



EUROPEAN PARLIAMENT

2009 - 2014

*Committee on Legal Affairs
The Chair*

25.2.2013

Mrs Amalia Sartori
Chair
Committee on Industry, Research and Energy
BRUSSELS

Subject: Opinion on the legal basis of the Nuclear decommissioning assistance programmes in Bulgaria, Lithuania and Slovakia
(COM(2011)0783 – C7-0514/2011 – 2011/0363(NLE))

Dear Madam Chair,

By letter of 11 December 2012, you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to consider the possible addition of a legal basis to the above proposal for a Council Regulation.

The legal basis proposed by the Commission is Article 203 of the Treaty establishing the European Atomic Energy Community (hereinafter "the Euratom Treaty"), the so-called "flexibility clause", which is to be used only when action is necessary to attain one of the objectives of that Community and the Euratom Treaty has not provided the necessary powers.

Amendments tabled to the draft report in ITRE seek to add Protocol No 4 to the 2003 Act of Accession, on the Ignalina nuclear power plant in Lithuania, to the legal basis. This Protocol makes a reference to Article 56 of the 2003 Act of Accession for the adoption of Community assistance measures for the decommissioning of Ignalina.

You ask in your letter whether it would be appropriate to change the legal basis of the proposal in the light of its aim and content.

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I - Background

In the accession negotiations, Bulgaria, Lithuania and Slovakia made a commitment to close a number of nuclear reactors, and in return the EU committed itself to provide financial assistance for the decommissioning of these reactors, respectively the Kozloduy, Ignalina and Bohunice Programmes. According to estimates provided by the three Member States in 2011, substantial financial resources in addition to what has already been provided by the EU will be required to complete the decommissioning of the plants in a safe manner.

The proposal therefore foresees an extension of financial support from the Union by repealing the three Regulations by which the three different assistance programmes had been set up, and contain the continued dispersal of assistance for the period 2014-2020 in one single programme.

II - Relevant Treaty Articles

The following Article of the Euratom Treaty is presented as the legal basis in the Commission proposal:

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.

Protocol No 4 to the 2003 Act of Accession, on the Ignalina nuclear power plant in Lithuania, which is proposed to be added to the legal basis, includes the following pertinent Article (operative parts highlighted):

Article 3

1. Recognising that the decommissioning of the Ignalina Nuclear Power Plant is of a long-term nature and represents for Lithuania an exceptional financial burden not commensurate with its size and economic strength, the Union shall, in solidarity with Lithuania, provide adequate additional Community assistance to the decommissioning effort beyond 2006.

2. The Ignalina Programme will be, for this purpose, seamlessly continued and extended beyond 2006. Implementing provisions for the extended Ignalina Programme shall be decided in accordance with the procedure laid down in Article 56 of the Act of Accession and enter into force, at the latest, by the date of expiry of the current Financial Perspective.

3. [...]

4. For the period of the next Financial Perspectives, the overall average appropriations under the extended Ignalina Programme shall be appropriate. Programming of these resources will be based on actual payment needs and absorption capacity.

Article 56 of the 2003 Act of Accession has the following wording:

Article 56

Unless otherwise stipulated, the Council, acting by a qualified majority on a proposal from the Commission, shall adopt the necessary measures to implement the provisions contained in Annexes II, III and IV referred to in Articles 20, 21 and 22 of this Act.

III - The proposed legal bases

Article 203 of the Euratom Treaty may only be used where action by Euratom should prove necessary to attain one of its objectives and the Euratom Treaty has not provided the necessary powers. The Council acts unanimously and the Parliament is consulted.

Article 3 of Protocol No 4 to the 2003 Act of Accession provides that implementing provisions for the extended Ignalina Programme shall be decided in accordance with the procedure laid down in Article 56 of the Act of Accession. Under that procedure, the Council acts by a qualified majority and there is no role for the Parliament.

IV - Case-law on legal basis

It is settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act at stake.

In this case, it therefore has to be established whether the proposal either:

1. pursues a twofold purpose or has a twofold component, and one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental; or
2. simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other.

According to the case law of the Court of Justice, in the first case the act must be based on a single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act will have to be founded on the various corresponding legal

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] E.C.R. I-7585.

bases.¹

V. Aim and content of the proposed regulation

The aim of the proposal, according to Articles 1 and 2, is to establish an assistance programme for the period 2014-2020 laying down rules for the implementation of the EU's financial support for measures connected with the decommissioning of the Kozloduy, Ignalina and Bohunice nuclear power plants in order to assist the Member States concerned to reach an irreversible state for the plants while keeping the highest level of safety. Technical objectives for the three programmes in this respect are also specified.

Article 3 of the proposal contains specific provisions concerning the budget for the three programmes, whereas Article 4 sets out the conditionalities which have to be fulfilled for financial assistance to take place. Article 5 sets out the forms of implementation which shall be used in accordance with the Financial Regulation, and Article 6 requires the Commission to adopt annual work programmes and detailed implementation procedures. Article 7 contains provisions concerning the protection of the EU's financial interests and Articles 8 to 12 set out final provisions on evaluation, committee procedure, transitional provisions, the repeal of the legal acts containing the previous programmes and entry into force.

The main purpose of the proposal is therefore to replace the three legal acts for the existing programmes, which all lapse at the end of 2013, with one legal act for the period 2014-2020, which corresponds to the upcoming multiannual financial framework.

VI. Institutional background

Whereas the legal act for the Ignalina Programme was adopted on the basis of Protocol No 4 and Article 56 of the 2003 Act of Accession², which provides for financial assistance to at least 2013, the legal acts for the two other programmes were based on Article 203 of the Euratom Treaty, since the 2003 Act of Accession only provided for financial assistance to Slovakia until 2006 and Bulgaria would only receive assistance until 2009 under the 2005 Act of Accession³.

The Council is therefore suggesting splitting the proposal into two instruments: one for the Ignalina Programme and one for the other two programmes, and retaining the separate legal bases used for the legal acts for the existing programmes.⁴ This suggestion is based on the opinion of the Council Legal Service⁵, in which it basically argues that Protocol No 4 and Article 56 of the 2003 Act of Accession must be retained for the Ignalina Programme post-2013 since the wording and logic of Article 3 of Protocol 4 sets no limit for the programme to a certain period of time. According to the Council, there is consequently an existing legal basis for the EU to provide financial assistance for the Ignalina Programme and that would

¹ See Case C-411/06, cited above, paras. 46-47.

² Council Regulation (EC) No 1990/2006 (OJ L 411, 30.12.2006, p. 10).

³ Council Regulation (Euratom) No 549/2007 (OJ L 131, 23.5.2007, p. 1) and Council Regulation (Euratom) No 647/2010 (OJ L 189, 22.7.2010, p. 9)

⁴ See the letter of 26 July 2012 from the Secretary-General of the Council to President Schulz.

⁵ See Council document 9526/12.

therefore preclude the use of the flexibility clause set out in Article 203 of the Euratom Treaty.

It could also be noted that although Parliament would not be consulted under the legal basis suggested by the Council for the Ignalina Programme, the Council has maintained consultation on a voluntary basis, and Parliament would consequently be consulted on both the suggested legal acts.

The Commission, backed by the Legal Service of Parliament¹, does not however agree with the position of the Council and maintains that Protocol No 4 only covers the period up to the end of the current financial perspective, until the end of 2013, and they therefore argue that Article 203 of the Euratom Treaty must provide the legal basis for the continuation thereafter of all three programmes.

VII - Determination of the appropriate legal basis

The three programmes all have the same purpose: to lay down the rules for the implementation of assistance intended for the final closure of nuclear power plants. The proposal can therefore not be said to have a twofold purpose or component of which one is predominant, thus requiring a single legal basis. Since it attempts to join three programmes from three different legal acts with different legal basis into one, it does instead have several components that are indissociably linked, warranting a joint legal basis.

The choice of the correct legal basis in this case ultimately comes down to whether one considers that there is potentially no time limit for the provision of financial assistance under Protocol No 4, or that it does not extend to the period beyond 2013. In the latter case, there would be no necessary power provided by the Treaty, and Article 203 would thus have to be used as the legal basis for all three programmes.

Taking into account that Protocol No 4 does not include a stated end date for the financial assistance to be provided, as opposed to what was the case concerning the Slovak and Bulgarian plants, but rather states in its Article 3(2) that the programme will be "seamlessly continued and extended beyond 2006", and since its Article 4 talks of "the next financial perspectives" (in plural), it is difficult to draw the conclusion that this Protocol was intended to be limited in time. Against this background, the more likely conclusion is that the intention of the Protocol was to provide for the possibility of making financial assistance available for as long as it was needed in order to decommission the nuclear power plant in a safe manner.

Protocol No 4 is therefore not limited in time and may be used as a legal basis for a decision in the Council to continue the Ignalina Programme. Since the legal bases in the Acts of Accession for the other two programmes have lapsed, the continuation of those programmes will however have to be decided on by the Council under Article 203 of the Euratom Treaty.

These two legal bases are however in any event not compatible since Article 203 of the Euratom Treaty provides for unanimity in the Council, whereas Protocol No 4 and Article 56

¹ See the note of 14 January 2013 from the Legal Service, SJ-0716-12.

of the 2003 Act of Accession provide for a qualified majority decision in the Council. They can therefore not be combined into a conjoined legal basis.

The legal basis for continued financial assistance for the Ignalina Programme would therefore have to be Protocol No 4 and Article 56 of the 2003 Act of Accession, whereas it would have to be Article 203 of the Euratom Treaty for the Kozloduy and Bohunice Programmes.

VIII - Conclusion and recommendation

In light of the foregoing analysis Protocol No 4 and Article 56 of the 2003 Act of Accession may not be added to Article 203 of the Euratom Treaty to form the legal basis for the proposal.

In order to adopt a decision in the Council on continued assistance under the three programmes, the proposal has to be split as proposed by the Council, and the Ignalina Programme made the subject of a legal act separate from the other two programmes, based on Protocol No 4 and Article 56 of the 2003 Act of Accession. The resulting second act, for the Kozloduy and Bohunice Programmes, would however have to be based on Article 203 of the Euratom Treaty.

The splitting of the proposal into two legal acts would however not affect the prerogatives of the Parliament in this specific case, since consultation would be maintained on a voluntary basis by the Council.

At its meeting of 21 February 2013 the Committee on Legal Affairs accordingly decided, by 14 votes in favour and 1 against¹, to recommend to you as follows: Protocol No 4 and Article 56 of the 2003 Act of Accession constitute the proper legal basis for continued assistance under the Ignalina Programme and Article 203 of the Euratom Treaty constitutes the proper legal basis for continued assistance under the Kozloduy and Bohunice Programmes.

Yours sincerely,

Klaus-Heiner Lehne

¹ The following were present for the final vote: Evelyn Regner (acting Chair), Raffaele Baldassarre (Vice-Chair), Françoise Castex (Vice-Chair), Francesco Enrico Speroni (rapporteur), Luigi Berlinguer, Piotr Borys, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Eva Lichtenberger, Antonio López-Istúriz White, Bernhard Rapkay, József Szájer, Alexandra Thein, Rainer Wieland, Tadeusz Zwiefka.