling and waste transport to interim and final storage, including ensuring that Member States have clear timetables.

The question of setting up a European Nuclear Waste Disposal Fund needs to be discussed in depth. In this respect, the criticism voiced at that time by several Member States regarding fund provisions in the European Commission's above-mentioned proposal in the nuclear package needs to be taken up, examining whether, from today's perspective, the concerns expressed at the time make an EU fund regulation more realistic, with increased pressure put on operators and Member States to dismantle and dispose of further ageing nuclear power plants in the Community. Lessons learned from recent progress on Community structural funding for a 'just transition' in the coal sector are possibly of use in this discussion.

¹⁷¹ OJ L 326/31, 13. 12. 1984, Directive last amended by Directive 86/279/EEC (OJ L 181/13, 4. 7. 1986).

7) Missing liability rules

a) Overview of the applicable liability law in the EU

The current EURATOM Treaty has an approach to nuclear liability that can almost be described as homeopathic, as defined in Article 98 of Chapter 9 on the Nuclear Common Market. The entire EURATOM Treaty contains the word "insurance" just once, precisely in this Article:

"Member States shall take all measures necessary to facilitate the conclusion of insurance contracts covering nuclear risks.

The Council, acting by a qualified majority on a proposal from the Commission, which shall first request the opinion of the Economic and Social Committee, shall, after consulting the European Parliament, issue directives for the application of this Article."

There is no EU-level harmonisation of liability law in the EURATOM Treaty.

In particular, the following international treaties provide the legal basis for compensation claims:

- The Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Additional Protocol of 28 January 1964, the Protocol of 16 November 1982 and the Protocol of 12 February 2004¹⁷²;
- The Brussels Supplementary Convention of 31 January 1964¹⁷³;
- the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage¹⁷⁴ and the Protocol of 12 September 1997¹⁷⁵;
- the Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention¹⁷⁶; and

¹⁷² Cf. Paris Convention on Third Party Liability in the Field of Nuclear Energy - Paris Convention of 29.7.1960, supplemented by the Protocol of 28.1.1964, in force under international law since 1.4.1968, supplemented by the Protocol of 16.11.1982, in force under international law since 7.10.1988; published in Germany in the Bekanntmachung der konsolidierten Fassung vom 15. Juli 1985, BGBl. II S. 963, 964.

¹⁷³ Brussels Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy (Brussels Supplementary Convention or BSC) and Additional Protocol of 28 January 1964 (concluded on 31 January 1963, entered into force on 4 December 1974), German Federal Law Gazette 1975 II, p. 992.

¹⁷⁴ Vienna Convention on Civil Liability for Nuclear Damage (concluded 21 May 1963, entered into force 12 November 1977), available at: <https://www.iaea.org/publications/documents/conventions/vienna-convention-on-civil-liability-for-nuclear-damage>.

¹⁷⁵ Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (adopted on 12 September 1997, entered into force on 4 October 2003). http://www.iaea.org/Publications/Documents/Conventions/protamend_status.pdf

¹⁷⁶ (German) BGBl. 2001 II, p. 202.

- the Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage¹⁷⁷.

b) The patchwork

In the European Union, as in the rest of the world, there is a rift running through the camps. There are those countries which have signed the Vienna Convention and others which have signed the Paris Convention. *"The Paris Nuclear Liability Convention has a regional focus on Western European countries, while the Vienna Nuclear Liability Convention is predominantly attractive to economically weaker Eastern European, African, Asian and American states because of its lower liability requirements."*¹⁷⁸

Both globally and within the EU, nuclear liability constitutes a patchwork rather than a unified system with the highest standards of responsibility.

As regards the existing multilateral nuclear energy agreements on liability and compensation for nuclear damage, the world is confronted with a mixture of opinions¹⁷⁹:

Most Member States that joined the EU before 2004 are parties to the Paris Convention, while the majority of states joining after 2005 are parties to the 1963 Vienna Convention. Most, but not all, of the parties to the Paris Convention are parties to its supplementary convention, the Brussels Supplementary Convention of 1963.

Just few of the parties to the Paris Convention are parties to the Joint Protocol on the application of the Vienna Convention and the Paris Convention (1988 Joint Protocol), which establishes a link between the two conventions.

On the other hand, all Member States which are parties to the 1963 Vienna Convention are also parties to the 1988 Joint Protocol. While some "new" Member States have acceded to the 1997 Protocol amending the Vienna Convention on Civil Liability for Nuclear Damage (1997 Vienna Protocol), just two have actually ratified it.

As regards the International Atomic Energy Agency Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage, which only entered into force 18 years later, on 15 April 2015, it should be noted that the Czech Republic, Italy and Romania are the only EU Member States to have signed it. Up to now, Romania is the only country to have ratified it.

¹⁷⁷ Convention on Supplementary Compensation for Nuclear Damage (adopted on 12 September 1997, entered into force on 15 April 2015). Germany has not acceded to the Convention (http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf).

¹⁷⁸ Wissenschaftliche Dienste Deutscher Bundestag, WD 2 - 3000-070/17: Die völkerrechtliche Haftung für grenzüberschreitende Schäden am Beispiel belgischer Atomkraftwerke, p. 6.

¹⁷⁹ All texts of the international agreements can be found at <https://www.oecd-nea.org/law/multilateral-agreements/liability-compensation.html>.

c) The example of Germany

In Germany, the Act on the Peaceful Use of Nuclear Energy and the Protection against its Dangers (Atomic Energy Act - AtG) regulates liability provisions in §§ 25 - 40, while §§ 13 - 15 regulate the damage compensation obligations and liability insurance of plant operators.

§ 25 (Liability for nuclear installations) tightens the liability principles set forth in the Paris Convention and the Joint Protocol:

"(1) Where damage results from a nuclear incident originating in a nuclear installation, the liability of the installation's owner shall be governed by the provisions of this Act in addition to those of the Paris Convention and the Joint Protocol. The Paris Convention shall be applied domestically by the Federal Republic of Germany irrespective of its binding force under international law, unless its rules presuppose reciprocity brought about by the entry into force of the Convention.

(2) If, in the case of the transport of nuclear material, including its related storage, the carrier has assumed contractual liability in place of the owner of a nuclear installation situated within the scope of this Act, he shall be deemed to be the owner of a nuclear installation from the time liability is assumed. The contract must be in writing. The assumption of liability is only effective when it has been approved by the competent authority authorising the transport, at the request of the carrier, before the start of the transport of nuclear materials or their related storage. The authorisation may only be granted if the carrier is authorised as a carrier or has its principal place of business as a freight forwarder within the scope of application of this Act, and the owner of the nuclear installation has declared its consent to the competent authority.

(3) The provisions of Article 9 of the Paris Convention relating to the exclusion from liability of damage resulting from nuclear incidents directly attributable to acts of armed conflict, hostilities, civil war, insurrection or a major natural disaster of an exceptional character shall not apply. If the damage occurs in another state, sentence 1 shall apply only insofar as the other state has, at the time of the nuclear incident, ensured an equivalent arrangement in relation to the Federal Republic of Germany in terms of type, extent and amount.

(4) The owner of a nuclear installation shall be liable irrespective of the place where the damage occurred. Article 2 of the Paris Convention shall not apply.

(5) The owner of a nuclear installation shall not be liable under the Paris Convention to the extent that the damage was caused by a nuclear incident attributable to nuclear materials specified in Annex 2 to this Act.

Also relevant to nuclear liability law is the Regulation on Financial Security under the Atomic Energy Act (Atomrechtliche Deckungsvorsorge-Verordnung - AtDeckV) 2, which specifies the requirements of §§ 13-15 of the Atomic Energy Act in concrete terms."

d) The example of Austria

Already described at the beginning¹⁸⁰, the Austrian Liability Act is more consistent and comprehensive than the German liability rules. Its principles have since been adopted by Luxembourg in its new liability law¹⁸¹.

This Act marks a turning point in terms of the liability principles for damage caused by ionising radiation. The Act applies not only to the operation of nuclear power plants, but also to the transport of radioactive materials and the handling of radionuclides, covering all damage occurring after its entry into force in 1999.

As under German law, liability is unlimited. Under the Austrian system, the operator of the nuclear power plant also assumes liability for contractors working in his plant. This means that the latter do not need insurance when an employee causes an accident with resulting damage to third parties.

The Austrian Act does not provide for exclusive jurisdiction, as is the case in international nuclear liability law, instead establishing the principle that an Austrian court has jurisdiction and that Austrian law is applicable when nuclear damage occurs in Austria, regardless of the source. The Act significantly expands the definition of nuclear damage and contains provisions making it easier to prove causation. In view of the fact that the Austrian Atomic Energy Act, in contrast to the international agreements referred to above, foresees no liability ceiling or channelling and an Austrian place of jurisdiction, and that these principles of Austrian law may not be violated in any way,¹⁸² Austria has not yet acceded to any of the international agreements.

However, Austria continues to observe the development of international liability instruments for nuclear damage with regard to the question of whether accession can be in the interest of potential Austrian claimants.

e) Suggestion

Europe needs a single harmonised nuclear liability law, giving a reformed EURATOM Treaty a high international profile and, within the EU, a strong boost in terms of safety and much-needed harmonisation. In preparation for the Convention on a reform of the EURATOM Treaty, a detailed study of the strengths and weaknesses of the liability regimes in the EU Member States, including provisions and insurance conditions, should

¹⁸⁰ Cf. Federal Act on Civil Liability for Damage Caused by Radioactivity [AtomHG 1999] Federal Law Gazette Part I [BGB1 I] No. 170/1998 (Austria), digital version at <https://www.oecd-nea.org/law/legislation/austria/AUSTRIA-AtomicLiabilityAct.pdf> (last accessed 8. 11. 2020).

¹⁸¹ Loi du 6 juillet 2020 sur la responsabilité civile en matière de dommages en relation avec un accident nucléaire, <http://data.legilux.public.lu/eli/etat/leg/loi/2020/07/06/a578/jo> (last accessed 08.11.2020)

¹⁸² Cf. Report of the Federal Government pursuant to § 30 AtomHG on the development of international liability instruments for nuclear damage of 15. 12. 2017, GZ:UW.1.1.7/0001-1/6/2017 .
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be conducted by states such as Austria, serving as input for a condensed and progressive European Liability Convention in a reformed EURATOM Treaty.

III. Excursus: Thoughts on a reform path without amending the EURATOM Treaty via an ordinary revision procedure

It is debatable whether a clarification of at least the exception principle can be achieved in the simplest possible way while at the same time strengthening the primary application of TFEU provisions.

1) Amendment of Article 106a of the EURATOM Treaty

Consideration should be given to supplementing the provisions of Article 106a in such a way that the primacy of the TFEU over the EURATOM Treaty is established. A rewording of Art. 106a §3 lends itself to this purpose. The current wording is: "*The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty.*" The sentence could either simply be deleted or worded the other way around: "*The provisions of this Treaty shall not derogate from the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union.*" This would be an important step towards clarifying and modernising the EURATOM Treaty.

2) Limits of such an amendment

On the other hand, an ordinary revision procedure is required even for such an amendment, since a simplified revision procedure under Art. 48(1, 6-7) TEU is excluded under Art. 106a EURATOM Treaty.

Moreover, the established derogation structures are clear under the EURATOM Treaty itself and under the rulings handed down by the ECJ even before the changes brought about by the Lisbon Treaty. The amendment of Art. 106a alone will not however prevent the extensive interpretations, in particular of Art. 31 ff of the EURATOM Treaty, but also of the application of the EURATOM objectives promoting nuclear energy, being applied when assessing state aid in the nuclear sector pursuant to TFEU rules.

3) Suggestion

A clarifying amendment to Article 106a EURATOM is basically to be supported, even if it is no real substitute for a comprehensive reform.

D. Examples: Possibilities for deletions and amendments

I. Introduction

Basically speaking, a list of minimum and maximum demands can be compiled from the proposed amendments presented in the context of the Constitutional Convention (see above). The complete democratisation of the EURATOM Treaty must be ensured

through a reform. The demands developed at that time should be updated and supplemented by aspects not considered at the time of the Constitutional Convention, such as a coherent waste management and safety policy with the strong involvement of the EU Commission and a new, independent liability regime.

It is worth recalling here the condensed minimum demands for a reform of the EURATOM provisions, as clearly summarised by Convention members Borrel and Nagy, Wagner and MacCormick:

- Title I, Articles 1-3¹⁸³ to be repealed.
- Title II, Chapters I (Promotion of Research) and II (Dissemination of Information) (Articles 4-29) to be repealed.
- Title II, Chapter 3 (Health and Safety) (Articles 30-39) to be brought in line with EU environmental and health legislation pursuant to the TFEU
- Title II, Chapter 4 (Investment, Articles 40-44) and the related articles, in particular Articles 173 and 203, to be repealed.
- Title II, Chapter 5 (Joint Undertakings) to be repealed in toto
- Title II, Chapter 6 (Supplies) and all its provisions "*relating to the safeguards and non-proliferation should be included in a new article, but all other elements of Chapter 6 should be repealed*".
- A new chapter with stricter rules on safety and non-proliferation. Accordingly, provisions (Articles 86-91) set forth in Title II, Chapter 8 (Property Ownership) should be included in such a specific chapter.
- Title II, Chapter 9 (Nuclear Common Market) (Articles 92-100¹⁸⁴) should be repealed as well as
- Title II, Chapter 10 (External Relations) (Articles 101-106).

II. In particular: Title and preamble

It is not the task of this assessment to already develop detailed proposals for a reformed EURATOM Treaty. Nevertheless, at least a few core proposals, in particular with regard to the Preamble, are presented in view of the deficiencies listed above, the empirical principles of general legislative development in the EU under the environmental and 'polluter-pays' principle and the principle of clear rules. However, these can only serve as a basis for discussion.

First of all, any reform process should begin with the Treaty's title, aligning it with the new energy market and new requirements. Instead of the "Treaty establishing the European Atomic Energy Community", we would propose the "European Treaty for Protection against Ionising Radiation, for Nuclear Non-Proliferation and the Establishment of an EU-wide Nuclear Liability Regime" (European Nuclear Safeguard and Liability Treaty).

¹⁸³ Article 3 has been deleted from the EURATOM Treaty.

¹⁸⁴ Articles 94, 95 and 100 have been deleted from the EURATOM Treaty.

A child of its time, the Treaty's current preamble, apart from one paragraph, namely the fourth, no longer bears any relation to today's energy world in the European Union.

The following elements could be included in a new preamble:

RECOGNISING that, more than 60 years after the establishment of the European Atomic Energy Community, the time is ripe for a fundamental reform of the existing Treaty,

AWARE that there is no longer any place in the European internal energy market for a special right to promote nuclear energy,

RECOGNISING that the Union must adopt the measures necessary to realise the internal market or to ensure the functioning thereof in accordance with the relevant provisions of the Treaties,

RECOGNISING that, at all times, including in the field of nuclear energy, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt measures to harmonise the provisions laid down by Member State laws, regulations or administrative decrees concerning the protection of the environment and public health and the establishment and functioning of the internal market,

AWARE that the particular dangers of nuclear technology, its waste, the need for the construction and supervision of interim and final storage facilities, and the control and treatment of nuclear fuel continue to justify special safeguards in a separate European Treaty, without, however, retaining special rights regarding the promotion of this industry,

RECOGNISING the need for up-to-date rules in the European Union in the field of radiation protection and environmental protection and on the peaceful use of nuclear energy, the non-proliferation of nuclear materials for the whole life cycle including fissile materials,

RECOGNISING the need to provide safeguards at the highest level of sustainability throughout the life cycle of the installations and fissile materials to prevent all dangers to the environment, human life and health¹⁸⁵,

CONVINCED of the need for an up-to-date and harmonised nuclear liability regime in the European Union for nuclear incidents,

UNDERSTANDING the need for closer cooperation between Member States on the transboundary effects of nuclear energy, in particular on the prevention of and response

¹⁸⁵ Based on the 4th recital of the EURATOM preamble: "ANXIOUS to create the conditions of safety necessary to eliminate hazards to the life and health of the public".

to power plant incidents and on the issue of lifetime extensions and the construction of new plants,

DESIRING a programme for the decommissioning of old nuclear power stations in the European Union, based on solidarity and Community will, up to and including safe final disposal, in full compliance with the 'polluter-pays' principle,

RESOLVED to further strengthen democracy and efficiency in the work of the relevant bodies, enabling them to better perform the tasks assigned to them within a harmonised institutional framework¹⁸⁶,

DESIRING, in the context of the realisation of the internal market and the strengthening of cohesion and environmental protection, to promote the economic and social progress of their peoples, taking into account the principle of sustainable development, and to pursue policies ensuring that advances in economic integration go hand-in-hand with progress in other fields¹⁸⁷,

RESOLVED to achieve, also in the field of external nuclear energy relations, the Union's long-term policy objectives in terms of sustainability, life-cycle responsibility, environmental protection, climate and security of energy supply¹⁸⁸,

the States have substantially amended the previous Treaty establishing the European Atomic Energy Community.

III. Revised Title I (Community tasks)

1) A reworded Article 1

The current Art. 1¹⁸⁹ is to be repealed

in favour of new main Treaty thrust, for example as follows:

„Art. 1

Objectives and tasks

The purpose of the Treaty is to make nuclear power plants in the Community fully subject to the single European energy market and to the democratic principle of co-decision by the Council and Parliament. The Treaty shall ensure that the entire life cycle, from the

¹⁸⁶ From the TEU preamble.

¹⁸⁷ From the TEU preamble.

¹⁸⁸ Taken and adapted from the Austrian proposal for a protocol to the TEU and TFEU on renewable energy.

¹⁸⁹ EURATOM, Art. 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".

production of fissile material, through enrichment, the planning, licensing and operation of civil nuclear power plants, and the orderly dismantling of such plants, at the latest after a maximum lifespan laid down in this Treaty, as well as the area of waste and its management and safe interim and final storage, are subject to the European principles of precaution, the polluter-pays principle, sustainability, environmental protection, protection against ionising radiation, high safety standards and clear, up-to-date European liability rules, as well as a strict non-proliferation regime in accordance with the rules of this Treaty and the other European Treaties."

2) Revised Article 2

The following key points should be included in a new Article 2:

- It is the task of the Union to protect life, health, the environment and property from the dangers of nuclear energy and the harmful effects of ionising radiation and uncontrolled processes in the nuclear sector.
- The Treaty establishes a harmonised European liability regime, rules for monitoring and ensuring the safe management of nuclear power plants and transport, for guaranteeing regular adjustments of licences in the Member States to the best available technology, as well as rules for decommissioning old nuclear power plants and for a high level of safety with regard to radioactive waste, interim and final storage.
- The Treaty calls on Member States, as well as established and possible new safety bodies, to cooperate intensively on all aspects of safety and protection of the population and the environment, including in particular the question of transboundary safety between Member States and with third countries.
- The Treaty requires all Member States to comply with European environmental impact assessment rules and the international rules of the Espoo and Aarhus Conventions and related international treaties for all major modifications, licences at all stages of the use of nuclear energy and the storage of waste. The obligation of Member States to cooperate, at least among neighbouring Member States, is to be developed especially in relation to power plants close to borders, to lifetime extensions and decommissioning, as well as to interim and final storage, while an obligation of the European Commission to cooperate is also to be ensured.

With the exception of paragraphs b), f) and h)¹⁹⁰, the wording of the current Article 2 is to be repealed. Paragraphs b), f) and h) are to be included in a new Art. 2, amended to take account of the above key points.

¹⁹⁰EURATOM- Art. 2 a), c), d) and g)

a) promote research and ensure the dissemination of technical information;

In particular, the current paragraph b) should be extended to include sustainability and the protection of the environment, waste treatment, transport of waste and nuclear fuel, interim and final storage, ore production and enrichment, thereby also extending the protective function to and from third countries.

The current paragraph h) should be amended. An obligation should be introduced to review existing relations with other countries and intergovernmental bodies, removing any special promotion purpose and ensuring that current or new agreements focus on high safety standards, non-proliferation, sustainable environmental and radiation protection legislation, up-to-date waste management legislation, and on the adoption and observance of a harmonised liability regime fully respecting the polluter-pays principle over the entire life cycle.

IV. Specifically: Deletion of old and insertion of new requirements – for example with regard to the promotion of and research into nuclear energy, and to liability

1) Encouragement of progress

The current Title II ("The encouragement of progress in the field of nuclear energy") also needs to be completely reorientated.

To start with, the title needs to be changed to something like "Sustainability, Environment and Health, Safety Standards, Liability".

The current Chapters 1 (Promotion of research) and 2 (Dissemination of knowledge) should be deleted *in toto*.

It should be discussed whether to insert a general article stating that, from now on, the European Union will only provide a single research budget under the TFEU, under which all future nuclear research will be conducted, and subject to full co-decision by the European Parliament.

a) Background for the deletion:

aa) Council and Commission dominance over research content

The democratic principle is missing in the EURATOM Treaty, in particular with regard to research issues. Art. 4 EURATOM in conjunction with Art. 7 EURATOM states that it is the sole responsibility of the Council to determine the research and training programmes

c) 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;

d) ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;

g) ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialised materials and equipment, by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community;

to be launched by the EU Commission, solely after consultation of the Scientific and Technical Committee. In practice, the European Economic and Social Committee is also consulted,¹⁹¹ a committee originally created by the EURATOM Treaty and which later became an institution covering all EU treaties.

bb) The Scientific and Technical Committee

The Scientific and Technical Committee is regulated in Art. 134 EURATOM under Chapter 2 (The Institutions of the Community) and there under Section 3 (The Commission) as the only remaining article in Chapter 2 alongside Art. 135¹⁹². Endowed with an advisory role, the Committee is made up of 41¹⁹³ members appointed by the Council after consultation with the Commission. Members are appointed for five years in their personal capacity, may be reappointed indefinitely and are not bound by any instructions.¹⁹⁴

2) Integration into a new single European liability regime

The EURATOM Treaty contains no liability provisions. Article 98 of the EURATOM Treaty requires Member States to take all measures necessary to facilitate the conclusion of insurance contracts covering nuclear risks.

As discussed above, the inclusion of a harmonised and comprehensive European liability regime in the EURATOM Treaty is necessary in the opinion of the author, building in particular on the German and Austrian liability regimes and the integration of the rules set forth in the Brussels Additional Protocol. To this end, transitional provisions should be introduced with regard to opting out of the above-mentioned international treaties on nuclear liability with a view to closing existing liability gaps and differences between the rules of individual Member States.

¹⁹¹ Council Regulation (Euratom) 2018/1563 of 15 October 2018 on the Research and Training Programme of the European Atomic Energy Community (2019–2020) complementing the Horizon 2020 Framework Programme for Research and Innovation, and repealing Regulation (Euratom) No 1314/2013

¹⁹² Article 135 EURATOM: "The Commission may undertake any consultations and establish any study groups necessary to the performance of its tasks.

¹⁹³ The Committee originally had 20 members, but with the Act of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (Act of Accession, OJ EU 2003 L 236, p. 33 ff), the number increased to 39. Following further EU enlargements (Bulgaria, Romania and Croatia), there are now 41 members.

¹⁹⁴ The author has not yet succeeded in finding a direct reference to a list of names on the EU Commission's website.

Section 6 Overview of the reform process under EU law

A. Procedure for amending the Treaty as a separate reformed EURATOM Treaty

I. Introduction

All EU Member States belong to the European Atomic Energy Community, with the latter sharing all its institutions with the European Union.

This close relationship is codified in Art. 106a of the EURATOM Treaty,¹⁹⁵ in which several TEU and TFEU provisions are declared as being applicable. Via this Art. 106a, TEU Art. 48 (2) to (5)¹⁹⁶ on the ordinary (treaty) revision procedure and Art. 50 (2) on the withdrawal of a Member State are also applicable.

¹⁹⁵ Cf. EURATOM: Title III CHAPTER 1:

" Application of certain provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union

Article 106a

(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.

¹⁹⁶ Paragraphs 2-5 of Article 48 TEU: (2) The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

(3) If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

(4) A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

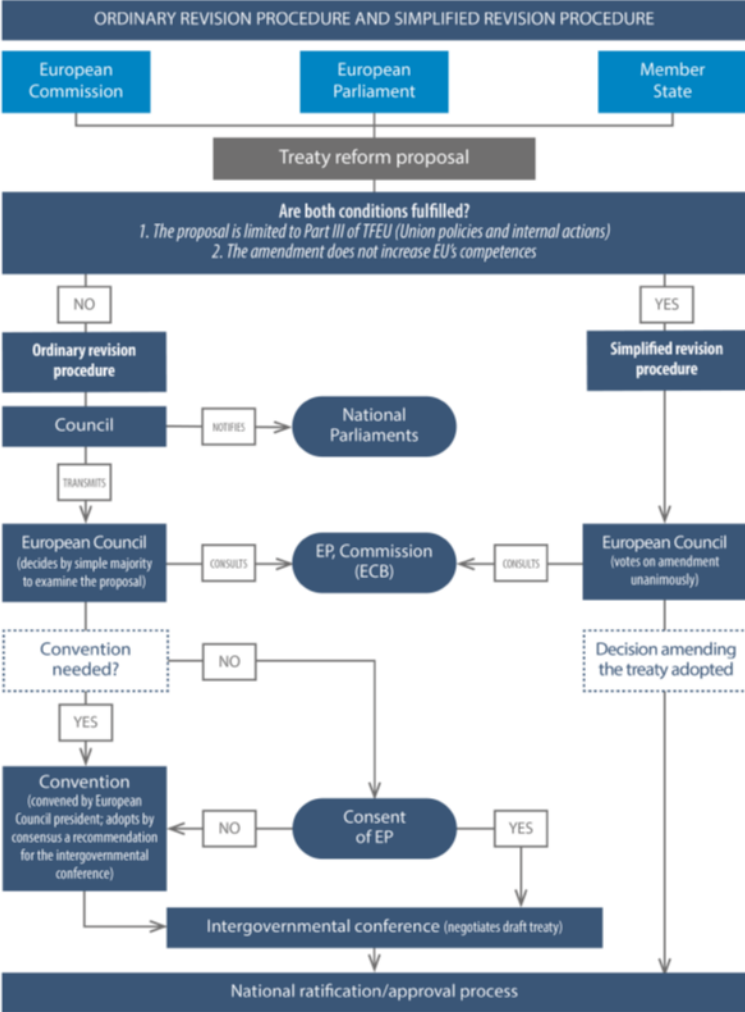
The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

(5) If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council."

Unfortunately, the incorporation of just the first paragraphs 2 to 5 of Article 48 TEU into Article 106a has further cemented the EURATOM Treaty as an almost monolithic, quasi unamendable treaty. It is incomprehensible why just paragraphs 2-5 of Art. 48 TEU have been incorporated, but not the subsequent paragraphs of Art. 48 TFEU detailing the simplified revision procedure.

The consequence restricts the sovereignty of EU Member States and leads to an imbalance in the energy economy between those states not producing nuclear energy (any more) and those allowing such. The competence of the non-nuclear Member States is thus solely regulated by the TFEU (Art. 194 TFEU). The nuclear sector, on the other hand, is accorded a special right under the EURATOM Treaty, with the Treaty only amendable by means of an ordinary revision procedure.

The following overview describes the ordinary and simplified revision procedures:



Source: European Parliament, Treaty Revision Procedure, "Infographic at a Glance".¹⁹⁷

II. The exclusion of the simplified revision procedure

The principle enshrined in Article 48 TEU provides for either an ordinary revision procedure (Article 48(2)-(5)) or, under certain conditions, a simplified revision procedure (Article 48(6) and (7)¹⁹⁸) for treaty reforms.

The advantages of the simplified procedure are:

Basically speaking, the simplified revision procedure means that only the European Council deals with a proposal for amending a treaty. Pursuant to Art. 48 (2) TEU, such a proposal may be submitted by the government of any Member State, by the Commission or by the European Parliament. As with the ordinary revision procedure pursuant to Article 48 (2-5) TEU (described in more detail below), the procedure ends with the unanimous adoption of the proposal by the European Council. Once adopted, it is then referred to the Member States for their approval "in accordance with their respective constitutional requirements". Under Art. 48 (7) 1 TEU, the European Council may even adopt a decision under the simplified revision procedure by a qualified majority.

¹⁹⁷ EPRS-European Parliamentary Research Service (Author: Laura Tilindyte; Graphics: Samy Chahri) Members' Research Service, PE 640.167 - September 2019, p. 1.

¹⁹⁸ "Simplified revision procedures

(6) The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

(7) Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

Interim conclusion: The EURATOM Treaty cannot be amended by a simplified procedure pursuant to Art. 48 (6) and (7) TEU and thus with the possibility of qualified majority voting, since Art. 106a EURATOM contains no reference to these two paragraphs.

III. Ordinary revision procedure

Even if it were possible to delete as many provisions as possible from the EURATOM Treaty and if it were not possible to insert new provisions such as European liability law, it would still be procedurally necessary for a Constitutional Convention to develop proposals for reforming the EURATOM Treaty, possibly also with additions needing to be made to the TFEU.

1) The procedure under Article 106a EURATOM in conjunction with Article 48 (2) to (5) TEU

As already stated, Art. 106a EURATOM refers to Art. 48 (2) to (5) TEU, i.e. to the ordinary revision procedure. This means that any EU Member State, the EU Commission or the European Parliament may submit a proposal for treaty amendments to the Council, which in turn submits it to the European Council, with national parliaments notified.

If a simple majority of the Member States in the European Council are in favour of examining the proposed Treaty amendments, the President of the European Council convenes a Convention. The European Parliament and the Commission are to be consulted beforehand.

Made up of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission, the Convention then discusses the proposed amendments. Its recommendations, adopted by consensus, are then put to the Intergovernmental Conference (IGC), the conference of representatives of the governments of the Member States, for a vote on the proposed treaty changes.

Alternatively, if the proposed amendments do not justify the convening of a Convention, the European Council may decide by a simple majority – after obtaining the consent of the European Parliament – not to hold a Convention and to define the terms of reference for the IGC itself.

In view of the many questions surrounding the EURATOM Treaty, such a solution is not at all feasible. In particular, the inclusion of new chapters in the EURATOM Treaty and the discussion of the consequences of the deletions and, accordingly, the re-institution of the sole competence of the TFEU require a discussion in a Convention, especially against the background of the principle of democracy established in Art. 3 TEU.

The only other feasible approach would be a step-by-step reform, with a request being made in the European Council that Art. 106a EURATOM be amended to contain the entire Art. 48 TEU.

A further move would be to add a sunset clause (possibly 5-8 years) to the EURATOM Treaty. Both proposed amendments are certainly important, but do not require special Convention treatment, i.e. the European Council should certainly be able to vote on them without a Convention.

The Intergovernmental Conference convened by the President of the European Council could then, with or without a Convention, adopt the Treaty amendments unanimously.

2) The simple, yet not easy majority for opening the revision procedure

Should the European Council, after consulting the European Parliament and the European Commission, decide by simple majority to examine the proposed amendments, the President of the European Council would convene a Convention of representatives from the national Parliaments, the Heads of State or Government of the Member States, the European Parliament and the Commission, as provided for in Article 48 (3).¹ TEU.

However, a simple majority is no easy matter when it comes to the EURATOM Treaty.

a) The necessary votes

Assuming a post-Brexit 27-state EU in the foreseeable future, 14 votes are required in the European Council to open the ordinary revision procedure. As a result of Brexit, the Member States without nuclear power or phasing it out are now in the majority.

Nevertheless, careful preliminary consultation with possible allies is needed before Austria can proceed with this step in the European Council.

b) A cautiously optimistic assessment

In our analysis, the step of opening the reform process is worth trying and, with all due caution, it would seem that the chances of success have never been as good as now. The following considerations are based on long-term observations of the European level as well as of the Member States and their assessment of and attitudes towards nuclear energy. An attempt has been made to elaborate objective points, though there is no guarantee of success.

aa) The European Commission as a helper

First, the EU Commission itself recommends in its above-mentioned Communication: "Consequently, a change of the EURATOM Treaty to extend the use of the ordinary legislative procedure would need to be part of a broader process of Treaty reform using the ordinary Treaty revision procedure under Article 48 TEU and should be seen in the longer-term, post-2025 perspective."¹⁹⁹ This recommendation should be taken

¹⁹⁹ Cf. Brussels, 9.4.2019, COM(2019) 177 final "Communication from the Commission to the European Parliament, the European Council and The Council - A more efficient and democratic decision making in EU energy and climate policy, p. 10

seriously. There is an urgent need to propose launching a comprehensive revision as early as 2021.

bb) The financial weakness of the nuclear power companies as a further helper

As already stated, the problem of sufficient funding for the decommissioning and dismantling of old nuclear power plants is a problem common to many countries, regardless of whether they wish to build or are building further nuclear power plants. With regard to France, a focused discussion could be helpful. Governments and companies in France and Belgium are coming under increasing pressure from the public at home and in neighbouring countries over the issue of lifetime extensions. One elegant solution would be that, in return for support for EURATOM Treaty reform under the premises set out here, the countries willing to reform could negotiate, in full compliance with the polluter-pays principle, special structural programmes up to and including a discussion of a temporary relaxation of stability criteria for the European Monetary Union with regard to the 3% GDP ceiling on budget deficits. Such a solution would be specific to issues surrounding the financing of the decommissioning and dismantling of the old power plants, with reference possibly made to experiences in the financial crisis at the beginning of this century. However, a detailed analysis is beyond the scope of this report²⁰⁰.

cc) France discovers EURATOM

During the 2002-2003 Constitutional Convention, there was no discussion of the EURATOM Treaty in France. Largely unknown to the general public, it was not seen as a problem, even by non-governmental organisations. According to a cursory review of the interviews given by Giscard d'Estaing and the analyses published in France at the time, the EURATOM Treaty received little attention²⁰¹. In the meantime, however, the EURATOM Treaty has moved into the focus of the discussions on the future of nuclear energy in France, with several anti-nuclear organisations publishing a petition to end the EURATOM Treaty in January 2019.²⁰²

dd) Post-Brexit Ireland

Ireland will again have a growing interest in a modernised EURATOM Treaty with high safety standards and strong arrangements with the UK, following the latter's exit from the EU. It should be remembered that Ireland is not only a co-signatory of the above-

²⁰⁰ From the many analyses of the monetary union in the financial crisis, see, for example, *Staatsschuld und Geldpolitik: Lehren aus der globalen Finanzkrise*, Rede von Prof. Dr. Jürgen Stark, Member of the Executive Board of the ECB, June 2011, <https://www.ecb.europa.eu/press/key/date/2011/html/sp110620.de.html>.

²⁰¹ In his article "L'Europe en Convention" Pierre de Charentenay describes in detail the process, focus and analyses of the proposals put forward in the Convention, though only skirts the question of merging the Maastricht Treaty with the EURATOM Treaty. See *Etudes* 2003/3 (Volume 398), pp. 209 to 320; <https://www.cairn.info/revue-etudes-2003-3-page-309.htm#>.

²⁰² Pétition pour l'abrogation du traité Euratom, 10. 1. 2019 <https://www.sortirdunucleaire.org/Petition-pour-l-abrogation-du-traite-Euratom>

mentioned Declaration No. 54 of the Member States on the Treaty on European Union of 2012 by Germany, Hungary, Austria and Sweden, but also backs the call in it for an early conference of the representatives of the governments of the Member States on the EURATOM Treaty. Moreover, the June 2020 general election resulted in a coalition government with the Green Party.

Ireland's latent concern, particularly around the safeguards surrounding the UK's nuclear facilities²⁰³ is well summed up by the following quote from John Bruton MP during the 2003 debate in the Irish Parliament's European Affairs Committee on constitutional reform: „*We should revise, not scrap, the EURATOM treaty. If anything will close the plant at Sellafield, it will be the EURATOM Treaty. We should be wary of any suggestion to scrap it because if the courts take an aggressive view about interpreting the treaty, they will have the power to close the plant in a way that the OSPAR Convention never will. We should hold onto the EURATOM treaty and reform it. I sought to do this in the Praesidium about three or four months ago. Although the Government supported me and I circulated a paper on the matter, I got no support within the Praesidium. It is a matter to which the Intergovernmental Conference should return*”²⁰⁴

ee) The Nordics and EURATOM

There is no reason to be concerned that Sweden, with its present government, could deviate from its signature of Declaration No. 54. In 2018 in Denmark, parliament unanimously called on the government to move forward with a EURATOM Treaty amendment.²⁰⁵ Finland should also be open to a reform process.

Greatly interested in EURATOM reform, the current Lithuanian government is strongly critical of the construction of the Belarusian "BelaES" nuclear power plant Astravets not far from its border. In 2019, Lithuania's Deputy Energy Minister Lina Sabaitienė underlined Lithuania's openness to EURATOM reform during a debate in the European

²⁰³ It is worth briefly recalling Ireland's dispute with the UK over emissions and hazards stemming from the British MOX nuclear facility at Sellafield: on 15 June 2001, Ireland submitted to the United Kingdom, pursuant to Article 32 of the Convention for the Protection of the Marine Environment of the North-East Atlantic, signed in Paris on 22 September 1992, a request for the establishment of an arbitration tribunal and an application for a declaration of Community competence. Following infringement proceedings, the EU Commission took Ireland to the ECJ, arguing that only the ECJ had jurisdiction over such disputes. In its judgment in Case C-459/03 of 30 May 2006, the ECJ declared "that, by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield (United Kingdom), Ireland has failed to fulfil its obligations under Articles 10 EC and 292 EC and under Articles 192 EA and 193EA".

²⁰⁴ Joint Committee on European Affairs debate - Monday, 9 June 2003 https://www.oireachtas.ie/en/debates/debate/joint_committee_on_european_affairs/2003-06-09/2/.

²⁰⁵ Folketinget, Energi-, Forsynings- og Klimaudvalget 2018-19 B 54 Bilag 5 Offentligt.

Parliament and in connection with her speech on the problems surrounding the decommissioning of the former Ignalina nuclear power plant.²⁰⁶

ff) Germany and its debate

Many individual German *Länder*, the Ministry of the Environment, a strong faction in the German Bundestag as well as large slices of civil society are certain to continue pushing for the implementation of the above-mentioned passages in Germany's current government coalition agreement.

gg) Greece as an ally

Greece will not oppose the opening of a revision procedure for the EURATOM Treaty.

hh) BENELUX and EURATOM Treaty reform

The Netherlands and Belgium can also be expected to be in favour of a reform process, while Luxembourg has always been strongly in favour thereof.

ii) Italy can be counted in, as well as Spain

Italy's current government, at least in part of the coalition, is greatly opposed to nuclear power. It should also be remembered that the other side of the government clearly failed in its push to promote nuclear power in a July 2011 referendum, after Silvio Berlusconi's government proclaimed Italy's exit from nuclear power in 2008.

The current Spanish government can also be expected to be open for a reform process.

jj) Slovakia is modernising

In March 2019, Slovakia experienced a political change in government with the election of liberal civil rights activist Zuzana Caputova as its new president, meaning that the chances of the country being open to EURATOM Treaty reform have become more promising.

3) Summary on the chances of launching a reform process

This brief presentation of the chances of gaining the backing of 14 Member States is only sustainable if there are first negotiations among the Member States clearly open to reform. This will then need to be followed by coordinated negotiations with the wider circle of possible sympathisers.

It would nevertheless be presumptuous to anticipate the analyses of the Austrian government, and in particular of the competent Chancellery, even in abbreviated form.

²⁰⁶ Expert Workshop: The State of Nuclear Power, 6 February 2019 in the European Parliament: <https://rebecca-harms.de/post/untitled-42837>.

Even so, our analysis holds that the opportunity for reform is currently more favourable than ever before in the history of Europe.

4) The need for a clear mandate from the Council

In order to avoid a situation where, at the end of a Convention process – as happened in the negotiations on the European Constitution under Giscard d’Estaing –, accusations arise that the Convention went beyond its examination and reform mandate, it is important for the Council to reach agreement on clear guidelines.

In our opinion and after examination of the various reform approaches in the past as well as the brief analysis here – irrespective of the question of whether a new liability chapter, an extended safety chapter and health protection are included –, the EURATOM Treaty in its current form would be considerably reduced in scope. Therefore, any examination mandate should aim for an open-ended procedure on the future of an independent treaty or its integration into the TFEU.

5) Setting the course

If, after considering clearly defined repeal modalities – as analysed here – a rump treaty remains at the end of the examination, it would make sense and suffice to transfer these treaty provisions into the TFEU, while providing for a harmonious transition, if necessary including a multi-year sunset clause.

However, should special Treaty chapters on safety, dismantling, financial provisions as well as a financing programme for the dismantling and disposal of old reactors and an independent European liability regime be agreed, it would make sense to maintain an independent treaty as far as necessary.

As regards the transfer of funds and facilities from the former EURATOM part of the EU general budget, reference is again made to the experience surrounding the expiry of the ECSC Treaty.

Here again, it is advisable to include in the Convention’s terms of reference that the financial consequences of either a complete termination of the EURATOM Treaty, but equally of its comprehensive reform (with or without a sunset clause), be provided for in a proposal for a decision by the Member States represented in the Council on the financial consequences, for all variants, i.e.

- for the end of the EURATOM Treaty, if this is considered to be the goal,
- for expiry under a sunset clause or period of validity introduced via the treaty revision procedure, or
- for a EURATOM Treaty reform and TFEU amendment transferring budgetary resources for research etc. to the EU budget under the TFEU.

As already stated, reference can be made here to the 2002 Council Decision on the financial consequences of the expiry of the ECSC Treaty. This was conceived as a separate treaty between the (ECSC) Member States. In Austria, the National Council decided on 10 December 2002 to approve the conclusion of the State Treaty together with its annexes and appendices.²⁰⁷ The main thrust of the decision was that, for a transitional period, the liabilities of the ECSC as of 23 July 2002 would be managed by the European Commission on behalf of the Member States as from 24 July 2002. The period of validity of this interim administration and of the Decision ended, pursuant to Article 4.1, on the "*...date on which the assets and liabilities of the ECSC are transferred to the European Community.*".

²⁰⁷BGBL for the Republic of Austria, Volume 2002, 10.12.2002, Part III, No. 266, p. 1713 ff.

Section 7 Conclusions

The study confirms the Austrian Government's considerations to subject the EURATOM Treaty to a reform process. While it will not be easy to get the required simple majority of votes in the European Council for a reform, the opportunity to gain such a majority has perhaps never been more promising than now.

Even just considering the liberalised internal energy market and the principle of shared competence in energy law, set out in Article 194 TFEU, Austria's demands for a reformed EURATOM Treaty are justified in view of the Treaty's considerable deficits.

Without putting an end to the EURATOM Treaty's objective of promoting nuclear energy, its independent research budget, the provisions on a common market for nuclear materials, there can be no "*level playing field*" in Europe with regard to support for other energy production technologies, such as renewables. The sheer undebatable primacy of the free movement of nuclear goods in the EURATOM Treaty, without comparable articles on derogations from this principle as laid down in the TFEU, basically restricts a Member State's sovereignty over its energy mix, even though this must be respected under Article 194 (2) TFEU.

The study has shown that Europe has attained, compared to non-EU countries, a high level in such important issues as the safety of nuclear installations, radioactive waste and waste shipment through a number of specific regulations. However, the road to gaining European Council approval has not been easy for the EU Commission, with several proposals having to be withdrawn after years of deliberation failed to produce an agreement with and within the Council, as was particularly the case in the development of the 2002 nuclear package.

At the same time, more and more disputes over the EU Commission's proposals arose with an increasingly impatient European Parliament, especially in areas that also concerned environmental aspects and not just health protection, with the latter not accepting its exclusion as an equal partner to the Council in the nuclear energy field. In several cases, the CJEU was called upon to clarify the legal basis for legal acts and, through its own extensive interpretation of the EURATOM health articles as encompassing environmental protection, was able to pave the way for harmonised nuclear legislation in the European Union, including environmental aspects. Nevertheless, this meant that the European Parliament remained side-lined.

The gap between the nuclear sector and the developing general European environmental law is increasing, in comparison to the advances in EU legislation in such areas as European environmental liability legislation or waste and emissions legislation. EU directives often explicitly exclude the application of their rules to the nuclear sector. Although this means that the European Commission, working within the confines of the EURATOM Treaty and with the help of a broad interpretation of the health articles of the EURATOM Treaty in particular, has indeed promoted coherent and appropriate

legislation, progress is basically heading in the wrong direction, solely reinforcing the deficits of the EURATOM Treaty. The derogation principle between the TFEU and the EURATOM Treaty does not work consistently. The many directives which take as their legal basis the fall-back provision of Article 203 of the EURATOM Treaty for “unforeseen circumstances” do not promote confidence in the Treaty and its applicability in line with the times.

The study underlines the great need for up-to-date safety provisions within the EURATOM Treaty, including such elements as strict principles on non-proliferation, arrangements for decommissioning funds, on better cooperation between neighbouring states, or respect of the Aarhus and Espoo principles.

The study takes up the call for a harmonised European liability law as part of a reformed EURATOM Treaty, comparing the current, almost chaotic and highly divergent liability situations among the Member States, characterised by the absence of any European harmonisation, and proposing key points needing to be regulated.

The study concludes that there is no way Europe can get around a Convention process to reform the EURATOM Treaty.

The paper has developed an overview of the experiences and main demands for a EURATOM reform put forward during the EU Constitutional Convention under the leadership of former French President Giscard d'Estaing between 2002 and 2003. Basically speaking, the points elaborated there, in particular by the Convention's Austrian members, and the detailed proposals for deletions as well as demands for strengthening certain aspects, remain relevant and can be taken over. They will need to be supplemented by the above-mentioned areas that were not yet on the agenda at the time of the Convention, such as a new liability law.

It is important for the EU Council to provide precise guidance, to be developed together with the European Parliament and the European Commission, on the terms of reference for such a Convention, so as not to repeat the weaknesses of the Laeken Declaration of Heads of State and Government of December 2001 which kicked off the Constitutional Convention.

There are several possible scenarios needing to be discussed.

Looking at the repeal of the EURATOM Treaty's promotion and research sections and the associated financial or budgetary consequences, the paper also compares these with the instruments used by the Member States in the context of the expiry of the European Coal and Steel Treaty.

At the end of the day, no interpretation of the current EURATOM Treaty and no developments in secondary legislation can adequately accommodate:

- the removal of the democratic deficit,

- the elimination of the purpose of promoting nuclear energy, and
- enhanced protection.

ANNEX I: Key secondary legislation under EURATOM

Source, Federal Office for the Safety of Nuclear Waste Management (*Bundesamt für die Sicherheit der nuklearen Entsorgung* – BfE, heute: BASE), Germany²⁰⁸

Commission Recommendation [91/444/EURATOM](#) of 26 July 1991 on the application of Article 33 of the EURATOM Treaty (OJ 1991 L 238).

Note: Member states are obliged to forward draft legal and administrative regulations to the EU Commission prior to adoption

Commission Recommendation [2000/473/EURATOM](#) of 8 June 2000 on the application of Article 36 of the EURATOM Treaty (OJ 2000 L 191), as amended, [consolidated version 2004](#)

Remark: Monitoring of radioactivity levels in the environment to determine the exposure of the general population.

Commission Recommendation [2010/635/EURATOM](#) of 11 October 2010 on the application of Article 37 of the EURATOM Treaty (OJ 2010, L 279), <https://www.bfe.bund.de/SharedDocs/Downloads/BfE/DE/rsh/1f-recht-eu/1F-1-5-en.html> [Corrigendum](#) of 26 August 2011 (OJ 2011, L 220).

Note: List of Commission opinions on plans for installations containing radioactive substances pursuant to Article 37 of the EURATOM Treaty, cf. [Annex, point A.21](#).

Council Regulation ([EURATOM](#)) [2587/1999](#) of 2 December 1999 defining the **investment projects** to be notified to the Commission in accordance with Article 41 of the Treaty establishing the European Atomic Energy Community (OJ 1999 L 315).

Commission Regulation (**EC**) [1209/2000](#) of 8 June 2000 determining **procedures** for effecting the communications prescribed under Article 41 of the Treaty establishing the European Atomic Energy Community (OJ 2000 L 138), amended, latest [consolidated version 2003](#)

Publication of the [Notification](#) to the authorities of the Member States in the field of [Safeguards](#) pursuant to Article 79 §2 of the EURATOM Treaty of 19 August 1999 (Federal Gazette II 1999, No. 25, p. 811)

Commission Regulation ([EURATOM](#)) [302/2005](#) of 8 February 2005 on the **application of EURATOM safeguards** (OJ 2005 L 54), amended, latest [consolidated version 2013](#)

Verification agreement: see 1E-4 Non-proliferation of nuclear weapons, [item 1E-4.2](#)

Cooperation Agreement between EURATOM and

- [Governments](#),
- the [International Labour Organisation](#)
- and the [International Atomic Energy Agency](#)

Commission Decision [1999/819/EURATOM](#) of 16 November 1999 concerning the **accession** of the European Atomic Energy Community - EAEC - **to the 1994 Convention on Nuclear Safety** (OJ 1999 L 318), as amended by Commission Decision [2004/491/EURATOM](#) of 29 April 2004 concerning the accession of the European Atomic Energy Community EAEC to the Convention on Nuclear Safety (OJ 2004 L 172).

Council Decision [2007/513/EURATOM](#) of 10 July 2007 approving the **accession** of the European Atomic Energy Community - EAEC - **to the amended Convention on the Physical Protection of Nuclear Material and Nuclear Facilities** (CPPNM, cf. 1E-2.2)

²⁰⁸https://www.base.bund.de/DE/base/gesetze-regelungen/gesetze-regelungen_node.html

and [declaration](#) of the European Atomic Energy Community pursuant to Article 18(4) and Article 17(3) of the CPPNM (OJ 2007, L 190).

Council Regulation ([EURATOM](#)) No [237/2014](#) of 13 December 2013 establishing an **Instrument for Nuclear Safety Cooperation** (OJ 2014, L 77), valid until 31 December 2020.

Commission Decision [2007/530/EURATOM](#) of 17 July 2007 on establishing the **European High Level Group on Nuclear Safety and Waste Management** (OJ 2007 L 195).

Directive [2011/92/EU](#) of the European Parliament and of the Council of 13 December 2011 on the [assessment of the effects of certain public and private projects on the environment](#) (OJ 2012, L 26), amended, latest [consolidated version 2014](#)

Note: Transposition see EIA Act (see [point 1B-3](#))

Directive [2001/42/EC](#) of the European Parliament and of the Council of 27 June 2001 on the **assessment of the effects of certain plans and programmes on the environment** (OJ 2001 L 197)

Note: Transposition see EIA Act (see [point 1B-3](#))

Directive [2003/4/EC](#) of the European Parliament and of the Council of 28 January 2003 on **public access to environmental information** and repealing Council Directive 90/313/EEC (OJ 2003 L 41).

Note: Transposition s. EI Act (see item [1B-2.1](#))

Regulation (EC) No [1221/2009](#) of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a **Community eco-management and audit scheme (EMAS)**, (OJ 2009 L 342), amended, [consolidated version 2013](#)

Note: Transposition see EA Act (see [point 1B-4](#))

Commission Decision ([EU](#)) [2015/801](#) of 20 May 2015 on **reference document** on best environmental management practice, sector environmental performance indicators and benchmarks of excellence for the retail trade sector under Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (OJ 2015 L 127).

Directive [2008/99/EC](#) of the European Parliament and of the Council of 19 November 2008 on the **protection of the environment through criminal law** (OJ 2008, L 328)

Directive [98/34/EC](#) of the European Parliament and of the Council of 22 June 1998 laying down a **procedure for the provision of information in the field of technical standards and regulations** (OJ 1998 L 204), amended several times, latest [consolidated version 2015](#)

Directive [2006/42/EC](#) of the European Parliament and of the Council of 17 May 2006 on **machinery**, and amending Directive 95/16/EC, corrected and amended, latest [consolidated version 2016](#)

Note: Certain machines, e.g. mobile fairground equipment, shaft hoisting equipment and machinery for nuclear use, are excluded.

Directive [2009/72/EC](#) of the European Parliament and of the Council of 13 July 2009 concerning common rules for the **internal market in electricity** and repealing Directive 2003/54/EC (OJ 2009 L 211)

[2007/198/EURATOM](#): Council Decision of 27 March 2007 establishing the **European Joint Undertaking for ITER** and the Development of Fusion Energy and conferring advantages upon it (OJ 2007 L 90), amended several times, latest consolidated version [in 2015](#).

Commission Recommendation [2009/120/EURATOM](#) of 11 February 2009 on the implementation of a **nuclear material accountancy and control system** by [operators](#) of nuclear installations (OJ 2009, L 41).

Council Directive [2009/71/EURATOM](#) of 25 June 2009 establishing a **Community framework for the nuclear safety of nuclear installations** (OJ 2009, L 172) last amended by Council Directive [2014/87/EURATOM](#) of 8 July 2014 (OJ 2015, L 219), [consolidated version 2014](#)

Commission Recommendation (EURATOM) [2016/538](#) of 4 April 2016 on the application of Article 103 of the EURATOM Treaty (OJ 2016 L 89).

Note: Article 103 is relevant to reconcile the uniformity and primacy of EURATOM law with the freedom of action of Member States in the field of external nuclear relations.

Council Directive 2013/59/EURATOM of 5 December 2013

laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/EURATOM, 90/641/EURATOM, 96/29/EURATOM, 97/43/EURATOM and 2003/122/EURATOM (OJ 2014 L 13), corrected, [consolidated version 2016; English](#)

Council Directive [2003/122/EURATOM](#) of 22 December 2003 on the **control of high-activity sealed radioactive sources and orphan sources** (OJ 2003, L 346)

Note: repealed as of 6 February 2018 by Directive [2013/59/EURATOM](#)

Council Directive [90/641/EURATOM](#) of 4 December 1990 on the **operational protection of outside workers** exposed to the risk of [ionizing radiation](#) during their activities in [controlled areas](#) (OJ 1990, L 349)

Note: repealed as of 6 February 2018 by Directive [2013/59/EURATOM](#)

Council Directive [94/33/EC](#) of 22 June 1994 on the **protection of young people at work** (OJ 1994, L 216), amended several times, latest [consolidated version 2014](#)

Note: Article 7 of the Directive requires Member States to prohibit the employment of young people in work involving harmful radiation.

Commission Recommendation [2004/2/EURATOM](#) of 18 December 2003 on standardised information on **radioactive airborne and liquid discharges into the environment**<https://www.bfe.bund.de/SharedDocs/Glossareintraege/DE/A/abwasser.html?view=renderHelp> from nuclear power reactors and reprocessing plants in normal operation (OJ 2004, L 2), [Corrigendum](#) (OJ 2004, L 63)

Directive [2004/35/EC](#) of the European Parliament and of the Council of 21 April 2004 on **environmental liability with regard to the prevention and remedying of environmental damage** (OJ 2004 L 143), amended several times, latest [consolidated version 2013](#)

Commission Recommendation [90/143/EURATOM](#) of 21 February 1990 on the protection of the **public against indoor exposure to radon** (OJ 1990, L 80)

[2001/928/EURATOM](#): Commission Recommendation of 20 December 2001 on the protection of the public against exposure to **radon** in drinking water supplies (OJ 001, L 334)

Council Directive [97/43/EURATOM](#) of 30 June 1997 on health protection of individuals against the **dangers of ionizing radiation in relation to medical exposure** (OJ1997, L 180)

Note: repealed as of 6 February 2018 by Directive [2013/59/EURATOM](#)

Council Directive [93/42/EEC](#) of 14 June 1993 concerning **medical devices** (OJ 1993, L 169), amended several times, latest [consolidated version 2007](#)

Directive **98/79/EC** of the European Parliament and of the Council of 27 October 1998 on **in vitro diagnostic medical devices** (OJ 1998 L 331), corrected and amended several times, last [consolidated version 2012](#)

Directive [2013/35/EU](#) of the European Parliament and of the Council of 26 June 2013 on the minimum health and safety requirements regarding the **exposure of workers to the risks arising from physical agents (electromagnetic fields)** (OJ 2013, L 179)

Directive **2006/25/EC** of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the **exposure of workers to risks arising from physical agents (artificial optical radiation)** (OJ 2006 L 114), amended several times, last [consolidated version 2014](#)

Note: Transposition in the Occupational Health and Safety Regulation on Artificial Optical Radiation

<https://www.bfe.bund.de/SharedDocs/Glossareintraege/DE/S/strahlung.html?view=renderHelp>

Council Recommendation [1999/519/EC](#) of 12 July 1999 on the **limitation of exposure of the general public to electromagnetic fields (0 Hz to 300 GHz)** (OJ 1999, L 199)

Directive **1999/2/EC** of the European Parliament and of the Council of 22 February 1999 on the approximation of the laws of the Member States concerning foods and food ingredients treated **with ionising radiation** (OJ 1999 L 66), amended several times, latest [consolidated version 2008](#)

2002/840/EC: Commission Decision of 23 October 2002 adopting the **list of approved facilities in third countries for the irradiation of foods** (OJ 2002 L 287), amended several times, latest [consolidated version 2012](#)

Council Directive [2013/51/EURATOM](#) of 22 October 2013 laying down requirements for the **protection of the health of the general public with regard to radioactive substances in water intended for human consumption** (OJ 2013, L 296).

Directive **2011/65/EU** of the European Parliament and of the Council of 8 June 2011 on the **restriction of the use of certain hazardous substances in electrical and electronic equipment** (OJ 2011, L 174), amended several times, latest [consolidated version 2015](#)

Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on [personal protective equipment](#) and repealing Council Directive 89/686/EEC (OJ 2016 L 81).

Regulation **(EC) No 1907/2006** of the European Parliament and of the Council of 18 December 2006 concerning the **Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)**, establishing a **European Chemicals Agency**, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396), amended several times, [latest consolidated version 2017](#) **Note:** Excluding, inter alia, radioactive substances within the scope of Directive 96/29/EURATOM cf. 1F-2.1

Council Regulation **(EC) No 440/2008** of 30 May 2008 laying down **test methods** pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2008 L 142), corrected and amended several times, latest [consolidated version 2016](#)

Council Regulation **(EC) No 428/2009** of 5 May 2009 setting up a Community regime for the **control of exports, transfer, brokering and transit of dual-use items** (OJ 2009, L 134), amended several times, latest [consolidated version 2017](#)

Council Regulation ([EURATOM](#)) No [1493/93](#) of 8 June 1993 on **shipments of radioactive substances between Member States** (OJ 1993 L 148).

Commission communication of 10 December 1993 concerning Regulation EURATOM/1493/93 (OJ 1993 C 335).

Commission Regulation [EURATOM 66/2006](#) of 16 January 2006 **exempting the transfer of small quantities of ores, source materials and special fissile materials** from the rules of the chapter on supplies (OJ 2006 L 11).

Directive [2008/98/EC](#) of the European Parliament and of the Council of 19 November 2008 on **waste** and repealing certain Directives (OJ 2008, L 312), amended several times, [consolidated version 2015](#), [corrigendum](#) of Directive (EU) 2015/1127 amending Directive 2008/98/EC of 13 November 2015 (OJ 2015, L 297)

Note: Directive 2008/98/EC does not apply to radioactive waste

Council Decision [2005/84/EURATOM](#) of 24 January 2005 approving the **accession of the European Atomic Energy Community to the 'Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management'** (OJ 2005, L 30), Commission Decision [2005/510/EURATOM](#) of 14 June 2005 (OJ 2005, L 185).

Commission Recommendation [2006/851/EURATOM](#) of 24 October 2006 on the management of **financial resources for the decommissioning of nuclear installations, spent fuel and radioactive waste** (OJ 2006, L 330)

Commission Recommendation [99/669/EC](#) of 15 September 1999 on a **classification system for solid radioactive waste** (OJ 1999, L 265).

Council Directive [2006/117/EURATOM](#) of 20 November 2006 on the **supervision and control of shipments of radioactive waste and spent fuel** (OJ 2006 L 337)

Commission Decision [2008/312/EURATOM](#) of 5 March 2008 establishing the **standard document** for the supervision and control of shipments of radioactive waste and spent fuel referred to in Council Directive 2006/117/EURATOM (OJ 2008 L 107), corrected on 23 December 2011 (OJ 2011 L 343).

Commission Recommendation [2008/956/EURATOM](#) of 4 December 2008 on **criteria for the export of radioactive waste and spent fuel to third countries** (OJ 2008, L 338)

Commission Recommendation [2009/527/EURATOM](#) of 7 July 2009 for a **secure and effective system of transmission of documents and information** relating to the provisions of Council Directive 2006/117/EURATOM (OJ 2009, L 177)

Directive [2008/68/EC](#) of the European Parliament and of the Council of 24 September 2008 on the **inland transport of dangerous goods** (OJ 2008, L 260), amended several times, latest [consolidated version 2017](#), last amendment of the Directive by Commission Directive [\(EU\) 2018/217](#) of 31 January 2018 (OJ 2018, L 42).

Council Directive [95/50/EC](#) of 6 October 1995 on uniform procedures for **checks on the transport of dangerous goods by road** (OJ 1995 L 249), amended several times, latest [consolidated version 2008](#)

Directive [2002/59/EC](#) of the European Parliament and of the Council of 27 June 2002 establishing a **Community vessel traffic monitoring and information system** (OJ 2002 L 208), amended several times, latest [consolidated version 2014](#).

Regulation (EC) [1272/2008](#) of the European Parliament and of the Council of 16 December 2008 on **classification, labelling and packaging of substances and mixtures** (OJ 2008, L 353), amended several times, last [consolidated version 2016](#), amended by Commission Regulation (EU) [2016/1179](#) of 19 July 2016 (OJ 2016, L 195); amended as of 1 February 2018 by Commission Regulation (EU) [2016/918](#) of 19 May 2016 (OJ 2016, L 156); Regulation (EU) 2016/918 corrected <https://www.bfe.bund.de/SharedDocs/Downloads/BfE/DE/rsh/1f-recht-eu/1F-3-17-Berichtigung.html> on 18 October 2016 (OJ 2016, L 280), amended by Directive (EU) [2016/2037](#) of 21 November 2016 (OJ 2016, L 314), [corrected](#) on 21 December 2016 (OJ 2016, L 349)

Commission Regulation (EU) [No 440/2010](#) of 21 May 2010 on the **fees payable** to the European Chemicals Agency pursuant to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (OJ 2010 L 126).

Council Directive [2011/70/EURATOM](#) of 19 July 2011 establishing a **Community framework for the responsible and safe management of spent fuel and radioactive waste** (OJ 2011, L 199).

Council Regulation (EURATOM) [No 1368/2013](#) of 13 December 2013 on Union **support for the nuclear decommissioning assistance programmes in Bulgaria and Slovakia** (OJ 2013 L 346).

Council Regulation (EURATOM) [No 1369/2013](#) of 13 December 2013 on Union **support for the nuclear decommissioning assistance programme in Lithuania** (OJ 2013 L 356).

[Agreement](#) between EURATOM and non-member states of the EU on participation in arrangements in the Community for the **rapid exchange of information in a radiological emergency (ECURIE)** (OJ 2003, C 102)

Commission Decision [2005/844/EURATOM](#) of 25 November 2005 concerning the **accession of the European Atomic Energy Community to the Convention on Early Notification of a Nuclear Accident** (OJ 2005 L 314).

Commission Decision [2005/845/EURATOM](#) of 25 November 2005 concerning the accession of the European Atomic Energy Community to the [Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency](#) (OJ 2005 L 314).

Decision [No 1313/2013/EU](#) of the European Parliament and of the Council of 17 December 2013 on a **Union Civil Protection Mechanism** (OJ 2013 L 347).

[Commission Implementing Decision](#) of 16 October 2014 laying down rules for the implementation of Decision 1313/2013/EU (OJ 2014 L 320).

Council Regulation (EURATOM) [2016/52](#) of 15 January 2016 laying down maximum permitted levels of **radioactive contamination** of food and feed following a nuclear accident or any other case of radiological emergency (OJ 2016, L 13).

Council Regulation (EEC) [No 2219/89](#) of 18 July 1989 on the special conditions for **exporting food stuffs and feeding stuffs** following a nuclear accident or any other case of radiological emergency (OJ 1989 L 211)

Council Regulation (EC) [No 733/2008](#) of 15 July 2008 on the **conditions governing imports of agricultural products** originating in third countries following the accident

at the Chernobyl nuclear power station (OJ 2008 L 201), as amended, latest [consolidated version 2009](#)

Note: provisionally valid until 31 March 2020)

Commission Regulation **(EC) No 1635/2006** of 6 November 2006 laying down **detailed rules for the application of Council Regulation (EEC) No 737/90** on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station (OJ 2006 L 306), amended, [consolidated version 2013](#)

Commission Regulation **(EC) No 1609/2000** of 24 July 2000 establishing a **list of products excluded** from the application of Council Regulation (EEC) No 737/90 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station (OJ 2000 L 185)

Commission Implementing Regulation (EU) 2016/6 of 5 January 2016 imposing **special conditions governing the import of feed and food** originating in or consigned from Japan **following the accident at the Fukushima nuclear power station** (OJ 2016, L 3), last amended by Implementing Regulation (EU) 2017/2058 (OJ 2017, L 294), latest [consolidated version 2017](#)

ANNEX II: Liability principles under current legislation, broken down by EU Member State

Nuclear operators' third-party liability – amounts and financial security limits

Source: OECD-NEA (2017), own research²⁰⁹

Country/ Economy	International Liability Convention	Installations/Activities	Operator's Liability Amount	Funds available			Last updated by the NEA
				Financial Security Limit to cover Operator's Liability Amount	Public funds	International funds (established under either the BSC or the CSC)	
Austria	(PC), (BSC)	Nuclear installations	Unlimited	EUR 406 million			November 2016
		Experimental and research reactors and transport activities of nuclear materials		EUR 40.6 million			
		Holder of radionuclide- exceeding 370 gigabecquerel		EUR 4.06 million			
Belgium	PC, BSC, (RPC), (RBSC), (JP)	Nuclear installations	EUR 1.2 billion	EUR 1.2 billion	SDR 125 million	November 2016	
		Transport activities	EUR 80-297 million	EUR 297 million			
		Low risk Installations	EUR 75-297 million	EUR 297 million			
Bulgaria	VC, JP	Nuclear installations and transport activities	BGN 96 million	BGN 96 million		June 2011	

²⁰⁹ Cf. Dörte Fouquet, Legal Opinion, Pathways to a EURATOM-Reform, (2018) European Parliament, The Green /EFA Group, Annex III; <https://rebecca-harms.de/post/juristisches-gutachten-zur-reform-des-euratom-vertrags-40765>

Benutzte OECD ACRONYMS

BSC: 1963 Brussels Convention Supplementary to the 1960 Paris Convention ("Brussels Supplementary Convention").

CSC: 1997 Convention on Supplementary Compensation for Nuclear Damage.

JP: 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention.

PC: 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy ("Paris Convention").

RPC: 2004 Protocol to amend the Paris Convention ("Revised Paris Convention"), **not yet in force**.

RSBC: 2004 Protocol to amend the Brussels Supplementary Convention ("Revised Brussels Supplementary Convention"), **not yet in force**.

RVC: 1997 Protocol to Amend the Vienna Convention ("Revised Vienna Convention").

VC: 1963 Vienna Convention on Civil Liability for Nuclear Damage ("Vienna Convention").

(): When within brackets, it means that the country has signed but not yet ratified the convention.

Cyprus	none			unlimited			
Czech Republic	VC, (RVC), JP, (CSC)	Nuclear installations used for power generation purposes, storage facilities and repositories of spent fuel assigned to these installations or nuclear materials generated by reprocessing of spent fuel	CZK 8 billion	CZK 2 billion minimum			June 2017
		Other nuclear installations and transport activities	CZK 2 billion	CZK 300 million minimum			
Denmark	PC, BSC, (RPC), (RBSC), JP	Nuclear installations and transport activities	SDR 60 million	SDR 60 million	SDR 115 million	SDR 125 million	June 2014
Estonia	VC, JP	Nuclear installations and transport activities	Unlimited (in the absence of legislation to the contrary)	Unlimited (in the absence of legislation to the contrary)			June 2011
Finland	PC, BSC, (RPC), (RBSC), JP	Nuclear installations	Unlimited liability (for damage suffered within Finland) SDR 600 million (for damage suffered outside Finland)	SDR 600 million		SDR 125 million	November 2016
		Low risk installations and transport activities	SDR 5-600 million				
France	PC, BSC, (RPC), (RBSC), JP	Nuclear installations	EUR 700 million	EUR 700 million	After depletion of the operator's liability amount and up to SDR 175 million	SDR 125 million	December 2017
		Low risk nuclear Installations	EUR 70 million	EUR 70 million			
		Transport activities	EUR 80 million	EUR 80 million			
		Transit across France	EUR 80 millions (if covered by the Paris Convention) Unlimited (if not covered by the Paris Convention)	EUR 80 millions (if covered by the Paris Convention) EUR 700 million (if not covered by the Paris Convention)			
		Nuclear power plants		2.5 billion			

Germany	PC, BSC, (RPC), (RBSC), JP	other nuclear installations	Unlimited	Up to EUR 2.5 billion (maximum depending on thermal capacity (for reactors); on type, amount, activity and nature of radioactive substances (for other installations))	Up to EUR 2.5 billion	SDR 125 million	November 2016
		transport activities		Up to EUR 70 million (maximum depending on type, amount, activity and nature of radioactive substances)			
Greece	PC, JP, (RPC)	Nuclear installations	SDR 15 million	SDR 15 million			November 2016
		Transport activities					
Hungary	VC, (RVC), JP	Nuclear installations	SDR 100 million	SDR 100 million	SDR 200 million		November 2016
		Transport or storage of nuclear fuel	SDR 5 million	SDR 5 million	SDR 295 million		
Ireland	none			unlimited			
Italy	PC, BSC, (RPC), (RBSC), (RVC), JP, (CSC)	Nuclear installations and transport activities	SDR 15 million	SDR 15 million	SDR 160 million	SDR 125 million	November 2016
Latvia		Nuclear installations	LVL 4 million	LVL 4 million	Difference between available insurance and LVL 80 million		
		Other practices (nuclear facilities, radioactive waste disposal / management facilities)	LVL 0.8 million	LVL 0.8 million			
	VC, RVC, JP	Practices involving high doses of radiation sources	LVL 0.4 million	LVL 0.4 million			June 2011
		Practices involving medium doses of radiation sources	LVL 80 000	LVL 80 000			

		Other practices which require a special license	LVL 1 000	LVL 1 000			
Lithuania	VC, (RVC), JP,(CSC)	Nuclear installations and transportation	LTL equivalent of (1963: USD 5 million)	LTL equivalent of (1963: USD 5 million)			June 2011
Luxembourg	(PC), (BSC)	Nuclear installations and transport activities	Unlimited (in absence of legislation to the contrary)	No amount specified			June 2014
Malta	none			unlimited			
Netherlands	PC, BSC, (RPC), (RBSC), JP	Nuclear power plants	EUR 1.2 billion	EUR 1.2 billion	After depletion of the operator's liability amount and up to EUR 2.3 billion		
		Enrichment installations, research reactors, storage installations and closed nuclear power plants	EUR 22.7-100 million	EUR 22.7-100 million	After depletion of the operator's liability amount and up to EUR 1.5 billion	SDR 125 million	November 2016
		Transport activities	EUR 8-22.7 million	EUR 8-22.7 million			
Norway	PC, BSC, RPC, RBSC, JP	Nuclear installations and transport activities	SDR 60 million	SDR 60 million	SDR 115 million	SDR 125 million	June 2014
		Exceptional cases, low risk nuclear installations and transport activities	SDR 5 million minimum	SDR 5 million minimum	SDR 170 million		
Poland	VC, RVC, JP	Nuclear installations	SDR 300 million	SDR 300 million			June 2014
		Research reactors or a nuclear facility where nuclear material originated from it is kept or stored, as well as transportation of nuclear material from such facilities		SDR 0.4-5 million			
		Nuclear material and spent fuel storage and disposal facilities for nuclear materials not originated from research reactors Radioactive waste repositories		SDR 300 million			
Portugal	PC, (RPC), (JP)	Nuclear installations	SDR 15 million	No amount specified			November 2016
		Transport activities					

		Low risk installations					
Romania	VC, RVC, JP, CSC	Nuclear installations	SDR 300 million (can be reduced to SDR 150 million if State provides for the difference up to SDR 300 million)	SDR 300 million (can be reduced to SDR 150 million if State provides for the difference up to SDR 300 million)	After depletion of the operator's liability amount and up to SDR 300 million	SDR 108 million	December 2017
		Research reactors, radioactive waste and spent fuel storage facilities	SDR 30 million (can be reduced to SDR 10 million if State provides for the difference up to SDR 30 million)	SDR 30 million (can be reduced to SDR 10 million if State provides for the difference up to SDR 30 million)	After depletion of the operator's liability amount and up to SDR 30 million		
		Transport of nuclear fuel used in a nuclear reactor	SDR 25 million	SDR 25 million			
		Transport of nuclear materials	SDR 5 million	SDR 5 million			
Slovak Republic	VC, JP	Nuclear installations with nuclear reactor or nuclear reactors serving for energy purposes (during their commissioning and operation)	EUR 300 million	EUR 300 million			November 2016
		Nuclear installations with nuclear reactor or nuclear reactors serving exclusively for scientific, educational or research purposes (during their commissioning and operation), transport of radioactive materials, nuclear materials and spent fuel handling, storage, conditioning and treatment of radioactive waste, any nuclear installations in decommissioning	EUR 185 million	EUR 185 million			
Slovenia	PC, BSC, JP, (RPC), (RBSC)	Nuclear installations	SDR 150 million	SDR 150 million	SDR 25 million	SDR 125 million	November 2016
		Research reactors		SDR 5 million	SDR 170 million		
		Transport activities		SDR 20 million	SDR 155 million		
		Nuclear installations	EUR 700 million	EUR 700 million			

Spain	PC, BSC, (RPC), RB SC, (VC), (JP)	Low risk nuclear installations	EUR 30 million minimum	EUR 30 million minimum	After depletion of the operator's liability amount and up to SDR 175 million	SDR 125 million	December 2017
		Transport activities					
Sweden	PC, BSC, JP, (RPC), (RBSC)	Nuclear installations and transport activities	SDR 300 million	SDR 360 million	SEK 900 million	SDR 125 million	June 2017
		Installations for production and storage of un-irradiated uranium and transport activities	SDR 10 million	SDR 12 million			
United Kingdom	PC, BSC, (RPC), (RBSC), (VC), (JP)	Nuclear installations and operator transport activities	GBP 140 million	GBP 140 million	After depletion of the operator's liability amount and up to SDR 175 million	SDR 125 million	December 2017
		Low risk installations (e.g. research reactors and nuclear disposal installations)	GBP 10 million	GBP 10 million			

ANNEX III: Example in preparation of a more detailed analysis²¹⁰

EURATOM Article (<i>used as base for secondary legislation</i>)	Directive/Regulation /etc.	Transparency, Control sanction established	Necessary in EURATOM or Transfer under clarification to EU Treaty	Reform needs for EURATOM Treaty	Reform needs for secondary legislation	Sunset provision for reform of secondary legislation
Articles 31 and 32 (Consequence Art. 33 for MS's enforcement and following definitions under Art. 30))	<p><u>Council Directive 2009/71/EURATOM</u> of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations</p> <p>amended by:</p> <p><u>Council Directive 2014/87/EURATOM</u> of 8 July 2014 amending <u>Directive 2009/71/EURATOM</u> establishing a Community framework for the nuclear safety of nuclear installations</p>		Necessary to remain under EURATOM as inherent part of radiation protection and strong link to non-proliferation	Not fully aligned with Aarhus: overlapping to the detriment of clear application of Aarhus and ESPOO. Art. 34 needs clear link to right of neighbouring and third States for involvement and respect of ESPOO	Y	Y

²¹⁰ Taken from: Dörte Fouquet, Legal Opinion, Pathways to a EURATOM-Reform, (2018) European Parliament, The Green /EFA Group, Annex III; <https://rebecca-harms.de/post/juristisches-gutachten-zur-reform-des-euratom-vertrags-40765>

					and Aarhus		
Articles 31 and 32		<p>COUNCIL DIRECTIVE 2013/59/EURATOM of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/EURATOM, 90/641/EURATOM, 96/29/EURATOM, 97/43/EURATOM and 2003/122/EURATOM</p>		Necessary to remain under EURATOM			

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