

## BOOK REVIEWS

ANNA SÖDERSTEN, *EURATOM AT THE CROSSROADS* (EDWARD ELGAR 2018)

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The Treaty establishing the European Atomic Energy Community (hereinafter 'the Euratom Treaty' or 'the Treaty') was signed by the representatives of six states on 25 March 1957 in Rome.<sup>1</sup> Pursuant to its Article 224, the Treaty entered into force on the first day of the month following the deposit of the instrument of ratification of the final signatory state, i.e. on 1 January 1958. During the 1950s and 1960s, the establishment of Euratom triggered significant interest within scientific literature.<sup>2</sup> During this time, Euratom became the subject of several

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<sup>1</sup> Belgium, Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

<sup>2</sup> Kenneth Cohen, 'Euratom' (1959) 7 *The Journal of Industrial Economics* 79; Reuben Efron and Allan S. Nanes, 'The Common Market and Euratom Treaties: Supranationality and the Integration of Europe' (1957) 6 *International & Comparative Law Quarterly* 670; Georges Fischer and Daniel Vignes, 'Euratom' (1956) 2 *Annuaire Français de Droit International* 695; Hugo J. Hahn, 'Control under Euratom Compact' (1958) 7 *American Journal of Comparative Law* 39; Hugo J. Hahn, 'Euratom: Conception of an International Personality' (1958) 71 *Harvard Law Review* 1001; James G. Johnson, 'An Introduction to the European Atomic Community (Euratom)' (1957-1958) 13 *Business Lawyer* 801; Allan Nanes, 'The Evolution of Euratom' (1957/1958) 13 *International Journal* 12; Pierre Mathijsen, 'Problems Connected with the Creation of Euratom' (1961) 26 *Law and Contemporary Problems* 438; Norbert Pelzer, 'Die rechtliche Problematik der Beschränkung der deutschen Atomwirtschaft durch den Euratomvertrag' (1962) *Der Betrieb* 398; Willem Van Slobbe, 'Euratom' (1956) 104 *De Economist* 593; Lawrence Scheinman, 'Euratom: Nuclear Integration in Europe' (1966/1967) 36 *International Conciliation* 1; Georges Vedel, 'Euratom' (1958) 9 *Revue économique* 225 etc.

academic theses which were successfully defended at various universities.<sup>3</sup> In addition, the Brussels-based '*Librairie encyclopédique*' published the first commentary on the provisions of the Treaty.<sup>4</sup> This widespread attention to Euratom clearly reflected the atmosphere of 'nuclear euphoria', which supported nuclear energy as of the way forward for future economic development.<sup>5</sup>

However, later political and economic developments<sup>6</sup> caused academic interest in the Euratom Treaty to wane. During the 1970s, it became clear that Euratom would not be implemented in the way the Treaty had foreseen, a fact described by some authors as the 'final crisis of Euratom'.<sup>7</sup> In the following decades, Euratom received only occasional academic attention. In particular, it was the 'Euratom Treaty's notorious resistance to change'<sup>8</sup> which became the object of academic interest.<sup>9</sup> The literature thus reflected the fact that the Euratom

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<sup>3</sup> E.g. Kurt Ballerstedt, *Das Eigentum an Kernbrennstoffen* (Veröffentlichungen des Instituts für Energierecht an der Universität Bonn 1962); Theo W. Vogelaar, *Het eigendomsrecht van Euratom over bijzondere splijstoffen* (Gorcum & Comp NV 1961), etc.

<sup>4</sup> Jacques Errera et al., *Euratom: Analyse et Commentaires du Traité* (Librairie Encyclopédique 1958).

<sup>5</sup> See e.g. Bertrand Goldschmidt, *The Atomic Complex: A Worldwide Political History of Nuclear Energy* (American Nuclear Society 1982) 112.

<sup>6</sup> In the course of the 1970s, it became clear that the member states preferred to develop their own nuclear research, in the area of nuclear reactors, rather than pursuing joint research under the auspices of Euratom. The member states were also not prepared to allow Euratom to execute some of its functions, in particular the supply monopoly as set out in the Chapter 6 of the Euratom Treaty. Further, the incident in the Three Miles Island (1979) crystallised anti-nuclear concerns among the general public and became a catalyst for new nuclear construction programme in several countries.

<sup>7</sup> Carl Deubner, 'The Final Crisis of Euratom' (1979) 2(1) *Current Research on Peace and Violence* 53.

<sup>8</sup> Irina Cenevska, *The European Atomic Energy Community in the European Union Context: The 'Outsider' Within* (Brill Nijhoff 2016) 1.

<sup>9</sup> Ilina Cenevska, 'The European Parliament and the European Atomic Energy Community: A Legitimacy Crisis?' (2010) 35 *European Law Review* 415; Christiane True, 'EU-Kompetenzen für Energierecht, Gesundheitsschutz und Umweltschutz und die Position der Euratom nach dem Verfassungsentwurf des Konvents' (2004)

Treaty had not undergone any substantial modification since its adoption (having even managed to evade the amendments provided by the Lisbon Treaty later on).<sup>10</sup> In this respect, the Euratom Treaty was referred to as being 'like a Chinese girl-child, exposed after birth because the parents did not want it to live',<sup>11</sup> 'a dormant serpent',<sup>12</sup> 'an outsider',<sup>13</sup> 'a chameleon',<sup>14</sup> 'an invisible creature',<sup>15</sup> or even said to be 'already forgotten a decade after its establishment'.<sup>16</sup>

The 60<sup>th</sup> anniversary of the Euratom Treaty provided a good opportunity to revisit this community and its peculiar legal order. This opportunity was taken by Anna Södersten, who published her book *Euratom at the Crossroads* based on

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Juristenzeitung 779; Sebastian Wolf, 'Zur Zukunft des Euratom-Vertrags' (2006) 29 Integration 297; Sebastian Wolf, 'Integration durch Kernfusion? Zur Wiederbelebung der Euratom - Gründungsmythen' (2007) 25 Forum Recht 26 etc.

<sup>10</sup> The Euratom Treaty has been amended by the Maastricht Treaty (Title IV: Provisions amending the Treaty establishing the European Atomic Energy Community and Title VII: Final Provisions which extended the institutional changes introduced to the EC Treaty and the ECSC Treaty to the Euratom Treaty), the Treaty of Amsterdam (Articles 1, 4, 7, 8, 9, 10, 11 and relevant protocols applicable to Euratom), the Treaty of Nice (Articles 1, 3, 7, 9 and relevant protocols applicable to Euratom) and lastly, by the Lisbon Treaty (see Protocol No. 2, 'Amending the Treaty establishing the European Atomic Energy Community' and other protocols applicable to the Euratom). However, notwithstanding several non-substantial changes, the text of the Euratom Treaty has essentially remained the same since 1957.

<sup>11</sup> David Allen, 'The Euratom Treaty, Chapter VI: New Hope or False Dawn?' (1983) 20(3) Common Market Law Review 473.

<sup>12</sup> Nuria Prieto Serrano, 'Wakening the Serpent: Reflections on the Possible Modification of the Euratom Treaty' (2006) 1(1) International Journal of Nuclear Law 14.

<sup>13</sup> Cenevska (n 7).

<sup>14</sup> Jakub Handrlica, 'The Splendid Durability of the Provisional: A Tribute to Euratom' (2018) 14 Croatian Yearbook of European Law & Policy 161.

<sup>15</sup> Juan Sellarés Sella, 'El Euratom subsiste, invisible e incompatible con el tinglado comunitario' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa: la salida de la crisis constitucional* (Iustel 2007).

<sup>16</sup> Theo W. Vogelaar, 'Euratom: de vergeten gemeenschap' (1967) 8(1) Nieuw Europa: maandblad van de Europese Beweging in Nederland 14.

her PhD thesis.<sup>17</sup> At the start of her book (p. 1), she correctly states that Euratom remains a kind of *terra incognita* for the majority of the recent scholarship on European Union (EU) law. The goal of her study, to identify the legal implications of the continued separate existence of Euratom within the EU, is ambitious.

Several other studies have recently addressed this issue from a number of perspectives. Rasa Ptasekaite has dealt with mutual relations between the EU and Euratom from the point of view of the three founding treaties (the Treaty on European Union, the Treaty on Functioning of the European Union and the Euratom Treaty).<sup>18</sup> In her 2016 book, Iлина Cenevska addressed Euratom issues mainly from the perspective of environmental law.<sup>19</sup> And very recently, Pamela M. Barnes published an outstanding monograph on nuclear energy in the EU from a policy perspective.<sup>20</sup> In this context, Södersten's book represents the first attempt to comprehensively address the legal issues arising from the existence of the Euratom Treaty since Jaroslav G. Polach's *Euratom: Its Background, Issues and Economic Implications* of 1964.<sup>21</sup> In contrast to Polach's study, Södersten's main focus is the legal framework of Euratom, rather than the economic or political issues.

Following a historical introduction (pp. 12-30), the book is divided into two parts, 'Structural issues' and 'Substantive issues'. They may be read independently. The first part, containing a more theoretical discussion, will

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<sup>17</sup> The dissertation was written under supervision of Professor Marise Cremona and successfully defended at the European University Institute, Department of Law in 2014.

<sup>18</sup> Rasa Ptasekaite, *The Euratom Treaty vs. Treaties of the European Union: Limits of competence and interaction* (Swedish Radiation Safety Authority 2011).

<sup>19</sup> Cenevska (n 10).

<sup>20</sup> Pamela M. Barnes, *The Politics of Nuclear Energy in the European Union* (Barbara Budrich Publishers 2018).

<sup>21</sup> Jaroslav G. Polach, *Euratom: Its Background, Issues and Economic Implications* (Oceana Publications 1964). Abram I. Ioirish published his *Euratom: Právoúye problémi* [Euratom: Legal Problems] in 1992. However, the fact that this study was published only in Russian makes it much less accessible for European scholars.

perhaps be more interesting for scholars of EU law and, in general, for those interested in questions of the mutual relations between the EU and Euratom. The second part may be more interesting to practitioners, as it provides an outstanding (and often detailed) overview of existing Euratom policies and corresponding legislation. However, only together do the two parts provide a complete picture of the implications of the separate legal order established under the Euratom Treaty.

The section on structural issues deals with the architecture of the Euratom Treaty (pp. 31-56) and with the relations between this Treaty and primary EU law (pp. 57-84). Södersten thus provides a valuable introduction for any reader familiar with EU law seeking clarification of the mutual relations between the two existing communities (i.e. the EU and Euratom). In this respect, she correctly points to the 'different ethos' of the two treaties, stating that 'while the European Economic Community was initially predominantly *functional*, the EU is now predominantly (or at least increasingly) *humanist*. Euratom has not undergone the same evolution' (pp. 66-68).<sup>22</sup> In this respect, two potential interpretations of the mutual relations between the Euratom Treaty and primary EU law are discussed. On the one hand, one can use a strict interpretation, which provides for a 'fixed boundary' between the respective treaties, thus understanding the Euratom Treaty as 'a *lex specialis* as a whole and *in abstracto*' (p. 53). This interpretation was previously developed in more detail by Thomas F. Cusack.<sup>23</sup> Cusack argued that because of the fundamental difference of approach and philosophy of the treaties, it would be wrong to see this relationship as a dichotomy of *lex specialis* and *lex generalis*. This interpretation would lead to the

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<sup>22</sup> However, there had in fact been a 'different ethos' in the two treaties from the very beginning. While the Treaty establishing the European Economic Community aimed primarily to create a common market, the Euratom Treaty's purpose was the promotion of the speedy development of nuclear industry. This divergence of goals was reflected in the contemporary legal scholarship. See e.g. Ulrich Meyer-Cording, 'Europa und der Euratomvertrag' in Europa Union Deutschland (ed), *Euratom: Wirtschaftliche und politische Probleme der Atomenergie* (Europa-Union 1957).

<sup>23</sup> Thomas F. Cusack, 'A Tale of Two Treaties: An Assessment of the Euratom Treaty in Relation to the EC Treaty' (2003) 40 *Common Market Law Review* 177.

conclusion that matters not being addressed by the Euratom Treaty remain in the competence of the member states. On the other hand, there has been another contrasting interpretation, arguing in favour of the subsidiary application of provisions of EU primary law. Södersten follows this latter interpretation, supported by both theoretical arguments and the case law of the Court of Justice. The author presents a general outline of this issue in the 'structural issues' section (pp. 50-55), while the topical issues of subsidiary application of EU primary law are discussed under 'substantive issues', in particular with regard to competition law (pp. 128-130), state aid (pp. 131-140), and nuclear export controls (pp. 211-216).

Legal issues arising from Euratom membership are also discussed (pp. 78-80), in particular with respect to potential withdrawal from this community. Here, the author clearly, and to my mind correctly, argues that separate membership of just one community (either the EU or Euratom) would be – from a strict legal point of view – possible. In the light of the current Brexit debate, this issue is very topical. Here, Södersten builds upon her earlier work on this topic.<sup>24</sup> She argues against the recent statements made by the UK government that Brexit from Euratom is a *necessary* corollary of Article 50 TEU (p. 78). In this respect, she claims that reference to this provision, as provided in the Euratom Treaty (Article 106a),<sup>25</sup> merely implies the existence of a possibility for a separate 'withdrawal from Euratom', rather than a necessity to withdraw from both

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<sup>24</sup> Anna Södersten, 'Brexit, Euratom and Nuclear Proliferation' (2016) 98 Nuclear Law Bulletin 47.

<sup>25</sup> (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.

(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.

communities at once (p. 80). At the same time, she also correctly states that 'although legally possible, partial membership would likely create some practical difficulties because Euratom and the EU share the same institutions' (p. 80). In this context, the author pays further attention to the issues of the UK's withdrawal from Euratom in the chapters addressing nuclear non-proliferation (pp. 210-211). However, the UK's withdrawal from Euratom will clearly have much wider consequences than presented here and will also touch upon some other areas, such as nuclear research, supply policy, and nuclear common market.<sup>26</sup>

Among the 'substantive issues' discussed, Södersten deals with the material issues of particular policies, as executed under the Euratom Treaty. Euratom was established with the aim to promote the speedy development of nuclear industries. The author analyses supply policy (pp. 93-100), as well as the policies of exclusive ownership (pp. 100-102), investments (pp. 102-106) and nuclear research (pp. 107-113). Furthermore, she considers the provisions of the Euratom Treaty dealing with the nuclear common market, questioning both their effectiveness (127-128) and their relation to the rules of competition law (pp. 128-131). Finally, she looks at the issues of radiation protection (pp. 141-168) and nuclear safety (pp. 169-196), which had originally played only a marginal role within the Euratom competencies.

The fact that these measures, which primarily aim to protect human health and the environment, have recently played an increasing role in Euratom's legislation somewhat undermines the suggestion discussed above that the Euratom Community is more 'functional' than 'humanistic'. The amount of space the author devotes to dealing with various pieces of legislation protecting both society and the environment from potential dangers demonstrates, in my opinion, that there has been a considerable shift in the 'ethos' of Euratom toward

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<sup>26</sup> The topic was recently addressed by Stephen Tromans and Ian Truman in their speech 'Existing Euratom', given at the 'Nuclear Inter Jura 2018' in Abu Dhabi, UAE. The presentation is available at <<https://inl2018uae.com/congress-papers/>>.

a more 'humanistic' community in recent decades.<sup>27</sup> This conclusion is also supported by the discussions on a prospective strengthening of the nuclear third party liability regime under the umbrella of the Euratom Treaty.<sup>28</sup> Moreover, the fact that Euratom has, at last with regard to certain policies, been considered a source of inspiration for other regions may also lead to a more positive evaluation of this Community.<sup>29</sup>

Euratom also possesses certain important external competencies. Södersten does not deal with these in a specific chapter of her book, but rather addresses them in the context of relevant policies. External relations vis-à-vis third states are discussed with respect to supply policy (pp. 96-99), nuclear research (pp. 111-112), and nuclear non-proliferation (pp. 223-226). Södersten also touches upon this issue with respect to nuclear safety (pp. 187-188), in the light of Euratom enlargement to Central and Eastern Europe (2004 and 2007). This work represents a useful contribution to the current debate on the extra-territorial effects of EU energy policy.<sup>30</sup> However, with respect to nuclear safety, it would also be interesting to address the issue of the potential extra-territorial effects of the existing Euratom directives.<sup>31</sup> Södersten did not address this issue explicitly

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<sup>27</sup> For this perspective, see also Pamela M. Barnes, 'The Resurrection of the Euratom Treaty: Contributing to the Legal and Constitutional Framework for Secure, Competitive and Sustainable Energy in European Union' in Thijs F. Etty and Han Somsen (eds), *Yearbook of European Environmental Law* (OUP 2008); Jürgen Grünwald, 'Der Euratom-Vertrag: nie war er so wertvoll wie heute' (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 481; Werner Schröder, 'Die Euratom: Auf dem Weg zu einem Umweltgemeinschaft' (1995) *Deutsches Verwaltungsblatt* 322.

<sup>28</sup> See Denis Philippe, Marc Beyens and Patrick Reyners (eds), *Prospects of a Civil Nuclear Liability Regime in the Framework of the European Union* (Bruylant 2012).

<sup>29</sup> Gregoire Mallard, 'Can the Euratom Treaty inspire the Middle East?' (2008) 15 *The Nonproliferation Review* 459.

<sup>30</sup> See e.g. Kim Talus and Moritz Wüstenberg, 'Risks of Expanding the Geographical Scope of EU Energy Law' (2017) *European Energy and Environmental Law Review* 138.

<sup>31</sup> E.g. 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, *Of L 199, 2.8.2011, pp. 48-56* (see *Article 4 for principles governing export of*

in her book, which opens the door for future research and publications in this field by her and others.

In her conclusion, Södersten correctly states that 'while Euratom has some important functions, the EU could equally perform many of these functions. Given the expansion of EU competencies, there is no longer a need for the Euratom Treaty as a separate treaty' (p. 234). However, she has not composed a requiem for Euratom. For her, it seems clear that the dissolution of Euratom would be a purely academic proposal, rather than a politically viable solution. In fact, the issues of nuclear energy remain so delicate that most of the member states will in future quite probably prefer the status quo to incorporation of Euratom into the EU framework.<sup>32</sup> The author is aware of this situation, stating that '[a]t a time when public support for the EU is in decline, such a reform would not be desirable; nuclear energy cooperation is far too sensitive an issue' (p. 235).

Overall, I consider Södersten's book to make a valuable contribution to legal scholarship on the future of EU law. In her introduction, she correctly points to the lack of publications addressing Euratom. Most of the literature is from the 1950s and 1960s and only a minor portion of it refers to the legal aspects. However, this book contains references to a wide range of existing academic sources dealing with various issues of Euratom. Consequently, it is clear that Södersten's book is based on comprehensive and thorough scientific research on existing sources and their subsequent analysis. She succeeded in her goal of providing a complex analysis of the legal framework established under the Euratom Treaty. Regarding the relative lack of scientific literature on Euratom, Södersten's work deserves to become a handbook on Euratom issues in the coming decades.

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*radioactive waste to third States*). See also Jakub Handrlica, 'Exclusivism' in International Nuclear Law: The Concept Revisited' (2018) 8 *The Lawyer Quarterly* 280-283.

<sup>32</sup> For further details see Christiane True, 'The Euratom Community Treaty's Prospects at the Start of the New Millenium' (2006) 1 *International Journal of Nuclear Law* 247.