



EUROPEAN PARLIAMENT

2009 - 2014

*Committee on Legal Affairs
The Chair*

21.3.2014

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

Subject: Opinion on the legal basis of the proposal for a Council directive amending Directive 2009/71/EURATOM establishing a Community framework for the nuclear safety of nuclear installations (COM(2013)0715 – C7-0385/2013 – 2013/0340(NLE))

Dear Madam Chair,

By letter of 21 February 2014 you asked the Committee on Legal Affairs pursuant to Rule 37 of the Rules of Procedure, to give its opinion on the appropriateness of changing the legal basis of a proposal for a Council directive amending Directive 2009/71/EURATOM establishing a Community framework for the nuclear safety of nuclear installations (COM(2013)0715).

I. Background

On 17 October 2013 the Commission published a proposal for a Council directive amending Directive 2009/71/EURATOM establishing a Community framework for the nuclear safety of nuclear installations. The proposal amends Council Directive 2009/71/EURATOM of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations¹. The legal basis of the proposal is Chapter 3 of the Treaty establishing the European Atomic Energy Community, and in particular Article 31 and 32 thereof.

¹ OJ L 172, 2.7.2009, p.18.

The draft report of the Committee on Industry, Research and Energy (rapporteur, Romana Jordan) is scheduled for adoption in the ITRE Committee on 18 March with a view to enabling Parliament to adopt its position in the April plenary session. A number of amendments have been tabled to the draft report which seek to modify the legal basis of the proposal by replacing the reference to Articles 31 and 32 of the Euratom Treaty by a reference to the Treaty on the Functioning of the European Union (TFUE) and in particular Articles 153, 191 and 192 thereof as legal bases for the Directive.

By letter of 21 February 2014 the Chair of the Committee on Industry, Research and Energy has requested the opinion of the Committee on Legal Affairs pursuant to Rule 37 of the Rules of Procedure on the correct legal basis for the proposed directive.

II. The proposal

The proposal refers to the Fukushima nuclear accident in Japan in 2011 and the renewed attention paid worldwide to measures needed to minimise the risk of nuclear accidents and improve nuclear safety, as well as to the 'stress tests' carried out in order to have comprehensive risk and safety assessments of nuclear power plants in the European Union.

The main elements of the proposal are as follows:

- Ensuring the avoidance of radioactive releases during all stages of the lifecycle of nuclear installations (siting, design, construction, commissioning, operation, decommissioning).
- Criteria and requirements to guarantee the effective independence of regulators, including ensuring effective independence in decision-making, own appropriate budget allocations and autonomy in implementation, requirements for the appointment and dismissal of staff, avoidance and resolution of conflicts of interests, and staffing levels with the necessary qualifications, experience and expertise.
- The proposal provides that both the competent regulatory authority and the licence holder are required to develop a transparency strategy, which covers information provision under normal operating conditions of nuclear installations as well as communication in case of accident or abnormal event conditions. The role of the public is emphasised through the requirement that it effectively participates in the licensing process of nuclear installations.
- The introduction of general safety objectives for nuclear installations and laying down more detailed provisions for different life-cycle phases of nuclear installations, including methodological requirements concerning the siting, design, construction, commissioning, operation and decommissioning of nuclear installations.
- An on-site emergency response centre is required for a nuclear installation, sufficiently protected against the effects from external events and severe accidents, including radiological ones, and equipped with the necessary material to mitigate the effects of severe accidents.
- New provisions are set out on self-assessments and peer-reviews of nuclear installations based on nuclear safety topics selected by the Member States jointly and in close coordination with the Commission.

III. The amendments to the draft report

There are, first of all, amendments tabled to the draft report in ITRE which explicitly seek to change the legal basis of the proposed Directive and its institutional character. Thus, amendment 33 by Kathleen Van Brempt and Teresa Riera Madurell and amendment 34 by Michèle Rivasi and Corinne Lepage seek to change the title of the Directive from a Council Directive to a Directive of the European Parliament and the Council.

Concretely, amendment 35 by the first mentioned authors seeks to change the legal basis by replacing the references made in Citation 1 to Articles 31 and 32 of the Euratom Treaty by a reference to Articles 191 and 192 TFEU, whereas amendment 36 to Citation 1 by the second two authors mentioned above proposes Articles 191, 192 and 153 as legal bases for the Directive. One could also mention amendment 85 by Bernd Lange, which advocates the Treaty on the Functioning of the European Union as the appropriate legal basis for the Directive.

Amendments have also been tabled with a view to adapting the procedure for the adoption of the Directive to suit the changed legal bases. Thus, amendments 37 and 38 to Citation 2 would delete the reference to the opinion of a committee of experts, designated by the scientific and technical committee among scientific experts of the Member States, which is an obligatory requirement under the Euratom Treaty, while amendment 39 to Citation 3 refers to the ordinary legislative procedure for the adoption of the Directive itself.

Further amendments have been tabled which can be conceived of as seeking to change the content of the Directive in line with the proposed alternative legal bases. Amendments 40 (recital 4a new) and 41 (recital 4b new) refer to the transparency and public participation requirements of the Aarhus Convention; to which the European Union, but not the European Atomic Energy Community, is a party.

Amendment 42 to recital 1 seeks to change the definition of the objectives to correspond to the amendment by the same authors seeking to introduce the environment articles of the TFEU as the legal basis for the Directive. The amendment would replace the reference in the proposal to the establishment of safety norms for the public and workers pursuant to Article 2(b) of the Euratom Treaty by a reference to Article 191 TFEU and a definition of the objectives of the Directive which corresponds to the objectives of Article 191 TFEU.

Similarly, amendment 44 to recital 2 would base the norms for the protection of the health and safety of the public and workers on Article 153 TFEU. Amendment 43 (recital 1a new) can also be mentioned, as it calls for nuclear energy to be treated as an energy source "on the same basis as other energy sources" under the TFEU.

The Members who tabled the amendments seeking to change the legal basis and the definition of the objectives of the Directive have also tabled amendments to the articles, which could be considered to support the choice of the proposed alternative legal bases. Among these the following could be mentioned:

- amendment 89 to Article 1, paragraph 1 - point a (new) of the proposal, which would replace

the terminology of the Euratom Treaty as regards the purpose of the Directive, adding a reference to the environment and requiring the protection of the public, workers and the environment from "any risk" of radiation from nuclear installations;

- amendment 132 to Article 1, paragraph 1 - point 9, which would require conformity with the Aarhus Convention as regards, notably, public participation, and amendments 152 and 165 to Article 1, paragraph 1 - point 10, which would replace two references to "air water and soil" taken from the Euratom Treaty by a reference to "the environment";

- amendment 164 to Article 1, paragraph 1 - point 10, adding a new subparagraph according to which licence holders would be required to "authorise, permit and favour" the participation of the public and of non-governmental organisations concerned by nuclear safety in the required 'on-site emergency preparedness and response' activities and amendment 181 to Article 1, paragraph 1 - point 11, which would provide for a central role for governmental organisations in the procedure for selecting specific themes connected to the verification of the safety of nuclear installations.

VI. The proposed legal bases

a) The original legal basis of the proposal

The Commission proposal is based on Articles 31 and 32 of the Euratom Treaty (Title II Chapter 3: Health and Safety), which read as follows:

Article 31

The basic standards shall be worked out by the Commission after it has obtained the opinion of a group of persons appointed by the Scientific and Technical Committee from among scientific experts, and in particular public health experts, in the Member States. The Commission shall obtain the opinion of the Economic and Social Committee on these basic standards.

After consulting the European Parliament the Council shall, on a proposal from the Commission, which shall forward to it the opinions obtained from these Committees, establish the basic standards; the Council shall act by a qualified majority.

Article 32

At the request of the Commission or of a Member State, the basic standards may be revised or supplemented in accordance with the procedure laid down in Article 31.

The Commission shall examine any request made by a Member State.

Basic standards referred to in Article 31 are defined in Article 30 of the Euratom Treaty which reads as follows:

Article 30

Basic standards shall be laid down within the Community for the protection of the health of workers and the general public against the dangers arising from ionizing radiations.

The expression 'basic standards' means:

- (a) maximum permissible doses compatible with adequate safety;*
- (b) maximum permissible levels of exposure and contamination;*
- (c) the fundamental principles governing the health surveillance of workers.*

b) The legal bases proposed in amendments

The amendments seeking to change the legal basis propose Articles 191 and 192 TFEU on the protection of the environment, as well as Article 153 on social policy as legal bases. The articles read as follows:

Article 191

(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.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,*
- environmental conditions in the various regions of the Union,*
- the potential benefits and costs of action or lack of action,*
- the economic and social development of the Union as a whole and the balanced development of its regions.*

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Article 192

(ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to

achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

3. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

— temporary derogations, and/or

— financial support from the Cohesion Fund set up pursuant to Article 177.

Article 153

(ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

— shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,

— shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

V. The case law

It is settled case law that the choice of the legal basis for a Union measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure². Subjective factors, such as the conviction of an institution as to the objective pursued are not relevant in this connection.³

In principle, a measure is to be founded on only one legal basis. A dual legal basis can be used

² Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

³ See, for instance, Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585, para. 45 and the case-law cited therein.

only if a measure simultaneously pursues a number of objectives or has several linked components, without one being secondary and indirect in relation to the other,⁴ subject to the condition that the procedures laid down for each legal basis are not incompatible.⁵

VI. Analysis of the proposal and the amendments tabled to it

a) the proposal

As the Parliament's Legal Service notes in its opinion, the question of the legal basis of the Commission's proposal was raised on the own-initiative of the Committee on Legal Affairs during the procedure for the adoption of Council Directive 2009/71/EURATOM. At that time the Legal Service, in a note dated 10 February 2009, concluded that Articles 31 and 32 Euratom Treaty were the appropriate legal basis for the proposal. At its meeting of 31 March 2009, the Committee on Legal Affairs decided, by 13 votes in favour, 6 votes against and no abstentions, to recommend that same conclusion.

The Legal Service concludes that there are "no elements that would call for a change of legal basis, since the aim is still linked to an improvement of nuclear safety". The Legal Service refers also to the judgments in Case C-70/88⁶, where the Court held that the purpose of those articles was to ensure consistent and effective protection of the health of the general public against the dangers arising from ionising radiations, whatever their source, and in Case C-29/99⁷, which concerned the accession of the European Atomic Energy Community to the Nuclear Safety Convention.

However, it is, nevertheless, worth noting that the entry into force of the Lisbon Treaty brought some changes to the relationship between the Euratom Treaty and the Treaties of the Union, notably the abrogation of Article 305 of the EC Treaty, according to which the EC treaty was to be "without prejudice" to the Euratom Treaty and the introduction of Article 106(a) in the Euratom Treaty, which states that the Union Treaties "may not derogate " from the Euratom Treaty, while listing a number of articles of the TEU and TFEU which apply to the EA Treaty.

The consequences of the introduction of Article 194 TFEU on energy has been the subject of an action brought by Parliament against Council, in which the Court concluded that the proposed legislation should have been based on that article and not on Article 337 TFEU and Article 187 Euratom.⁸

The relationship between, on the one hand, the health and safety provisions in the Euratom Treaty and, on the other hand, the provisions on the environment in the TFEU has also been subject to an opinion of the Committee on Legal Affairs, which at its meeting of 6 November 2012 decided, by 22 votes in favour, one against and no abstentions to recommend that the appropriate legal basis for the proposal for a directive of the European Parliament and of the

⁴ Case C411/06 *Commission v Parliament and Council* [2009] ECR I-07585, para. 47.

⁵ Case C-300/89 *Commission v Council* ("Titanium dioxide") [1991] ECR I-2867, paras 17-25.

⁶ *Parliament v Council* [1991] ECR I-4529, para. 14.

⁷ *Commission v Council* [2002] ECR I-11221.

⁸ See Case C-490/10, *European Parliament v Council*, judgment of 6 September 2012. The Council was supported by the French Republic and the European Commission.

Council laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption should be Article 192(1) TFEU.

It must, however, be noted that those two cases differ from the one at hand. In the former case the question was essentially about the relationship between the Euratom Treaty and the new Article 194 on energy, introduced by the Lisbon Treaty. In the second case general legislation had been adopted on the protection of the health of the general public with regard to polluting substances in water intended for human consumption and the proposed Directive sought to include pollution from radioactive substances into that framework.

As the present proposal would amend an existing directive adopted on the basis of Articles 31 and 32 Euratom it must be concluded that the proposal, as such, has been correctly based on the same articles. The legal basis of the proposal could, thus, only be called in question if the changes proposed to be made by Parliament would change the objective and purpose of the proposal to such an extent that an alternative legal basis would be justified.

b) The amendments

It is clear from the case law referred to above that the mere desire to change the legal basis does not suffice as a justification for such a change. Therefore, it is worth noting that in addition to amendments which directly seek to change the legal basis or concern the institutional qualification of the proposed Directive or the procedural norms for its adoption, amendments have also been tabled, which seek to change the definition of the objectives of the Directive.

Considering first the amendments seeking to introduce Articles 191 and 192 TFEU as the legal basis, amendment 42 to recital 1 is worth noting, as it seeks to change the definition of the objectives of the proposal to correspond to the objectives of Article 191 TFEU.

The amendments that seek to subject the Directive to the Aarhus Convention and the requirements of access to information and the right to public participation under that Convention and in accordance with EU legislation adopted for the purpose of implementing the Convention are also noteworthy. In this context the fact might merit consideration that, while the European Union is a party to the Aarhus Convention, the European Atomic Energy Community is not, as this would seem to raise questions of the compatibility of these provisions with a legal basis in the Euratom Treaty.

As regards the proposal for a double legal basis, combining Articles 191 and 192 TFEU with Article 153 TFEU, it must be noted that fewer elements have been introduced into the content of the proposed Directive than in the case of Articles 191 and 192 alone. Bearing in mind that a multiple legal basis should only be used when distinct objectives are pursued, none of which is clearly dominant, and that the protection of human health is already included among the objectives set in Article 191 TFEU, it does not appear justified to consider Article 153 as a potential legal basis.

Owing to the timing of the vote in the Committee on Industry, Research and Energy,⁹ any

⁹ ITRE voted on 18 March 2014.

conclusions as regards the impact of the amendments tabled to the proposal must, by necessity, be hypothetical, and based on the assumption that they will be adopted.

Bearing in mind that the amendments go further than simply calling for a change of legal basis but also seek to change the objectives of the proposed Directive with a view to aligning it with the protection of the environment under the TFEU and, in particular, to subject nuclear safety measures to the requirements of access to information and public participation under the Aarhus Convention it is, in any case, clear that the authors of the amendments have sought to change the nature of the proposed Directive.

However, this does not necessarily mean that the amendments actually would change the basic purpose and nature of the legal act in question to the extent of justifying the consideration of Articles 191 and 192 as legal bases. Otherwise, the principle of the priority of *lex specialis* would lead to considering Articles 31 and 31 Euratom as the correct legal basis.

It is worth recalling that a multiple legal basis is only possible when these are procedurally compatible. Thus, it would not be possible to combine Articles 31 and 32 Euratom with Articles 191 and 192 TFEU, as under the former Parliament would only be consulted, whereas under the latter adoption would take place in accordance with the ordinary legislative procedure.

It appears that the amendments tabled to the draft report in ITRE seeking to change the legal basis of the proposed Directive and to align it with other legislation in the field of environmental protection have been rejected in the vote in the committee. This does not necessarily make the opinion on the legal basis from JURI irrelevant, as according to Rule 37 amendments seeking to change the legal basis can be tabled to plenary if either the committee responsible or the Committee on Legal Affairs have contested the legal basis of a proposal.

VII. Conclusion

The Committee on Legal Affairs voted against the proposal to change the legal basis to Articles 191 and 192 TFEU by 8 votes in favour, 12 against and no abstentions¹⁰. Accordingly, the original legal basis as proposed by the Commission of Articles 31 and 32 Euratom stands.

Yours sincerely,

Evelyn Regner

¹⁰ The following were present: Paolo Bartolozzi, Luigi Berlinguer, Françoise Castex, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Richard Howitt, Sajjad Karim, Annette Koewius, Eva Lichtenberger, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Evelyn Regner (Acting Chair), Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Axel Voss, Rainer Wieland, Cecilia Wikström.