



THE PLACE OF NUCLEAR POWER IN THE ENERGY TRANSITION

EU Law between
Ambivalence and Ambiguity



INTRODUCTION

► Energy transition :

→ Evolution of the **energy system** => **power sources** / primary energy + **operating technologies**.

→ Evolution of **sources and operating techniques** of **nuclear energy?**

- **Yes** if **broad** interpretation of the issues → reduction of: greenhouse gas emissions; environmental and health risks; pollution and hazardous waste.
- **No** if **narrow** interpretation of issues → reduction of greenhouse gas emissions.

=> **The place of nuclear power** in the energy system at the heart of current debates on its evolution: energy of *the* energy transition or energy of energy transition?



► Future of nuclear energy and EU law

→ **EURATOM Treaty and Community** (Treaty of Rome, 1957)

→ **TFEU (Art. 194)**: EU policy "in the field of energy" enshrined in the Lisbon Treaty.

=> Legal framework **ambiguous** and **ambivalent** : between **promoting** (§1) and **regulating** (§2) nuclear energy.



§1. PROMOTING NUCLEAR ENERGY ?

▶ Promote = encourage, create, rise, etc.

=>EU competent to promote nuclear energy?

- EURATOM Treaty (A)?
- TFEU (B)?



A. On the basis of the EURATOM Treaty?

B. Ambitious objectives

► **Preamble** : *"aware that nuclear energy is the **essential resource** which will ensure the development and renewal of production and enable the progress of works of peace ... ;*

*- committed to **create the conditions for the development of a powerful nuclear industry**, which will provide a vast supply of energy and a modernization of technology, as well as many other applications contributing to the well-being of their peoples (...)"*

► **Operative provision: Art. 1**: "The Community's mission is to **contribute**, through the establishment of the necessary conditions, to the **formation and rapid growth of nuclear industries** (...)"



2. Limited scope

- ▶ The EURATOM Treaty **does not imply that Member States use nuclear energy**=>Member States can fall outside the scope of its provisions.

- ▶ The EURATOM Treaty **does not allow the Community legislator to prescribe the use of nuclear energy**=>The EURATOM institutions have limited powers of action.



B. On the basis of the TFEU?

1. The EU may take measures "to promote new and renewable energies" (TFEU, Art. 194.1 c)

- ▶ **Ambivalence** of the term "new and renewable energy".
- ▶ Directives promoting renewable energy => EU consumption targets set for **all Member States**.

2. Yet :

- **Ambiguity** of the notion of "new" energy.
- **Art. 106a EURATOM** (from the Treaty of Lisbon): provides for the application of dozens of articles of the TEU/TFEU to EURATOM **without referring to Art. 194 TFEU**.



§2. REGULATION OF NUCLEAR ENERGY?

A. By the EURATOM Treaty?

1. Relativity of the framework

► Limited focus:

→ **Protection of the population against radiation** (EURATOM Treaty, Chapter 3).

→ **Safeguards of nuclear installations** (EURATOM Treaty, Chapter 7).

► Limited effect:

A measure banning nuclear power in the Member States "would be manifestly contrary to the objectives of the EURATOM Treaty, as set out in its preamble and Article 1," EU Commission, response to the ECI My voice against nuclear power, C(2012)3687 final.



2. Framework Specialty

► **Limited role of parliamentary bodies** (European Parliament and national parliaments)

► **Limited association of the civil society**

→ **Non application of the Aarhus Convention** to a EURATOM decision: *Trib. EU, 27 Feb 2018, CEE Bankwatch Network v Commission, T-307/16.*

→ **Non-application of the European Citizens' Initiative mechanism** (TEU, art. 11; TFEU, art. 24) to EURATOM: EU Commission, response to the ECI My voice against nuclear power, C(2012)3687 final).



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B. By the TFEU?

1. Residual applicability to nuclear energy

► EU competition law

"The Euratom Treaty does not contain exhaustive rules on competition which may preclude the application of the rules laid down in Title VII, Chapter 1, of the TFEU" (EU Court, 12 July 2018, *Austria v Commission*, T-356/15)

E.g.: **State aid law**: CJEU, Gr. ch. 22 Sept. 2020, *Austria v Commission*, C-594/18 P.

► EU environmental protection law

"The requirement to preserve and improve the environment, expressed in particular in Article 37 of the Charter and in Articles 11 and 194(1) TFEU, as well as the rules of Union law on the environment, are intended to apply in the nuclear energy sector" (CJEU, Gr. ch., 22 Sept. 2020, *Austria v Commission*, C-594/18 P).

E.g.: **Directives**: CJEU, 29 Jul 2019, *Inter-Environnement Wallonie*, C-411/17

E.g.: **General principles of environmental law**: CJEU, Gr. ch., 22 Sept. 2020, *Austria v. Commission*, *aforementioned*).



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2. Flexible application to nuclear energy

► State aid law

"The application of Article 107 TFEU to measures in the field of nuclear energy must take account of the provisions and objectives of the Euratom Treaty"

=>The creation of new nuclear power generation capacity: a **public interest objective** within the meaning of Art. 107.3 TFEU (*EU Court, 12 Jul 2018, Austria v Commission, T-356/15*).

► Environmental protection law

The application of EU environmental protection rules must take into account the **public interest of protecting the security of energy supply**: *CJEU, 29 Jul. 2019, Inter-Environnement Wallonie, supra*.

The application of EU environmental protection rules must take into account the fact that "**the choice of nuclear energy** (belongs according to Art. 194 TFEU) to the **Member States**": *CJEU, Gr. Ch. 22 Sept. 2020, Austria v. Commission, prec.*



CONCLUSION

- ▶ EU law **not absent** from discussions on the use of nuclear energy, e.g. in the context of an energy transition process
- ▶ EU law takes a **back seat** on the question of the value of nuclear energy for the energy transition.