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**Euratom Before the Court: A Political Theory of Legal Non-Integration\***

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**Abstract:** This paper mainly explores how law-based neo-functionalism can contribute to explain the legal development of the European Atomic Energy Community (EAEC or Euratom) in the last decades. The neo-functionalist approach developed by Burley (Slaughter) and Mattli in the 1990s expects spill-overs because it assumes that subnational actors try to overcome national law in order to pursue their interests by means of preliminary proceedings before the European Court of Justice (ECJ). It also presumes political dynamics as a consequence of a general strategy of the European Commission to widen the scope of the EAEC's and/or its competences by means of actions against member states. By analysing ECJ case law on Euratom, the paper shows that the mechanisms and phenomena highlighted by this particular neo-functionalist approach do not occur in the case of the EAEC. It is concluded that a revised version of law-based neo-functionalism which takes into account, inter alia, context factors such as the interdependence of deregulation and reregulation is likely to have more explanatory power.

**Keywords:** court politics, functionalism, integration theory, intergovernmentalism, negative integration, neo-functionalism, positive integration, regulatory competition, sectoral governance, European law, preliminary rulings, energy policy, founding Treaties, European Court of Justice, ECJ, law, political science

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## 1. Introduction

In 1993, Anne-Marie Burley (Slaughter) and Walter Mattli published their seminal article “Europe Before the Court: A Political Theory of Legal Integration” which obviously strongly influenced the title and content of this paper. Burley/Mattli (1993) and Mattli/Slaughter (1995, 1998) outline a theory of law-based neo-functionalism that intends to explain the spill-over dynamics and constitutionalisation of European integration by combining the neo-functionalist model developed by Haas (1958) and others (see Renner 2009 for additional references) with legal approaches that focus on the more or less hidden political and instrumental power of supranational law.

We find that the independent variables posited by neo-functionalist theory provide a convincing and parsimonious explanation of legal integration. We argue that just as neo-functionalism predicts, the drivers of this process are supranational and subnational actors pursuing their own self-interests within a politically insulated sphere. The distinctive features of this process include a widening of the ambit of successive

legal decisions according to a functional logic, a gradual shift in the expectations of both government institutions and private actors participating in the legal system, and the strategic subordination of immediate individual interests of member states to postulated collective interests over the long term (Burley/Mattli 1993: 43-44).

As a result of the strategic use of the European Union's judicial system by supranational actors (especially the European Commission and the European Court of Justice (ECJ) itself) and subnational actors (e.g. individuals, companies, associations, national courts), the EU's quasi-constitutionalisation (Weiler 1999) has deepened and the scope of policies directly or indirectly influenced by European Community (EC) law has rapidly grown over the last decades:

The evolution of community law also has manifested the substantive broadening typical of functional spill-over. EC law is today no longer as dominantly economic in its character as in the 1960s. It has spilled over into a variety of domains dealing with issues such as health and safety at work, entitlements to social welfare benefits, mutual recognition of educational and professional qualification, and, most recently even political participation rights (Burley/Mattli 1993: 66).

Burley (Slaughter) and Mattli do not discuss whether their argumentation applies to all areas of EU law (Mattli/Slaughter 1998: 184). They confine their analysis to the (former) European Community, as most scholars working on European integration at the intersection of political science and law do (see e.g. Alter 2001; Joerges 2003; Scharpf 2003; Weiler 1999). However, quantitative studies show that the impact of ECJ case law on the member states varies between policy fields (e.g. Conant 2001). Thus, political scientists and lawyers should no longer limit their research to analysing the "European Court's Political Power" (Alter 1996) or the central elements of the "Constitution of Europe" (Weiler 1999). According to Mattli/Slaughter (1998: 206), scholars should rather "address the impact of EU law on European economic, political, and social integration. Such studies must proceed issue area by issue area".

Against this backdrop, this paper deals with a particular field of European integration which is usually disregarded by researchers of nearly all scientific disciplines: the European Atomic Energy Community (EAEC or Euratom). Since the European nuclear energy policy has only sparsely developed over the last decades (Wolf 2009), it seems worthwhile to analyse whether and how the dynamics and logics described by Burley (Slaughter) and Mattli materialised in this specific issue area (Renner 2009 applies the original neo-functional approach to the European Coal and Steel Community (ECSC) and other energy-related policies, but not to Euratom).

This paper does not intend to continue or reopen the neo-functional-intergovernmentalist debate (as to the role of law, see e.g. Garrett 1995; Mattli/Slaughter 1995, 1998; on endless controversies between neo-functional and intergovernmental approaches, see Scharpf 2000: 5). It is obvious that intergovernmentalism has an excellent and unparalleled explanatory power with regard to Euratom since the EAEC, unlike other EU policies, is clearly dominated

by the member state governments (Moravcsik 1998; Sauter 2009; Weilemann 1983). Thus, this contribution deliberately does not deal with intergovernmentalism and does not aim to draw a systematic comparison between the explanatory power of neo-functionalism and intergovernmentalism with respect to Euratom. Moreover, it does not intend to detect all factors that might account for the EAEC's meagre legal development in the past. Intergovernmentalist studies provide good explanations in this regard, and examinations of ecological, economical and technical framework conditions yield additional insights (Wolf 2009). However, these approaches cannot explain why the specific mechanisms and phenomena postulated by law-based neo-functionalism do not seem to (fully) work in the case of Euratom. Therefore, this paper aspires, *inter alia*, to identify eventual inherent weaknesses of the original approach developed by Burly (Slaughter) and Mattli and to suggest conceptual improvements. It is hoped that a refined version of law-based neo-functionalism can provide complementary insights regarding the legal development of Euratom and other policies.

Since Euratom is hardly known even by European integration experts, the next section provides a short historical, legal and political overview of the EAEC. Then two key assumptions of law-based neo-functionalism are presented. The approach developed by Burley (Slaughter) and Mattli expects spill-overs because it assumes that subnational actors try to overcome national law in order to pursue their interests by means of preliminary proceedings before the European Court of Justice (ECJ). It also presumes political dynamics as a consequence of a general strategy of the European Commission to widen the scope of the EAEC's and/or its competences by means of actions against member states. These two theoretical assumptions guide the subsections in which ECJ case law on Euratom is analysed. In the concluding section, it is argued, *inter alia*, that the meagre legal development of the EAEC can be explained to a certain degree by inherent limitations of Euratom primary law. According to this perspective, lacking legal preconditions hamper or prevent political and legal dynamics that could be triggered by interdependent processes of deregulation and reregulation.

## **2. Euratom – a short overview**

The Treaty establishing the European Atomic Energy Community is one of the two “Treaties of Rome” which were negotiated in the mid-1950s, signed in 1957 and went into force on 1 January 1958 for an unlimited period (on intergovernmental package deals including the parallel negotiations of the Treaty establishing the European Economic Community (EEC), see Moravcsik 1998 and Weilemann 1983). Jean Monnet, one of the masterminds of the ECSC which had been established a few years earlier (Renner 2009: 8), strongly preferred Euratom to the EEC. From his point of view, sectoral and technical integration in the field of nuclear energy policy seemed to be much more promising than cross-sectoral economic integration (Duchêne 1994; Monnet 1976). Security of supply, competitiveness and environmental sustainability are guiding principles of energy policy (Grunwald 2003: 87-92). Euratom shall be conducive to achieving these general objectives. Thus, the EAEC's main

task is “to contribute to the raising of the standard of living in the Member States and to the development of relations with the other countries by creating the conditions necessary for the speedy establishment and growth of nuclear industries” (Art. 1 of the Euratom Treaty). According to Art. 2, the Community shall

- a. promote research and ensure the dissemination of technical information;
- b. establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied;
- c. facilitate investment and ensure, particularly by encouraging ventures on the part of undertakings, the establishment of the basic installations necessary for the development of nuclear energy in the Community;
- d. ensure that all users in the Community receive a regular and equitable supply of ores and nuclear fuels;
- e. make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended;
- f. exercise the right of ownership conferred upon it with respect to special fissile materials;
- g. ensure wide commercial outlets and access to the best technical facilities by the creation of a common market in specialized materials and equipment, by the free movement of capital for investment in the field of nuclear energy and by freedom of employment for specialists within the Community;
- h. establish with other countries and international organizations such relations as will foster progress in the peaceful uses of nuclear energy.

In its second title, the Euratom Treaty contains 10 chapters or sub-policies “for the encouragement of progress in the field of nuclear energy”: promotion of research, dissemination of information, health and safety, investment, joint undertakings, supplies, safeguards, property ownership, the nuclear common market and external relations (see Grunwald 2003 and Schärf 2008 for details on primary and secondary law). The EAEC sub-policies feature different modes of governance (see Wolf 2009): supranational law-making and law harmonisation prevail in the chapters on health and safety as well as the nuclear common market. The chapters on promotion of research, dissemination of information, investment, and joint undertakings mainly provide “soft” measures to foster research and investments in the nuclear sector. The chapter on supplies established, inter alia, the Euratom Supply Agency (ESA) – the EU’s first agency – in order to organise and supervise a fair supply of nuclear fuels throughout the EU. The section on safeguards authorises the European Commission to directly monitor anti-proliferation measures in the member states and to impose, if necessary, immediate sanctions (Howlett 1990). Finally, the chapter on external relations enables the EAEC to cooperate, within the limits of its jurisdiction, with other

organisations or states. While the member states have transferred several important competences regarding nuclear energy policy to the supranational level, many Euratom provisions are optional and key decisions remain with the national governments (such as the fundamental choices to use nuclear energy, to foster the nuclear sector or to impose certain additional nuclear safety standards) (Grunwald 2003).

Euratom did not develop as hoped for by Monnet and others in the 1950s and 1960s. Today, nuclear energy provides less than half of the electric energy produced in the EU. Most European countries do not plan to build new nuclear power plants. Supranational research on nuclear issues has not superseded national research apart from some cost-intensive projects (on nuclear fusion see Wolf 2007). In the absence of shortages of ores and nuclear fuels so far, the EAEC's provisions on supply have never played a noteworthy role (cf. ECJ 1971). Euratom's safeguards policy has lost much of its significance after the establishment of a global anti-proliferation regime by the International Atomic Energy Agency (IAEA) (Gmelin 2007). Maybe Euratom's most important achievements are the uniform safety standards on radiation protection enacted after the Chernobyl disaster (Grunwald 1986, 2003) and obligations for some new Eastern European member states to either adhere to certain safety standards regarding nuclear installations or to shut down their Soviet-style reactors (Grunwald 2000). However, due to the Chernobyl disaster, minor nuclear incidents, and general risk perceptions, most European citizens oppose nuclear energy, although attitudes considerably vary from country to country (Eurobarometer 2010). Nuclear energy is mostly seen as a national policy issue – Most EU citizens have never heard of Euratom. And member state governments recently decided to circumvent the EAEC framework by cooperating on a couple of nuclear energy issues on an intergovernmental basis (Sauter/Grashof 2007).

The governments of the EU member states usually strongly disagree when it comes to nuclear energy issues (Sauter 2009). As a consequence, the Euratom Treaty, unlike the EU and E(E)C Treaties, has never been amended in substance (Wolf 2006). Therefore the European Parliament's legislative powers under the Euratom Treaty have never been strengthened, and the EAEC is mainly governed by the Council (major decisions) and the European Commission (day-to-day politics). Even the Treaty of Lisbon only adapted the Euratom Treaty's institutional and financial provisions to the EU's new legal framework. That is why the EASC, unlike the ECSC (which expired in 2002), is still a separate political reality. After the EU absorbed the EC and its legal personality because of the Lisbon Treaty, Euratom is the only European Community left. Some observers call it the "failed Community" (Wegener 2007: 7; Weilemann 1983: 157), and especially civil society actors and green parties call for abolishing the EAEC or unilateral withdrawing from the Euratom Treaty (Mayer/Petri 2006; Wegener 2007). On the other hand, EAEC experts highlight the unique supranational nuclear safety regime and maintain that the Euratom Treaty is also beneficial for member states without nuclear power plants (Grunwald 2007).

### 3. An analysis of ECJ case law on Euratom

#### 3.1. Euratom and the law-based neo-functional approach

In its more than 50 years of existence, the EAEC has adopted a considerable body of secondary law (on the “Euratom acquis”, see European Commission 2007; Grunwald 2003; Schärf 2008). However, nearly no spill-overs of Euratom law to other policies (e.g. general energy, economic, health, environmental or security and defence policies) have occurred. An intergovernmentalist analysis which lays emphasis on member states/governments interests provides good explanations in this regard (see Moravcsik 1998 and Weilemann 1983 for the early EAEC years and Sauter 2009 for recent Euratom developments). An examination of the ecological, economical and technical framework conditions of European nuclear energy policy yields additional insights (Wolf 2009). Nevertheless, these approaches cannot explain why the specific dynamics and logics highlighted by law-based neo-functionalism do not seem to (fully) work in the case of Euratom. Against this backdrop, this section tries to provide a necessary “fresh infusion of data” (Mattli/Slaughter 1995: 189).

Mattli and Slaughter do not “offer specific hypotheses” (1998: 179) which could be directly used for theory testing case studies (cf. George/Bennett 2005). However, they clearly indicate which actors and mechanisms trigger legal integration from their point of view. Firstly, they describe preliminary proceedings according to Art. 177 TEC (latter Art. 234 TEC, now Art. 267 TFEU which also applies to the EAEC) as “a framework for links between the Court and subnational actors” (Burley/Mattli 1995: 58) that enables the ECJ as well as individuals, companies or national courts to pursue their self-interests using EU law against the member states and their national law (see also Mattli/Slaughter 1995: 185, 1998: 180-183). Secondly, Burley (Slaughter) and Mattli stress that the Court cooperates with the Commission. The “ECJ uses the EC Commission as a political bellwether [...] and successfully encouraged the increased use of the Article 169 [now Art. 258 TFEU which also applies to the EAEC] procedure [i.e. actions against a member state initiated by the Commission]” (Burley/Mattli 1993: 71-72). These assertions imply the following theoretical assumptions:

1. Political and legal dynamics (including spill-overs) can be expected because supranational and subnational actors try to overcome national law in order to pursue their interests by means of preliminary proceedings.
2. Political and legal dynamics (including spill-overs) can be expected since the European Commission tries to extend the EAEC’s and/or its competences by means of actions against member states.

Burley (Slaughter) and Mattli discuss several details of the EU’s judicial system that they deem crucial for their approach. However, they do not elaborate in a systematic manner on potential context factors or framework conditions that might be necessary for the occurrence of the highlighted mechanisms and spill-over processes (e.g. specific legal and/or factual circumstances such as certain enabling clauses, a particular number of key actors or specific

constellations of actors). This omission could reduce the explanatory power of law-based neo-functionalism (see 4.).

### **3.2. Comparing sectoral and cross-sectoral treaties**

All founding treaties of European integration share a similar institutional framework and are based on supranational legal doctrines such as supremacy and direct effect of European law (cf. Weiler 1999). But the former EC Treaty (now Treaty on the Functioning of the European Union) is a cross-sectoral treaty whereas the Euratom Treaty and the expired ECSC Treaty are sectoral administrative treaties (Grunwald 2007: 6). Thus, is it possible to compare the EAEC to the former EC (now EU except Euratom) from the perspective of law-based neo-functionalism? If we take the approach developed by Burley (Slaughter) and Mattli seriously, a comparative analysis should be possible. They do not restrict their arguments to certain policy fields, but mainly base their assumptions on the existence of a legal and judicial framework that enables subnational actors to indirectly initiate preliminary proceedings and a supranational actor such as the Commission to bring actions against the member states. If such a framework exists, they assume that both subnational and supranational actors will make use of it and try to overcome national law in order to pursue their respective interests (see 3.1.). Euratom shares a framework like this with the other supranational parts of the EU. Therefore, one may conclude that a comparative study taking Burley's (Slaughter's) and Mattli's approach as analytical starting point is feasible.

However, which concept or meaning of political spill-over shall be applied? Burley (Slaughter) and Mattli clearly had cross-sectoral spill-overs in mind (cf. Burley/Mattli 1993: 66). Can such spill-overs take place in the context of a sectoral supranational organisation such as the EAEC? Although Euratom's legislative enabling provisions are rather limited, it cannot be ruled out, from a theoretical point of view, that Euratom measures might spill over to neighbouring policies, especially if such an expansion can be justified by functional reasons. ECJ case law supports this consideration, as subsection 3.4. shows in more detail. For example, the Euratom health and safety chapter is rather narrow in scope since it mainly deals with laying down and controlling basic standards regarding nuclear radiation protection (cf. Art. 30-39 Euratom Treaty). Nevertheless, the Court already expanded the EAEC health policy to planning and construction policy (ECJ 2002) and civil law (ECJ 2009), the Council expanded it to the regulation of the free movement of foodstuffs (ECJ 1991), and the Commission unsuccessfully tried to extend it to security and defence policy (ECJ 2005, 2006b). These examples are, in both qualitative and quantitative terms, not as impressive as many spill-overs under the EC/TFEU Treaty. However, they still can be regarded as spill-overs.

### 3.3. Euratom before the Court

Since a couple of years, the ECJ (i.e. the Court of Justice, the General Court (i.e. the former Court of First Instance), and the Civil Service Tribunal) decides more than 1000 cases annually, and it is not easy to single out relevant judgements on Euratom because of the sheer magnitude of ECJ case law. Moreover, dozens of cases concerning the EAEC do hardly touch substantial Euratom law since they are civil actions, arbitration proceedings, or disputes involving the EU civil service. Aside from that, there are several rulings involving certain aspects of Euratom law, but EC and/or EU law clearly dominate these cases. All these judgments have to be sorted out in order to compile relevant cases in which EAEC primary and/or secondary law prevail(s). This study draws on four different sources to find and select Euratom rulings: (a) key case law on Euratom compiled by the European Commission (2007: 27); (b) Euratom cases available at the ECJ's website (all judgments since mid-1997, assigned to different policy fields, are accessible at the Court's homepage); (c) the digest of ECJ case law (*répertoire de jurisprudence*), a systematic and sectoral collection of cases (including rather old rulings) by the Court (ECJ 2010); (d) academic literature (e.g. Grunwald 2003; Schärf 2010). This means that the author has not checked every case since 1958 for Euratom relevance, but several reliable (meta) sources have been exploited in order to find as much relevant case law as possible. Burley (Slaughter) and Mattli (and many other scholars) did not even try to work with a specific representative sample of ECJ rulings compiled on the basis of certain criteria. They just picked and cited seminal judgments which supported their arguments (for a supporter of intergovernmentalism also using this questionable method, see e.g. Garrett 1995).

The result of this research for data is a compilation of only 30 cases which mainly concern EAEC primary and/or secondary law (see Table 2 for the full list). Given the sheer mass of ECJ cases, this small number already can be interpreted as another indicator of the rather meagre legal development of the EAEC. This sample does not claim to include all (relevant) Euratom cases, but cross-checks between the different sources suggest that it is a representative compilation – at least far more representative, transparent and systematic than Burley's (Slaughter's) and Mattli's selection of judgments. If one estimates that there was approximately one relevant case per year in recent decades and even less rulings in the first years of Euratom, there might be up to 50 or so relevant cases in total. In this regard, the sample includes ca. 60% of relevant Euratom rulings (probably more). However, it is likely to contain more than 90% of all important EAEC cases since most sources used for this compilation focus on significant judgments, and most cases are mentioned by at least two out of the four sources. Cross-checks and frequency distribution regarding the known rulings imply that most of the few unknown cases handed down in the 1960s, 1970s or 1980s probably are rather similar and unspectacular actions initiated by the Commission against a member state that failed to fulfil certain obligations under Euratom secondary law (mainly non-implementation of directives). This type of cases usually does not imply spill-overs (see 3.4. and 3.4.2.).

**Table 1: Relevant ECJ case law on Euratom**

<b>Parties or procedure</b>	<b>Number of cases</b>
Commission v. member state	15
Private party v. Commission (and Council)	7
Preliminary ruling	3
Member state v. Commission	1
Member state v. Council	1
Commission v. Council	1
European Parliament v. Council	1
Other	1
<i>Total</i>	<i>30</i>

Source: compiled by the author.

### 3.4. A neo-functionalism analysis of the case law

The next table provides a list of the Euratom cases (first column), expectations of the law-based neo-functionalism approach as to spill-overs (second column), findings regarding spill-overs (third column), and short summaries or comments (fourth column). The most important judgments (from a neo-functionalism point of view) are discussed in more detail in the following subsections.

**Table 2: Overview of the Euratom cases**

<b>Euratom case decided by the European Court of Justice</b> (in chronological order)	<b>Law-based neo-functionalism expects a higher probability of spill-over</b>	<b>Actual spill-over</b>	<b>Short summary or comment</b>
Case 7/71, Commission v. France [1971] ECR 1003	Yes (Commission v. member state)	No	France has to cooperate with the Euratom Supply Agency (ESA) as prescribed by the Euratom Treaty
Opinion 1/78 [1978] ECR 2151	No	No	ECJ interpreted the scope of certain Euratom policies against the background of an IAEA treaty
Case 187/87, Saarland and Others v. Minister for Industry and Others [1988] ECR 5013	Yes (Preliminary ruling)	No	See 3.4.1.
Case C-62/88, Greece v. Council [1990] ECR I-1527	No	No	See 3.4.3.
Case C-246/88, Commission v. Italy [1991] ECR I-2049	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-70/88, European Parliament v. Council [1991] ECR I-4529	No	Yes	See 3.4.3.

Case C-376/90, Commission v. Belgium [1992] ECR I-6153	Yes (Commission v. member state)	No	Member state did not fail to fully implement a Euratom directive
Case C-308/90, Advanced Nuclear Fuels v. Commission [1993] ECR I-309	No	No	Company unsuccessfully challenged a sanction imposed by the Commission (safeguards)
Case C-107/91, ENU v. Commission [1993] ECR I-599	No	No	Commission unlawfully did not decide on a Company's application to ask the ESA to buy the Company's products
Case C-95/92, Commission v. Italy [1993] ECR I-3119	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-146/91, KYDEP v. Council and Commission [1994] ECR I-4199	No	No	Greek peasants unsuccessfully applied for compensation for post- Chernobyl measures
Case C-135/94, Commission v. Italy [1995] ECR I-1805	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Cases T-458/93 and T- 523/93, ENU v. Commission [1995] ECR II-2459	No	No	The ESA is not obliged to buy and resell (all) nuclear products made in the EU
Cases T-149/94 and T- 181/94, KKW Lippe-Ems v. Commission [1997] ECR II-161	No	No	Company unsuccessfully challenged a decision of the Commission not to approve supply contracts with certain Asian producers
Case C-357/95 P, ENU v. Commission [1997] ECR I-1329	No	No	Company unsuccessfully appealed against the judgment in cases T- 458/93 and T-523/93 (see above)
Case C-21/96, Commission v. Spain [1997] ECR I-5481	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-161/97 P, KKW Lippe-Ems v. Commission [1999] ECR I-2057	No	No	Company unsuccessfully appealed against the judgment in cases T- 149/94 and T-181/94 (see above)
Case C-146/01, Commission v. Belgium [2002] ECR I-5117	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-29/99, Commission v. Council [2002] ECR I-11221	Yes (Commission v. member states)	Yes	See 3.4.2.
Case C-483/01, Commission v. France [2003] ECR I-4961	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-484/01, Commission v. France [2003] ECR I-4975	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive

Case C-218/02, Commission v. United Kingdom [2004] ECR I-1241	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-177/03, Commission v. France [2004] ECR I-11671	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case C-61/03, Commission v. United Kingdom [2005] ECR I-2477	Yes (Commission v. member state)	No	See 3.4.2.
Case C-65/04, Commission v. United Kingdom [2006] ECR I-2239	Yes (Commission v. member state)	No	See 3.4.2.
Case C-459/03, Commission v. Ireland [2006] ECR I-4635	Yes (Commission v. member state)	No	Ireland violated Euratom law by instituting proceedings against the United Kingdom under the UN Convention on the Law of the Sea
Cases C-123/04 and C-124/04, INDB, Siemens v. UBS, TUEC [2006] ECR I-7861	Yes (Preliminary ruling)	No	See 3.4.1.
Case C-155/06, Commission v. United Kingdom [2007] ECR I-103	Yes (Commission v. member state)	No	Member state failed to fully implement a Euratom directive
Case T-240/04, France v. Commission [2007] ECR II-4035	No	No	Commission does not have the competence to adopt regulations regarding communications on nuclear investment projects
Case C-115/08, Oberösterreich v. ČEZ as [2009] ECR I-10265	Yes (Preliminary ruling)	Yes	See 3.4.1.

Source: compiled by the author.

### 3.4.1. Preliminary rulings

As to the role of preliminary rulings (first theoretical assumption, see 3.1.), the low number of such judgments (3 out of 30, or 10%) indicates that subnational actors in proceedings before national courts hardly try to reinforce their position by means of Euratom law. A qualitative analysis shows that only in one out of these three judgments, the ECJ extended Euratom law to another policy field (political spill-over):

- In the case *Saarland and Others v. Minister for Industry and Others* (ECJ 1988), the Court ruled that the Commission – which has the right to deliver an opinion on transnational risks of nuclear contamination by disposals of nuclear waste – obviously has to be informed about plans to dispose of nuclear waste before such a disposal is authorised by a member state. Apparently, this decision did not imply a political spill-over.

- In the case *Industrias Nucleares do Brasil SA, Siemens AG v. UBS AG, Texas Utilities Electric Corporation* (ECJ 2006a), a civil law dispute, the Court had the opportunity to extend certain provisions of the Euratom Treaty to nuclear undertakings from countries outside the territory of the EAEC. It decided not to do so, as the Euratom Supply Agency suggested. There would not have been potential for significant legal or political dynamics even if the ECJ had opted for a wide interpretation.
- Finally, in the “Temelín” case *Oberösterreich v. ČEZ as* (ECJ 2009), the Court extended the scope of Euratom law to civil law by ruling that member states have to accept official authorisations for operating nuclear power plants by other member states since the EAEC provides for a sufficient protection against transnational risks of nuclear radiation and contamination. Thus, the ECJ shields the owners of nuclear power plants against civil actions for injunction from other member states (Schärf 2010; Wolf 2011). Among the cases analysed in this study, this is the only visible spill-over emerging from a preliminary ruling.

#### 3.4.2. *European Commission vs. member states*

As to the role of cases initiated by the Commission against member states (second theoretical assumption, see 3.1.), there is a considerable number of such judgments (15 out of 30, or 50%). However, a qualitative analysis reveals that most of these cases are similar and rather unspectacular actions due to poor implementation of certain Euratom directives (see Table 2). From an analytical point of view, it does not make sense to discuss these cases usually won by the Commission. The mere implementation of a Euratom directive normally does not imply a broadening of the scope of EAEC law. Evidence from the EC shows that spill-overs are likely to occur if the Commission tries to overcome sectoral national law by referring to rather abstract European primary law (e.g. the economic freedoms) (see 4.3.). The Commission did not follow that pattern in the 15 cases in question. Most of these cases cannot be considered to contain any aspects of political spill-overs at all (see Table 2). Thus, these rulings are not discussed here, but the concluding section (4.) reflects, *inter alia*, about the Commission’s limited role and legal means in Euratom disputes. There are only three mentionable judgments:

- In a case against the Council (ECJ 2002), the Commission argued that the EAEC’s legislative competences under the health and safety chapter were much broader than interpreted by the member states. The Court agreed with the Commission and found that the provisions of that chapter had to be interpreted broadly in order to give them practical effect. According to the Court, Euratom possesses, *inter alia*, “legislative competence to establish, for the purpose of health protection, an authorisation system which must be applied by the Member States” (ECJ 2002: para. 89). Because of its spill-overs to planning and construction policy, this judgment can be seen as the most important Euratom ruling so far (Schärf 2010: 83). The Commission did not lose time and based two far-reaching proposals for Euratom directives on this judgment (Trüe 2003). However, the Council did not adopt these initiatives for several years (Sauter 2009; Wolf 2009).
- In two actions against the United Kingdom (ECJ 2005, 2006b), the Commission tried to extend the scope of Euratom law to security and defence policy. The Commission

argued that Euratom secondary law applies to the decommissioning of a military nuclear reactor (ECJ 2005) and to the safety risks arising from a damaged nuclear-powered submarine (ECJ 2006b). Though the Court showed some sympathy for a better protection of the population against nuclear radiation, it did not share the Commission's opinion and ruled that Euratom law generally does not apply to military installations and activities. Thus, the ECJ did not follow the cross-sectoral approach of the Commission, in contradiction to what neo-functionalism suggests. These two rulings are only partially convincing. While it is rather obvious that the founders of the EAEC Treaty (especially France) did not want Euratom law to constrain military nuclear activities of individual member states (Weilemann 1983: 177), "the Euratom Treaty broadly defined peaceful activities" and "considered all nuclear dual-use activities [...] as peaceful" (Mallard 2008: 463). The Euratom Treaty is not unambiguous regarding that topic, only a few provisions clearly deal with security and defence policy (cf. Art. 24-28, 84 Euratom Treaty). Therefore, from a functional point of view, the Commission's teleological argumentation to apply Euratom's health and safety policy to marginal military nuclear activities, especially when European civilians are endangered, is reasonable. The Court prevented, maybe for political reasons, two good examples of political spill-over as assumed by law-based neo-functionalism.

#### 3.4.3. *Other remarkable cases*

It should be mentioned that the Court approved an exceptional and limited legislative (i.e. "positive") spill-over after the Chernobyl disaster (see Grunwald 1986, 2003). In the case *European Parliament v. Council* (ECJ 1991), it ruled that a regulation on maximum permitted levels of radioactive contamination of foodstuffs and of feeding stuffs was rightly based on the Euratom Treaty although it harmonised the conditions for the free movement of goods within the EU's internal market. However, in a similar case initiated by Greece against the Council (ECJ 1990), the Court decided that a regulation on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power plant did not have to be based on the Euratom Treaty although it fixes maximum permitted levels of radioactive contamination of goods from third countries designated for the internal market. From the perspective of the EEC, this ruling can be interpreted as a restriction of the scope of application of the Euratom Treaty.

A pure intergovernmentalist approach (e.g. Garrett 1995) can rather easily "explain" these two judgments as well as the two *Commission v. UK* cases (ECJ 2005, 2006b) and the *Temelín* ruling (ECJ 2009) since the ECJ followed the interests of the majority of member states involved in these cases. However, intergovernmentalism fails to shed light on the important judgment *Commission v. Council* (ECJ 2002). In the concluding section, it will be explored why the specific mechanisms of political and legal integration highlighted by Burley's (Slaughter's) and Mattli's neo-functionalist approach do not seem to work with regard to Euratom.

## 4. Conclusions

### 4.1. Failed assumptions?

This paper mainly explores how law-based neo-functionalism can contribute to explain the legal development of the EAEC in the last decades. The approach developed by Burley (Slaughter) and Mattli expects spill-overs (3.2.) because it assumes that supranational and subnational actors try to overcome national law in order to pursue their interests by means of preliminary proceedings before the ECJ (3.1.). An analysis of case law on Euratom shows that there are only a few preliminary rulings (3.3., 3.4.) Subnational actors apparently do not use this judicial procedure to pursue their interests by extending Euratom law to other policy fields with a little help of the Court (3.4.1.). They rather bring actions against the Commission in order to annul Euratom secondary law or to get financial help from the EAEC (see ECJ 1993, 1994, 1995, 1997).

Law-based neo-functionalism also assumes political and legal dynamics as a consequence of a general strategy of the European Commission to widen the scope of the EAEC's and/or its competences by means of actions against member states (3.1.). There is a considerable number of cases initiated by the Commission against individual member states or the Council (3.3., 3.4.). However, there is only one case so far in which the ECJ supported the Commission in significantly extending Euratom's legislative competences – And afterwards, the Council did not adopt far-reaching proposals for Euratom directives based on this judgment (3.4.2.). Thus, law-based neo-functionalism as developed by Burley (Slaughter) and Mattli (1993, 1995, 1998) can hardly explain the poor legal integration of the EAEC. Most notably, it cannot give reasons for the non-occurrence of the core mechanisms and phenomena it postulates.

### 4.2. The reluctance of subnational and supranational actors

There is an obvious – and maybe superficial – explanation for the above-mentioned (non-) behaviour of subnational actors and the Commission: Apparently, Euratom law does not provide these actors with viable opportunities or rights to pursue their interests (or the actors are not aware of such opportunities). In this regard, one could argue that the Euratom Treaty is only a sectoral administrative treaty with rather limited legislative enabling provisions (see Grunwald 2007: 6). One might add that the nuclear sector features a rather small number of key actors (e.g. major companies and associations) as well as limited economic competition and cross-border transactions, partly due to diverging technical systems. However, the overall number of actors in the European nuclear sector that could initiate preliminary proceedings should not be underestimated: Every citizen or subnational entity (cf. ECJ 1988) could take legal action against member state authorities because of, say, an alleged violation of Euratom nuclear safety directives. Such lawsuits might lead to preliminary proceedings. But even many legal experts do not know Euratom law. In the “Temelín” case (ECJ 2009), for example, both the national court and the Advocate General did not realise that Euratom law was affected and played a decisive role (Schärf 2010; Wolf 2011).

Spill-overs expected by law-based neo-functionalism would be possible if subnational and supranational actors saw Euratom law as an instrument to overcome national law in various policy fields and contexts. However, most ordinary citizens do not even know that an organisation like Euratom exists and regulates certain parts of nuclear energy policy with potential impacts on general energy, economic, environmental, health, non-proliferation, construction as well as research and development policies. Large companies in the nuclear sector are often dominated by or dependent on member state governments. Thus, these firms are not likely to bring actions based on Euratom law against their governments. They will hardly use legal remedies to get the Euratom Treaty fully implemented or even extended if the respective member state governments prefer the status quo. Nuclear companies rather tend to exploit the EAEC's benefits and oppose possible burdens by Euratom law (4.1.). The Commission might have learned from its seminal EAEC case against the Council (ECJ 2002) that even a wide interpretation of Euratom legislative competences by the Court does not mean that the EAEC's scope is actually broadened because the member states usually have to agree on major Euratom measures. Obviously, the mere existence of a supranational judicial system does not mean that subnational and supranational actors make use of it and thus spill-overs emerge.

#### **4.3. Euratom and the missing mechanism of negative and positive integration**

At this point it becomes obvious that the original neo-functionalist approach lacks specification regarding necessary context factors and framework conditions (cf. 3.1.). Against this backdrop, an analysis of judicial and legal dynamics in the former EC might help to better understand the particular situation under the Euratom Treaty and to improve law-based neo-functionalism. In all policies somehow related to the common market and its four basic freedoms, legal integration is frequently triggered by the interdependence of deregulation (negative integration) and reregulation (positive integration) (see Joerges 2003; Scharpf 2000, 2003): After deregulative measures by the Commission or by the Court (usually activated by subnational actors), member states are often interested in limiting future regulatory competition. As a consequence, they pass supranational secondary law which they would not have adopted without competitive pressure.

This deregulation-reregulation pattern does not exist in the case of Euratom since the EAEC lacks deregulative powers. Euratom provisions regarding the nuclear common market are very limited in scope and the other EAEC sub-policies either allow for optional, non-binding activities or strict regulative measures (see 2.). Thus, there are hardly any legal opportunities to pursue supranational or subnational interests against the national governments by instrumentalising the ECJ. In the absence of competitive pressure triggered by subnational or supranational actors, governments are usually not interested in "concrete institutional requirements with which the member states must comply" (Knill/Lehmkuhl 1999: 1). The failed nuclear safety and nuclear waste initiatives (Sauter 2009; Wolf 2009) after the Court's landmark Euratom decision (ECJ 2002) underline that member states predominantly opt for

non-harmonisation, especially in a highly disputed area like nuclear energy policy, if there is no regulatory competition.

#### **4.4. Notes regarding a refinement of law-based neo-functionalism**

To sum up, the remarkable explanatory power of intergovernmentalist approaches regarding the legal development of Euratom cannot be fully explained by the strong power of member state governments at national and supranational level (and their differences of opinion) in this policy field. Intergovernmentalism alone is not able to fully explain the non-occurrence of the subtle dynamic mechanisms highlighted by law-based neo-functionalism. It appears that a supranational judicial system which includes optional preliminary proceedings and is based on the legal doctrines of supremacy and direct effect (Weiler 1999) is necessary but not sufficient to generate the phenomena described by Burley (Slaughter) and Mattli. The EAEC's sectoral limitations and the limited number of subnational actors in the European nuclear sector should not be overestimated. An analysis that takes the original law-based neo-functionalist approach seriously has to focus on the law since other factors can be better explored with other approaches. From this perspective, an important point seems to be that supranational and subnational actors need specific legal provisions that enable them to deregulate national law and thus put pressure on member state governments. Euratom lacks these legal preconditions. As a consequence, without regulatory competition or exceptional external catastrophes like the Chernobyl disaster (Grunwald 1986), there are usually no significant incentives for most national governments to adopt supranational secondary law in a highly disputed policy field like nuclear energy (Wolf 2009). In contrast, the EC's (now EU's) common market has a broad legal basis and offers many opportunities for political dynamics because of its interdependent politics of deregulation and reregulation. Jean Monnet probably did not anticipate this crucial point when he preferred Euratom to the EEC in the late 1950s.

The empirical basis of this paper – 30 ECJ cases from a rather exotic policy field – does not seem to be sufficient to propose or present a comprehensive revision of law-based neo-functionalism. Nevertheless, several more or less tentative conclusions towards a refinement of this theoretical approach are possible. First of all, the key assumptions of Burley (Slaughter) and Mattli (see 3.1.) should not be called into question. Two out of the three Euratom cases which showed political spill-overs (ECJ 2002, 2009) actually emerged from constellations predicted by law-based neo-functionalism. The third case, an example of legislative spill-over (ECJ 1991), was the result of an exceptional external shock. Against this backdrop, it is necessary to focus on the cases which did not imply spill-overs although the original law-based neo-functionalist approach expected a higher probability of spill-over. The findings of this paper and further reflections suggest that

1. proceedings initiated by the Commission against individual member states due to poor implementation of directives usually do not leave much room for potential spill-overs;
2. there is a legal key requirement for “negative” spill-overs: rather abstract supranational provisions that make it possible to deregulate sectoral national law;

3. subnational and supranational actors need to know these provisions in order to be able to initiate actions that might lead to spill-overs (negative integration);
4. legislative spill-overs (positive integration) are less likely in highly disputed policy fields apart from exceptional situations such as external disasters;
5. the ECJ does not approve all proposals for spill-overs, but it seems to be less reluctant if basic principles of the EU or the respective policy field and/or its own position of power are at stake (see Wolf 2011 for an illustrative case study concerning the Temelín judgment).

Future research will have to explore whether a refined version of law-based neo-functionalism that takes these considerations into account has more explanatory power and can contribute to explain legal (non-) integration in other policy fields.

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