

Introductory Remarks on a
Draft
PROTOCOL

ANNEXED TO THE TREATY ON EUROPEAN UNION AND TO THE
TREATY ON FUNCTIONING OF THE EUROPEAN UNION
ON THE SWITCH OF THE TREATY ESTABLISHING THE EUROPEAN
ATOMIC ENERGY COMMUNITY INTO A TREATY ON RENEWABLE
ENERGY, ENERGY EFFICIENCY AND ENERGY SAVING

Salzburg, 19 September 2019

1. General Remarks

In the attachment, please, find a draft Protocol annexed to the Treaty on European Union (TEU) and to the Treaty on Functioning of the European Union (TFEU) on the Switch of the Treaty Establishing the European Atomic Energy Community into a Treaty on Renewable Energy.

The draft was inspired by the results of the Conference “Energy Transition in Europe: Options for Constitutional Reform“, which took place on 8 June 2018, 13.00-16.30 in the Common Hall (Fællessalen), Christiansborg of the Danish Parliament building and was organised by NOAH – Friends of the Earth Denmark, the Danish Ecological Council, SustainableEnergy, Nordic Folkecenter for Renewable Energy, the Swedish NGO Office for Nuclear Waste Review, the Swedish Renewable Energies Organization and Plattform gegen Atomgefahren in Austria.¹

The draft undertakes to integrate the key elements of a “PROTOCOL ANNEXED TO THE TREATY ON EUROPEAN UNION AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION ON THE ENERGY TRANSITION AND TO PROMOTE ENVIRONMENTALLY FRIENDLY FORMS OF ENERGY IN THE EUROPEAN UNION“,

¹ The Conference presentations and documents are available at: <https://noah.dk/energy-transition-europe> (190919).

presented at the Conference by Prof. Wilhelm Bergthaler, directly into the EURATOM Treaty, thereby fundamentally changing the Treaty's character and providing for a switch of nuclear energy to renewable energy in Europe without touching at articles 191 – 194 TFEU, which currently deal with environment and energy in the EU.

The idea is to end the thoroughly inconsistent parallel systems of an EU being a world-wide leader in protection of the environment and keen to fulfill the climate goals on one hand, and a EURATOM being dealt with by the same bodies and thoroughly disregarding environment and climate goals. This difference becomes clearly visible by comparing the Protocol top to the Consolidated version of the EURATOM Treaty. Article 3 of the PROTOCOL No 2 AMENDING THE TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY² read as follows:

“Article 3

The following chapter shall be inserted at the beginning of Title III of the EAEC Treaty:

‘CHAPTER I

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 9 to 9 F, Article 48(2) to (5), and Articles 49 and 49 A of the Treaty on European Union, Article 16 A, Articles 190 to 201b, Articles 204 to 211a, Article 213, Articles 215 to 236, Articles 238, 239 and 240, Articles 241 to 245, Articles 246 to 262, Articles 268 to 277, Articles 279 to 280 and Articles 283, 290 and 292 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.

...”.

Article 106a of the consolidated version of the EURATOM Treaty reads, however, as follows:

“CHAPTER I

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.

...”³

It is most interesting to note that from the ratified version of the Lisbon Treaty, the inclusion of Articles 16 A, Articles 190 to 201b, Articles 204 to 211a, Article 213, and Articles 215 to 222 TFEU into the EURATOM Treaty disappeared in the process of consolidation, which means, through editing by the EU Commission. In our given context it is decisive, that the application of Article 191 paras 1 and 2 TFEU disappeared from the consolidated text. This provision reads as follows:

“Article 191

² Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C .2007.306.01.0001.01.ENG&toc=OJ:C:2007:306:FULL#C_2007306EN.010199_01 (190919).

³ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012A/TXT&from=EN> (190919).

(ex Article 174 TEC)

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.”*

By declaring them applicable on the EURATOM Treaty, the EURATOM Treaty would have become subject to the application of the precautionary principle, which would have automatically meant the end of the use of nuclear energy.

When the Treaty on a Constitution for Europe was negotiated and the compromise of the Lisbon Treaty finally achieved, the EURATOM Treaty remained unreformed with the exception of the above provisions of the TEU and the TFEU which were declared applicable on the EURATOM Treaty. An agreement on the future of EURATOM could not be achieved (integration into the EU vs abolishment of EURATOM). By the identity of the European Community with the EU, the EU and EURATOM lost their joint roof and remained linked to each other only through the so-called “loan of organs“. One could describe the situation as the EU having been placed in the centre and EURATOM put into a corner. The EU bodies have been acting for two separate international organizations, a fact which became more and more critical by the ever faster growing challenges caused by the change of climate, supported on EU level and counteracted on EURATOM level by the same bodies.

In the meanwhile, all EU and at the same time EURATOM members are aware of an urgent need in transition of energy to environmentally friendly forms of energy. Nuclear energy is no environmentally friendly form of energy. It is no renewable energy, it is “uranium“ energy, because uranium is required to create the fuel to power a reactor. Uranium is a finite resource and not renewable. Currently about 70,000 tons of uranium are needed a year. There are no alternatives. To use lower grade uranium ores would require more energy per unit recovered uranium and, thus, cause higher CO2 emissions. To mine uranium from sea water would take as much energy for removal from sea as it would provide.⁴ In addition, nuclear power does not belong in state renewable portfolio standards and nuclear power plants consume too much water.⁵ Nuclear energy use even impedes renewable energy development, because its continued use necessitates the maintenance of an electricity system that accommodates inflexible baseload power and the state subsidies required draws down state funding for the renewable energy sector.⁶

The future of EURATOM, thus, can only be expiry. But in order to allow for a safe, secured and orderly expiry, the EURATOM Treaty needs for amendments for the period from present until the date of expiry, which has been set by the draft with 31 December 2040, and the EU bodies for targets to be met through powers to be entrusted with. Since at the end, the whole process of expiry of EURATOM and nuclear energy will culminate in flourishing renewable energy, it seems logical to link both aims in one and the same treaty. To step down with nuclear energy is a step forward to a push for renewable energy. By providing the necessary instruments, research results,

⁴ See “Climate change and why nuclear power can’t fix it“, p 8. Available at:

<https://beyondnuclearinternational.files.wordpress.com/2019/01/climate-change-chapter.pdf> (190919).

⁵ (fn 2), p 11.

⁶ (fn 2), p 15.

technics and general assistance for phasing out from nuclear energy, the EU bodies handling EURATOM direct their activity from supporting the use of nuclear energy to supporting the process of its expiry towards supporting its replacement by renewable energy at the end of the day. The know how acquired by the EU bodies on the field of dealing with nuclear energy can be used for and transformed to use of renewable energy.

2. Special Remarks as to Key Elements of the Draft

The draft is not understood as a finalised document, but as a basis for instigating and initiating negotiations. Thus, all elements of the draft Protocol are open for rewording and better alternatives. The draft aims at offering a consistent, well-balanced and debatable platform for eventual improvement based on better arguments and a joint will of the negotiating parties. Using the draft helps to avoid negotiations on the TEU and TFEU themselves, which negotiations might be not advisable in times of quite some EU-skepticism in many members of the EU and EURATOM.

The date of expiry of EURATOM (Article (art) 1: 31 December 2040) is oriented at the periods used by those EU/EURATOM members that decided to step out from nuclear energy on the national level. The date can only be met, if at the same time the tasks of EURATOM will be reversed. On all levels (research, investments, storage, commercial activities, international relations) the tasks of EURATOM shall be directed towards phasing out from nuclear energy (art 2). The EU shall support this process and at the same time further renewable energy by receiving a vast set of respective objectives (art 3).

Title III of the draft redirects the promotional tasks of EURATOM for the use of nuclear energy to undertaking all efforts for a safe and orderly withdrawal from nuclear energy. This goes for research (chapter 1) and dissemination of information (chapter 2). Given the context of expiry of nuclear energy, there is not seen any necessity anymore to provide for security provisions in the interests of the defence of member states (previous section 3 of chapter 2). To the opposite, by upholding discretionary power for the Commission not to disclose certain research results, the process of phasing out from nuclear energy would be obstructed. For the same reasons substantial amendments seem to be necessary as to Agency, dealing with supplies of ores, source materials and special fissile materials (chapter 6). The Agency will have to be dissolved at the moment of expiry of EURATOM (art 47 new), but until that date will have to continue to manage a regular supply, however, envisaging the target of closing down nuclear energy (arts 41 new – 67 new). All support actions of the Commission are subject to the same new orientation of expiry of nuclear energy. To continue special measures relating to supply policy appears to be obstructive to the aim of ending nuclear energy and, thus, it is proposed by the draft to eliminate old arts 70 – 72 and 76 EURATOM Treaty. The same goes for the privilege as to safeguards for materials to meet defence requirements and for the provisions of a nuclear common market, which, thus, is advised to levy through elimination of the old art 84 last para (art 75 last para new) and the previous chapter 9 with the exception of art 98 old (art 83 new).

On the other hand, a new Title IV dealing with the encouragement of progress in the field of renewable energies, energy efficiency and energy saving is proposed to add to the EURATOM Treaty. The title includes ideas of the PROTOCOL ANNEXED TO THE TREATY ON EUROPEAN UNION AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION ON THE ENERGY TRANSITION AND TO PROMOTE ENVIRONMENTALLY FRIENDLY FORMS OF ENERGY IN THE EUROPEAN UNION, but arranges them in a structure similar to the provisions for EURATOM. It is not proposed to create a new organization, but to have the EU and its bodies themselves put in charge of promoting respective research (chapter 8 new) in general and through a specific research and training programme (here called

“European Research and Training Programme for Renewable Energy Sources, Energy Efficiency and Energy Saving: EURENEWENERGY”; art 87 new), and by supporting the creation of joint undertakings (art 89 new). The EU bodies shall be responsible to disseminate respective information (chapter 9 new), promote respective investment (chapter 10 new) and lay down targets and action plans in the field of renewable energy sources, promote an energy market and measures for energy efficiency and energy saving (chapter 11 new). Chapter 12 new deals with financing and competition as to renewable energy and chapter 13 new sets up a Committee to Promote Environmentally Friendly Forms of Energy as advisory body for Commission, Council and EU members.

Title V new supplements title IV new on the external and international level and title VI new on the institutional and financial level. The proposal for art 107 new (art 106a) uses the wording of the consolidated version of the EURATOM Treaty, but respecting the Treaty of Lisbon as ratified by the EU members it should rather be discussed to implement the text of Protocol No 2 attached to the Treaty of Lisbon, as shown above, and replace the consolidated version by the version approved by the national parliaments in the process of ratification of the Treaty of Lisbon. Declaring the precautionary and prevention principles from art 191 para 2 TFEU applicable to the EURATOM Treaty would certainly favor the process of phasing out from nuclear energy.

Due to the new direction of the EURATOM Treaty as proposed by the draft in a couple of provisions the necessary majority for adoption of decisions on the Council have been proposed to change from unanimity to qualified/simple and from qualified to simple majority in order to more flexibly support the process of expiry of EURATOM (eg arts 7, 43 new, 83 new, etc).

At the date of expiry of EURATOM, the property of EURATOM shall become automatically property of the EU (art 82 para 2 new).

The proposed amendments as to the core of the EURATOM Treaty logically involve that the annexes I old, II old, IV old and V old are not needed anymore, thus leaving the previous Annex III as only Annex I new. Also the Protocol on Transitional Provisions is considered not to be relevant anymore as part of such updated version of the EURATOM Treaty.

With kind regards

A handwritten signature in black ink, appearing to read 'Michael Geistlinger', written in a cursive style.

Michael Geistlinger