

RASA ENGSTEDT, *EURATOM: THE TREATY AND THE COMPETENCES OF THE COMMUNITY* (UNIVERSITY OF EASTERN FINLAND 2020)

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After decades of disinterest, the legal issues arising with respect to the existence of the European Atomic Energy Community (thereinafter 'Euratom' or 'Euratom Community') have begun again to trigger academic interest. In 2016, Ilina Cenevska published her study, *The European Atomic Energy Community in the European Union Context: The 'Outsider' Within*.¹ Two years later, Anna Södersten published *Euratom at the Crossroads*.² Both works were well received in academic circles.³ Now, in 2020, Rasa Engstedt has completed a new monograph, *Euratom: The Treaty and the Competences of the Community*.⁴ These publications show a renewed academic interest in the Euratom Community, which in the 1960s was already referred to as 'forgotten'.⁵ Indeed, the previous comprehensive monograph on Euratom was published by Jaroslav G. Polach in 1964.⁶ After Polach's study, Euratom has only occasionally been the subject of academic attention, with authors dealing exclusively with specific issues, such as security of supply, non-proliferation and safeguards, nuclear safety, reform attempts, etc.⁷ Thus, the

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¹ Ilina Cenevska, *The European Atomic Energy Community in the European Union Context: The 'Outsider' Within* (Brill Nijhoff 2016).

² Anna Södersten, *Euratom at the Crossroads* (Edward Elgar 2018).

³ See Athanase Popov, 'Ilina Cenevska: The European Atomic Energy Community in the European Union Context: The 'Outsider' Within' (2019) 56 *Common Market Law Review* 296, Jakub Handrlica, 'Anna Södersten: Euratom at the Crossroads' (2019) 11 *European Journal of Legal Studies* 143.

⁴ Rasa Engstedt, *Euratom: The Treaty and the Competences of the Community* (University of Eastern Finland 2020).

⁵ Theo W. Vogelaar, 'Euratom: de vergeten gemeenschap' (1967) 8 *Nieuw Europa: maandblad van de Europese Beweging in Nederland* 14.

⁶ Jaroslav G. Polach, *Euratom: Its Background, Issues and Economic Implications* (Oceana Publications 1964).

⁷ Donald W. Allen, 'The Euratom Treaty, Chapter VI: New Hope or False Dawn?' (1983) 20 *Common Market Law Review* 473, Darryl A. Howlett, *EURATOM and*

three recently published books – all of which are based on academic dissertations – clearly illustrate that the Euratom Community still represents a fertile ground for legal scholarship.

While Cenevska mainly addressed issues of environmental law, Södersten focused on the legal implications of the continued separate existence of the Euratom within the European Union (EU). Both authors correctly argued that even six decades after its establishment, Euratom still remains a kind of *terra incognita* for a majority of recent scholars of EU law.⁸ Consequently, Engstedt is not bringing owls to Athens in publishing her new book, which is devoted exclusively to the problem of competences of the Euratom Community. On the contrary, her study analyses the topic from a perspective which has not been comprehensively addressed by a single book since the publication of a 1958 commentary edited by Jacques Errera.⁹

The importance of her work is clear, given the ongoing discussion of the competences within the EU. In fact, since the signing of the Lisbon Treaty, the EU's competences have been a high-profile and much-researched subject.¹⁰ By contrast, very little research has been done on the competences

Nuclear Safeguards (Palgrave Macmillan 1990), Christiane True, 'Energierrecht, Gesundheitsschutz und Umweltschutz und die Position der Euratom nach dem Verfassungsentwurf des Konvents' (2004) *Juristenzeitung* 779, Nuria Prieto Serrano, 'Wakening the Serpent: Reflections on the Possible Modification of the Euratom Treaty' (2006) 1 *International Journal of Nuclear Law* 14, Christiane True, 'The Euratom Community Treaty's Prospects at the Start of the New Millenium' (2006) 1 *International Journal of Nuclear Law* 247, Sebastian Wolf, 'Zur Zukunft des Euratom-Vertrags' (2006) 29 *Integration* 297, Anna Södersten, 'Brexite, Euratom und Nuclear Proliferation' (2016) 98 *Nuclear Law Bulletin* 47 etc.

⁸ Cenevska (n 1) 7, Södersten (n 2) 1.

⁹ Jacques Errera et al., *Euratom: Analyse et Commentaires du Traité* (Librairie Encyclopédique 1958).

¹⁰ See, for example, Lucia S. Rossi, 'Does the Lisbon Treaty Provide for a Clearer Separation of Competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012), Loïc Azoulay, 'Introduction: The Question of Competence' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014), Robert Schütze, 'EU Competences: Existence and Exercise' in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), Timothy Roes, 'The Question of

of Euratom; where Euratom has been mentioned, the focus has been primary on the comparison with the competencies of the EU.¹¹ Engstedt herself began her research in this area with a paper on mutual relations between the competences of the EU and the Euratom Community.¹²

Engstedt devotes her study exclusively to the competences of the Euratom Community.¹³ She further elaborates the goal of the study into three specific objectives (p. 22): (1) to analyse the scope, content and exercise of the competences with respect to (a) the wording of the Euratom Treaty, (b) the extent to which these competences have been used in secondary legislation, and (c) the case-law of the Court of Justice of the European Union (CJEU); (2) to evaluate relations, similarities and differences between the respective competences by using a systematic comparative analysis; and (3) to systematise the competences of the Euratom Community.

In order to address these objectives, Engstedt divides her study into two major parts. The first part deals with the evaluation and general aspects of Euratom's competences (pp. 25-52). After outlining the meaning of 'competence', the author analyses the objectives and tasks of the Community as provided by the Euratom Treaty. Here, Engstedt further addresses the thorny issue of the (in)applicability of the legal regime, as established under the Euratom Treaty, vis-à-vis defence (military) installations operated within

Competence in the European Union' (2015) 40 *European Law Review* 946, Sacha Garben, 'Confronting the Competence Conundrum' (2015) 35 *Oxford Journal of Legal Studies* 55.

¹¹ See, for example, Thomas F. Cussack, 'A Tale of Two Treaties: an Assessment of the Euratom Treaty in Relation to the EC Treaty' (2003) 40 *Common Market Law* 177, 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).

¹² Rasa Ptasekaite, *The Euratom Treaty vs. Treaties on the European Union: limits of competence and interaction* (Swedish Radiation Safety Authority 2011).

¹³ To define 'competence', Engstedt refers (p. 15) to Gerard Conway, *EU Law* (Routledge 2015) 259. Conway defines the term as 'the ability or capacity of a natural, legal person or institution to do something that is legally binding or has some legally valid effect.'

the territory of the Euratom Community.¹⁴ The author argues that while 'the Commission has interpreted the provisions of the Euratom Treaty as creating Euratom competences in the military applications, the Court has concluded that activities falling within the military sphere are outside the scope of the Euratom Treaty' (p. 45). However, the CJEU has also stated that this

finding does not by any means reduce the vital importance of the objective of protecting the health of the public and the environment against the dangers related to the use of nuclear energy, including for military purposes. In so far as the EAEC Treaty [Treaty establishing the European Atomic Energy Community] does not provide the Community with a specific instrument in order to pursue that objective, it is possible that appropriate measures might be adopted on the basis of the relevant provisions of the EC Treaty [Treaty establishing the European Community].¹⁵

The author does not address this possibility of governing safety issues relating to nuclear military installations by the means of EU law.

In the first part of the study, the author finally turns her attention to the 'flexibility' clause provided in Article 203 of the Euratom Treaty.¹⁶ This provision has attracted attention since the establishment of the Euratom Community.¹⁷ Engstedt not only provides a very detailed analysis of the secondary legislation enacted on the basis of this provision, but also a precise overview of the applicable case law of the CJEU. The 'flexibility' clause has been used several times in the past as a legal basis for secondary legislation in those cases where the EU and Euratom Community share competences.¹⁸ In

¹⁴ This particularly concerns two Member States (France and the United Kingdom), which operate nuclear military installations in their territory (e.g. military research reactors, installations serving for refuelling of nuclear submarines etc).

¹⁵ C-65/04 *Commission v United Kingdom* EU:C:2006:161, para 28.

¹⁶ '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 See Hugo J. Hahn, 'Euratom: The Conception of an International Personality' (1958) 71 *Harvard Law Review* 1040. Hahn refers to Article 203 as an 'extension' clause.

¹⁸ See, for example, Council Regulation (EC, Euratom) No 480/2009 of 25 May 2009 establishing a Guarantee Fund for external actions, OJ L 145, 10.6.2009, 10-14.

only the rarest instances is Article 203 of the Euratom Treaty the sole legal basis for a secondary legal act. In this context, Engstedt presents Regulation (Euratom) No 237/2014, which establishes an Instrument for Nuclear Safety Co-operation to finance measures supporting the promotion of high level of nuclear safety in third countries, as a unique example of a secondary legislation based solely on Article 203 (pp. 48-52).¹⁹ The author also briefly mentions other existing proposals to use this provision as a legal basis for further legislative initiatives, e.g. in the area of nuclear liability.²⁰ In this way, Engstedt gives a comprehensive account of the 'flexibility' clause, which has been addressed only partially in the legal literature so far.²¹ However, the proposal discussed, namely to use the 'flexibility' clause for facilitating the field of nuclear liability within the Euratom Community, is already a decade old. The analysis would therefore have benefitted from a more up-to-date evaluation of the provision's prospective usage.

The second part of the book addresses the specific competences provided by the Euratom Treaty: promotion of research (pp. 53-72), dissemination of information (pp. 73-82), health and safety (pp. 83-111), investments (pp. 113-122), joint undertakings (pp. 123-132), nuclear supplies (pp. 134-156), safeguards (pp. 158-172), property ownership (pp. 173-179), nuclear common market (pp. 180-193) and external relations (pp. 194-215). With respect to the three specific objectives outlined in the introduction, Engstedt proposes a systematisation of the respective competences of the Euratom Community.

Firstly, with respect to the scope of the competences as provided directly by the Euratom Treaty, the author argues (pp. 217-223) for their classification based on either (a) the legislative amendment procedure or (b) the level of regulatory detail in the provisions of the Euratom Treaty.²² When applying the second criterion, Engstedt argues that three groups of competencies can be identified: (a) those in respect of which the level of regulatory detail in

¹⁹ Council Regulation (Euratom) No 237/2014 of 13 December 2013 establishing an Instrument for Nuclear Safety Cooperation, *Of L* 77, 15.3.2014, 109-116.

²⁰ See Jakub Handrlica, 'Harmonisation of Nuclear Liability in the European Union: Challenges, Options and Limits' (2009) 84 *Nuclear Law Bulletin* 45.

²¹ For example, Cenevska (n 1) 70, Prieto Serrano (n 7) 14.

²² The amendment procedure can be realised either through the ordinary revision procedure, as provided by the Treaty on European Union or through the special amendment procedure, as provided by the Euratom Treaty

primary law is fully appropriate;²³ (b) those in respect of which the level of regulatory detail in primary law is generally appropriate, but where certain improvements could be recommended;²⁴ and (c) those in respect of which the primary law regulation may be considered too detailed.²⁵ With respect to this classification, the question arises whether to place the competences of the Euratom Community in the field of nuclear supplies in the first category. These competences have never been executed by the Euratom Community, as foreseen in the provisions of primary law.²⁶ On the contrary, a simplified, so-called 'co-signing' procedure has in practice been used for decades regarding supply of nuclear ores from third countries. Given this contrast between the procedure foreseen in the Euratom Treaty and the standard procedure used in the practice by the Community and its Member States, one might doubt whether this area really belongs with those where the level of regulatory detail in primary law is fully appropriate, as the author suggests.

Secondly, the author proposes a classification based on how the existing competences were exercised in secondary legislation (pp. 223-230). Analysing the topic from this viewpoint, the author argues that two analytical approaches can be applied. On the one hand, a quantitative approach may be used. Here, the competences can be classified as: (a) those used to a great extent by the Euratom Community to enact secondary legislation²⁷ and (b) those used only to a limited extent.²⁸ Concerns might be raised here regarding the methodology. While the author announces at the beginning of the section that the principal focus will be on secondary legislation (p. 223), international agreements concluded by the Euratom Community are also taken into consideration (pp. 224-225). Engstedt further proposes a

²³ In this category, the author placed the competences in the fields of research, investments, joint undertakings, nuclear supplies, safeguards and external relations.

²⁴ Health and safety, property ownership and nuclear common market.

²⁵ Dissemination of information.

²⁶ See Allen (n 7) 473 and André Bouquet, 'How Current are Euratom Provisions on Nuclear Supply and Ownership in View of the European Union's Enlargement?' (2001) 68 Nuclear Law Bulletin 7.

²⁷ The author argues that the competences in the area of safety and health and in the area of external relations belong to this category.

²⁸ Dissemination of information, joint undertakings, nuclear supplies and property ownership.

classification of competences based on whether they were executed in accordance with the way in which they were drafted in the Euratom Treaty. In this respect, the author argues for three different groups of competences: (a) those which have been executed in a narrower way, namely that provided by primary law;²⁹ (b) those which were executed in accordance with the wording of the Euratom Treaty;³⁰ and (c) those which were executed in a broader manner than primary law foresees (p. 228). The secondary legislation enacted based on the chapter on health and safety, which currently covers the field of safety of nuclear installations, is included in the latter category. While one might agree with the last category, certain doubts might be expressed about adding the provisions on external relations into the second one. The enactment of secondary legislation in the field of nuclear safety was the direct consequence of adherence by the Euratom Community to the Convention on Nuclear Safety in 2000. Given that both the adherence of Euratom to this Convention and the secondary legislation concern the area of nuclear safety, it would seem logical to place both areas of competence into a single category.

Reflecting on the analysis provided vis-à-vis the respective competences, the last section of the Engstedt's book tackles the question of Euratom's 'immunity' to any substantial changes (pp. 236-240). The Euratom Treaty has not undergone any substantial modification since its adoption, having even managed to evade the amendments provided by the Lisbon Treaty.³¹ The 'Euratom Treaty's notorious resistance to change' has had a mixed reception among legal scholars.³² Several authors have expressed criticism regarding

²⁹ Dissemination of information.

³⁰ Investments, joint undertakings, nuclear common market and external relations.

³¹ The Euratom Treaty was, however, 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.

³² Cenevska (n 1) 1.

these developments.³³ The general argument made is that several provisions of the Euratom Treaty have become obsolete or inapplicable in the current circumstances due to the lack of any substantive amendments since the 1960s. On the other hand, other authors have taken a more positive stance towards Euratom, pointing out the increasing importance of the Community in the areas of nuclear safety, environmental protection, and international relations.³⁴ Concerning the strengths and effectiveness of its legal framework, Euratom is viewed as one of the most effective regional energy communities.³⁵ Euratom has also been presented as a potential model for other regional nuclear communities.³⁶

In light of this difference of opinion in the current literature, Engstedt's book offers clear added value in its conclusions, compared to the two other recently published monographs on Euratom. Cenevska called for a

³³ See, among others, Allen (n 7) 473 (referring to Euratom as a 'Chinese girl-child, exposed after birth because the parents did not want it to live'), Prieto Serrano (n 7) 14 (referring to Euratom as a 'dormant serpent'), Sellarés Sella (n 11) 112 (describing Euratom as an 'invisible').

³⁴ For this line of argumentation, see Werner Schröder, 'Die Euratom: Auf dem Weg zu einem Umweltgemeinschaft' (1995) *Deutsches Verwaltungsblatt* 322. Jürgen Grünwald, 'Der Euratom-Vertrag: nie war er so wertvoll wie heute' (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 481, 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) and more recently Jakub Handrlica, 'The Splendid Durability of the Provisional: A Tribute to Euratom' (2018) 14 *Croatian Yearbook of European Law & Policy* 161.

³⁵ See Jakub Handrlica, 'Nuclear Law Revisited as an Academic Discipline' (2019) 12 *Journal of World Energy Law and Business* 62.

³⁶ See Grégoire Mallard, 'Can the Euratom Treaty inspire the Middle East? The Political Promises for Regional Nuclear Communities' (2008) 15 *Nonproliferation Review* 459, Mustafa Kibaroglu, 'Managing the Atom in the Middle East: Hints from the Euratom Experience', Policy Paper 2013/20, Robert Schuman Centre for Advance Studies (EUI 2013), Grégoire Mallard and Paolo Foradori, 'The Middle East at a Crossroads: How to Face the Perils of Nuclear Development in a Volatile Region', Policy Brief 2013/06, Robert Schuman Centre for Advance Studies (EUI 2013).

'rejuvenation' of Euratom,³⁷ while Södersten argued that Euratom is 'at a crossroad'.³⁸ By contrast, Engstedt argues (pp. 239-240) that

the stagnation of the Euratom Treaty and the fact that the substantive law contained in this primary legal act has never undergone amendment has not had a significant effect on the Euratom Community's system of competences [...] This study has established that, in general, the Euratom Community and its competences have stood the test of time.

Given the contribution the Euratom Community has made in the last decades through its secondary legislation in the areas of nuclear safety and environmental protection, one can fully support this conclusion.

Overall, Engstedt's book represents a valuable contribution to the renewed academic discourse on the Euratom Community. The book is based on profound, deep and long-lasting scientific research on the existing sources and their subsequent analysis. The author succeeded in her goal of providing a comprehensive analysis of the competences of the Community and of proposing a systematic classification of these competences. Consequently, I believe that the study will become a much-used reference work on Euratom's competences in the coming decades. A final observation is to be made: while for decades this area was dominated by male professionals, all three recently published monographs on the topic were written by women. Engstedt has thus also contributed to the 'feminisation' of the discourse on the Euratom Community.

³⁷ Cenevska (n 1) 31.

³⁸ Södersten (n 2) 235. For a critical response of this argument, see Handrlica (n 3) 150.