Explaining continuity and change: The case of the Euratom Treaty

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The Euratom Treaty is one of the EU Treaties. It was adopted already in 1957, but unlike the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) it has not been amended in substance. The article has two aims, which are analyzed through the lens of historical institutionalism, an approach characterized by its focus on the effects of institutions over time. First, it states and discusses some possible reasons as to why the Euratom Treaty has not been revised. Second, it shows that although the Treaty has not been formally amended by treaty revision, an incremental gradual change has occurred anyway through displacement, layering, drift, conversion, and exhaustion. This change is more than profound: it provides the Euratom with a new rationale.

1. Introduction

Treaty revision is often thought of as essential to the European Union’s existence. It is seen as a necessary tool to ensure that the primary law of the European Union adapts and responds to changing needs: it is a sign that integration works.1 Historically, treaty revision is the main tool for reform (for example, the Maastricht Treaty, Amsterdam Treaty, and Lisbon Treaty).2 Given the perceived importance of treaty revisions in the European Union, it is surprising to find an exception: the Treaty establishing the European Atomic Energy Community (“Euratom Treaty”),3 which is one of the founding treaties of the European Union.

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1 Until recently, many commentators believed that the Lisbon Treaty was to be the last major treaty revision for some time to come. There are now some recent discussions on treaty revision following the Conference on the Future of Europe that ran from April 2021 to May 2022.


The Euratom Treaty was adopted in 1957, but it is much less known than the EU’s two other treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Unlike the TEU and the TFEU, the Euratom Treaty has not been amended in substance; it looks the same as it did when it was signed by the member states. The absence of a treaty revision poses a puzzle in EU law. Why has the Euratom Treaty not been amended given that the TEU and the TFEU have undergone successive amendments over the years?

The Euratom Treaty’s principal objective is to promote the nuclear industry. This reflects the high expectations for nuclear energy in the 1950s. As was often said, nuclear power would be “too cheap to meter” and many believed it would even trigger an industrial revolution. In light of these high promises of nuclear power’s potential, it is not surprising that Jean Monnet, the architect behind European unity, saw the Euratom Treaty as the main instrument for integration.

In order to boost Europe with cheap energy, the Euratom Treaty came to include provisions that would promote nuclear research, facilitate investment, ensure the supply of ores and nuclear fuels, and create a nuclear common market. It also included provisions that aimed to deal with negative externalities: the Euratom would make certain that nuclear materials are not diverted to purposes other than those for which they are intended, and it would establish uniform safety standards to protect the health of workers and of the general public. Further, the Treaty had a clear international orientation: the Euratom was to establish relations with countries and international organizations to foster progress in the peaceful uses of nuclear energy.

However, many of the Treaty provisions came to have little or no practical relevance, including what in the negotiations had been considered the most central ones. One example is the Treaty’s provisions on the supply of nuclear material, which, briefly put, were intended to secure the uranium supply to the member states. The Treaty established a Supply Agency, which has a right of option of fissile materials: producers

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4 Consolidated Version of the Treaty on European Union, June 7, 2016, 2016 O.J. (C 202) 1 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union, June 7, 2016, 2016 O.J. (C 202) 1 [hereinafter TFEU]. There is no hierarchy between them; they have “the same legal value” (TEU, supra, art. 1(3); TFEU, supra, art. 1.2).


6 See, e.g., Euratom Treaty, supra note 3, art. 1.

7 Lewis L. Strauss (Chairman of the U.S. Atomic Energy Comm’n), Speech to the National Association of Science Writers, N.Y. City (Sept. 16, 1954).


9 See Jean Monnet, Memoires (1976).

10 Euratom Treaty, supra note 3, art. 2.

11 See also, e.g., id. ch. 2 (on Dissemination of Information), ch. 8 (on Property Ownership). For a discussion on the substantive competences that are “dormant,” see Jürgen Grunwald, From Challenge to Response: Dormant Powers in Euratom Law, in Nuclear Law in the EU and Beyond 19 (Christian Raetzke ed., 2014).
have to offer to the Agency any nuclear materials prior to any transaction. 

These provisions were drawn up in a time when there was a risk that shortages of nuclear material would occur. But shortages did not occur, and consequently, some of these provisions were soon regarded as obsolete.

In public international law, the existence of such so-called dead letters is not uncommon, and it is generally not problematic to open up possibilities for future use. The Euratom Treaty, however, is not just any international treaty; rather, as explained more in detail elsewhere, it could be regarded as a constitutional document, just like the TEU and the TFEU. The Euratom and the European Union are generally seen as intrinsically linked. The most important link is the shared institutional framework, which shall be touched upon below. Another sign of “constitutionalization” of the Euratom is that the Court of Justice of the European Union (CJEU) has been willing to transfer constitutional (general) principles over the treaty boundaries. Thus, the Euratom Treaty could have been constitutionalized because of its links to the European Union: they form part of the same legal order. As should be noted, there are some counter arguments to the constitutionalization thesis: most obviously, when proclaiming the constitutional principles of direct effect and supremacy, the Court never clarified that they were also applicable to the Euratom. Yet, if we start from this proposition (that is, the Euratom Treaty is a constitutional document), we might ask: what is so special about dormant provisions when it comes to constitutional documents?

The tentative answer is that constitutions are often thought of as expressions of the “will of the people.” If provisions would be invoked again after a long “dormant” period—in the case of Euratom, more than sixty years—this may cause problems of legitimacy: Could it still be said that the Euratom reflects the “will” of the people? Of course, every major treaty revision could be seen as a confirmation and a refreshment of the consent of the people; deciding not to amend the Euratom Treaty is also a choice.

12 Euratom Treaty, supra note 3, art. 57.
15 Opinion 2/91, Int’l Labour Org., EU:C:1993:106, ¶ 36 (stating that the “principle of close cooperation,” which was originally developed in a Euratom Treaty context, was also applicable to the EEC Treaty). See Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. See also, e.g., Case C-115/08, Land Oberösterreich v. ČEZ, EU:C:2009:660 [hereinafter Temelin] (see Section 2.3).
16 In Case 26/62, Van Gend en Loos, EU:C:1963:1, in which the Court established the principle of direct effect, the Court clearly referred to it as the “Community”—thus, the EEC Treaty and not explicitly including the Euratom—that “constitutes a new legal order of international law.” And in Case 6/64, Costa ENEL, EU:C:1964:66, in which the Court established the principle of primacy, the Court held that, “by contrast with ordinary international treaties, the EEC Treaty has created its own legal system” (emphasis added).
But if our aim is for the EU Treaties to be “living instruments” in the sense that they are to reflect reality and what is going on in practice, preserving the status quo is not preferable. In other words, it is the very existence of the many dormant provisions (invoked or not invoked) that makes revision or abolition of the Treaty necessary.

Yet, it is important to point out that the Euratom Treaty as a whole is not to be regarded as a dead letter. As shall be explained below, the Treaty does contain provisions that are applied, although some of these provisions are not applied as originally intended. But given that so many of the provisions are obsolete, and given the perceived importance of treaty revisions in the European Union, it is surprising that the substantial provisions of the Euratom Treaty have not been amended (or the Treaty abolished).

The aim of the article is twofold: first, to state and discuss some possible reasons as to why the treaty has not been revised; second, to show that although the treaty has not been formally amended by treaty revision, an incremental change has occurred anyway, through adjudication and practice. This change is more than profound: it provides the Euratom with a new rationale.

These two aims are attained through the lens of historical institutionalism, which is an approach characterized by its focus on the effects of institutions over time, and on questions of continuity and change: it is about analyzing an institution’s origins and development. It is most commonly applied by political scientists to various sociological issues, but it can also be applied to studies of law. The advantage of this approach is that it contains a set of conceptual tools that other institutional approaches are often lacking. Even when explicitly stating that an “institutional approach” is applied,

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17 There are some indications that “dead letters” have been a feature of the EU Treaties as a whole. Judge Pescatore noted that the flexibility clause (then EEC Treaty, supra note 15, art. 235) for many years was feared to remain a dead letter as it had only been used in a “sporadic manner to settle some marginal, essentially technical, problems in the organization of the agricultural markets” but that the flexibility clause was becoming more and more significant (PiErrE PEscAtorE, Le droit dE l’intéGrAtion: ÉmErGEncE d’un PhÉnômÈnE nouvEAu dAns lEs rElAtions intErnAtionAlEs sElOn l’ExPÉriEncE dEs communAutiEs EuroPéEnnEs [The RIGHT of Integration: THE EMERGENCE OF A NEW PHENOMENON IN INTERNATIONAL RELATIONS IN THE EXPERIENCE OF THE EUROPEAN COMMUNITIES] (1972)). Moreover, the Paris Summit of October 1972 sought the “widest possible use” of article 235. See Statement from the Paris Summit, 10 Eur. Comm. Bull. Eur. Comties. 14 (Oct. 1972) (thanks to one anonymous reviewer for pointing this out). Thus, this shows that supposedly “dead letters” can unexpectedly come to life again. In this context, it should be pointed out that many treaty provisions that were introduced by the Lisbon Treaty have not yet been applied, although over ten years now have passed. The European Parliament has published a study where it identifies some legal bases that are unused or under-used. See Unlocking the Potential of the EU Treaties: An Article-by-Article Analysis of the Scope for Action, Eur. Parl. Res. Service (May 2020), https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)651934. However, I think it is important not to attach a “dead letter label” too soon. In the case of Euratom, more than sixty years have now passed since the treaty was adopted, and many provisions remain unapplied. I think it is therefore right to label them “dead letters.”

18 See Kathleen Thelen, Historical Institutionalism in Comparative Politics, 2 ANN. REV. POL. SCI. 369 (1999); Sven Steinmo, Historical Institutionalism, in APPROACHES AND METHODOLOGIES IN THE SOCIAL SCIENCES: A PLURALIST PERSPECTIVE 118 (Donatella Della Porta ed., 2008).

19 Law fits into the definition of institutions (“formal rules”) that is used within historical institutionalism. See also, e.g., Yair Sagy, The Missing Link: Legal Historical Institutionalism and the Israeli High Court of Justice, 31 ARIZ. J. INT’L & COMP. L. 703 (2014) (linking historical institutionalism and traditional legal history).
legal scholars are often unclear what such an approach is about.\textsuperscript{20} Thus, by applying historical institutionalism, the methodological choices can be made more explicit than is often the case.

When it comes to the first aim (that is, to state and discuss possible reasons why the treaty has not been revised), historical institutionalism is useful, as it provides us with conceptual tools such as path dependency, continuity (or stability), and change. The main limitation of historical institutionalism, however, is that it is vague, including some of the key concepts. This is a common critique, and some commentators therefore argue that it is better described as an analytical approach than a theoretical method.\textsuperscript{21} Consequently, as should be pointed out at this stage, a definitive answer to the question posed cannot be provided in this study. Yet, it is worthwhile to examine it, as it seeks to provide insights into a piece of constitutional EU law that has not previously received much attention. It also feeds into the discussion on revision of the EU Treaties more generally.

The discussion is also inevitable in order to frame and give context to the second aim: to show that the Euratom has transformed in the absence of treaty revision. This transformation takes the form of gradual institutional change. Streeck and Thelen explain that such institutional change can be understood as displacement, layering, drift, conversion, and exhaustion.\textsuperscript{22} Each one of these “modes” will be discussed as illustrations of how the Euratom has transformed. It should be stressed that the intention is not to cover every aspect of the application of the Euratom Treaty. Rather, it is to offer some “evidence” of the thesis that the Euratom has transformed.

The article proceeds in the following way. Section 2 provides some background: it discusses the attempts to revise the treaty, explains how the treaty’s institutional provisions have undergone some changes, and briefly explains the relationship between the EU and the Euratom. Section 3 presents the methodological approach—historical institutionalism—and it discusses some “sources of stability,” that is, possible reasons why the Euratom Treaty has not been revised. Section 4 shows how the Euratom has transformed in the absence of a formal treaty revision along some “modes of gradual institutional change.”

2. The treaty relationship and revision impossible?

As was pointed out in the introduction, the Euratom Treaty’s substantive provisions have not been amended. By contrast, some of its institutional provisions have undergone some significant changes. This section describes these changes and the

\textsuperscript{20} In comparison to political science, which in my view can be described as an “umbrella” for various analytically sophisticated methods (approaches and theories), legal scholarship is generally less clear about methods. See also Rogers Smith, \textit{Historical Institutionalism and the Study of Law}, in \textit{The Oxford Handbook of Law and Politics} 46 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008).

\textsuperscript{21} Steinmo, supra note 18.

explaining continuity and change: the case of the euratom treaty

attempts made to amend the treaty. in doing so, we shall also shed some light on the complex relationship between the euratom and the european union: we cannot fully understand how the euratom has transformed without some understanding of how the euratom and the european union are connected. the section also discusses the treaty revision procedures, as well as the possibilities of "expansion."

2.1. from rome to lisbon

the euratom treaty was signed in rome in 1957 together with the european economic community (eec) treaty.23 together with the coal and steel community treaty (ecsc treaty),24 they established the "european communities."25 the three communities had the same member states, but separate legal personalities, and, to some extent, separate institutions (the commission and council). they shared the same single assembly (european parliament) and the same single european court of justice. in the early years, the communities could be best described as separate entities with some strong links.

some of the major treaty revisions that followed introduced changes that tied the three communities more closely together. the "merger treaty" (1967)26 merged the community institutions. the maastricht treaty (1993),27 which introduced the treaty on european union, also merged the three community treaties' separate provisions for accession and treaty revision.28 but the three communities—the eec, the euratom, and the ecsc—continued to exist as "separate entities" in parallel to the now established european union (with separate legal personalities and institutional provisions). the amsterdam treaty (1999) introduced only some minor changes: it deleted some lapsed provisions and made some minor adaptions.29 the nice treaty

23 eec treaty, supra note 15.
24 treaty establishing the european coal and steel community, apr. 18, 1951, 261 u.n.t.s. 140 [hereinafter ecsc treaty].
25 by the maastricht treaty, the european economic community (eec) changed names to the european community (ec). see treaty on european union, july 29, 1992 o.j. (c 191) 1 [hereinafter maastricht treaty].
26 treaty establishing a single council and a single commission of the european communities, apr. 8, 1965, 1967 o.j. (152) 2 [hereinafter merger treaty].
27 maastricht treaty, supra note 25.
28 eec treaty, supra note 15, art. 237; euratom treaty, supra note 3, art. 205; ecsc treaty, supra note 24, art. 98. states now accede by the procedure in teu. supra note 4, art. 49.
29 treaty of amsterdam amending the treaty on european union, the treaties establishing the european communities and certain related acts art. 8. nov. 10, 1997 o.j. (c 340) 1. it replaced words such as "after the entry into force of this treaty" with "after 1 january 1958" (id. art. 76(2). articles 93, 98, 104, 105, and 106 were amended in a similar manner. the treaty of amsterdam also repealed the provisions on a common external tariff (euratom treaty, supra note 3, arts. 94, 95). the reason was that, in practice, the ec provisions were applied instead. the treaty also repealed a provision that stated that member states must undertake to authorize payments connected with the movement of products and production factors.
(2003) introduced no changes regarding the Euratom. Finally, the Lisbon Treaty (2009) introduced some significant changes that we shall now turn to.

With the Laeken Declaration (2001), the EU leaders called for a simplification and reorganization of the treaties. However, no specific calls were made for a reform of the Euratom Treaty, and therefore the subsequently formed European Convention only paid some limited attention to this issue. Nevertheless, the Convention considered a number of proposals on how to reform the Treaty. One proposal, which was put forward by a group of Convention members, was to transpose certain Euratom provisions into the Constitution’s treaty text and repeal obsolete provisions. Another proposal, which originally came from the European Parliament, was to phase out the Euratom Treaty by 2007 (the Treaty is concluded for an unlimited period, pursuant to its article 208). In yet another proposal from the European Commission, it was suggested to identify and repeal those Euratom Treaty provisions that were duplicated in the European Community Treaty (EC Treaty) and to repeal obsolete provisions.

According to the Convention Praesidium, there was no basis to become involved in an operation to amend the Treaty substantially. Yet, the Treaty could not remain unchanged. It had to be adapted to the envisaged changes to the European Union’s institutional and financial provisions. The Convention finally adopted a proposal from the Convention Praesidium in which it suggested that the Euratom Treaty were to be included in the Constitutional Treaty as an annex. The Euratom Treaty would remain in force, and it was to keep its separate legal personality.

In the intergovernmental conference that followed, deliberations about the Euratom Treaty were not included in the discussions, because it was clear that there was no consensus on how (if at all) to reform the Treaty. However, five member states (Germany, 

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34 European Convention, Feb. 18, 2003, CONV 563/03.
38 Secretariat of the European Convention, Suggested approach for the Euratom Treaty, CONV-621-03-03-14-EN (March 14, 2003).
40 Barnes, supra note 33.
Ireland, Hungary, Austria, and Sweden) adopted a Declaration, where they noted that the “core provisions . . . have not been substantially amended since its entry into force and need to be brought up to date.” They called for a reform “as soon as possible”; the discussions were left for a later date. Clearly, the division between the member states must have been deep; the preamble of the protocol amending the Treaty recalls “the necessity that the provisions of the Treaty establishing the European Atomic Energy Community should continue to have full legal effect.”

2.2. The shared institutional framework after Lisbon

When the Lisbon Treaty was later formed, the Convention’s solution for Euratom was chosen. The Lisbon Treaty removed most of the institutional and financial provisions from the Euratom Treaty. They were replaced by one single treaty article—article 106a Euratom Treaty—which enlists a number of institutional provisions in the TEU and TFEU that shall apply to the Euratom Treaty. Today, this is the only link between the EU Treaties (here, the TEU and the TFEU) and the Euratom Treaty; the EU Treaties do not mention Euratom (except for in a few protocols that are annexed to the Treaties). Thus, the Euratom Treaty has a relatively “invisible” position in the treaty architecture (and perhaps its absence from the EU Treaties makes it easy to overlook).

Many of the Euratom provisions that were removed were identical to the provisions in the TEU and the TFEU. Thus, the intention seems to have been to streamline. The reform implied that the Euratom Treaty lacks separate institutional provisions, and therefore, it cannot stand on its own. But the Euratom and the European Union have not been merged. They can rather be described as separate entities with separate legal personalities, although closely linked through a shared institutional framework.

Nevertheless, there are still some important differences between the Euratom and the European Union. One of the most obvious differences concerns the European

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42 The amendments are found in Protocol No. 2, which is annexed to the Lisbon Treaty (note that this is not a Protocol annexed to the EU Treaties). See Protocol No. 2 amending the Treaty establishing the European Atomic Energy Community, Dec. 17, 2007, 2007 O.J. (C 306) 199.
43 Euratom Treaty, supra note 3, art. 106a.1:

Article 7, Articles 13 to 19, Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union, and Article 15, Articles 223 to 236, Articles 237 to 244, Article 245, Articles 246 to 270, Article 272, 273 and 274, Articles 277 to 281, Articles 285 to 304, Articles 310 to 320, Articles 322 to 325 and Articles 336, 342 and 344 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.
44 There are thirty-seven protocols annexed to the EU Treaties and only six of them are also attached to the Euratom Treaty.
46 On partial membership (i.e. withdrawal from only the EU or from only Euratom), see Anna Södersten, Brexit, Euratom and Nuclear Proliferation, 2 NUCLEAR L. BULL. 47 (2016).
Parliament, which under the Euratom still functions much like an advisory body: it is merely to be consulted, or, at best, to give its assent. In contrast, under the EU Treaties, the Parliament now shares the legislative role with the Council (except for the area of Common Foreign and Security Policy, CFSP): the ordinary legislative procedure is the default procedure. Since Lisbon, the ordinary legislative procedure also applies to the Euratom through the above-mentioned reference in article 106a Euratom. But it could at best be said to have a symbolic function because not a single one of the Euratom’s legal bases identifies the ordinary legislative procedure. Therefore, the procedure only applies where the Treaty does not explicitly state how the decision should be taken.

However, although formally excluded, in practice, the Parliament’s opinion is often taken into account; it is frequently consulted, although the Euratom Treaty does not formally require this. The Parliament has also sought to enhance its influence through litigation, in a few cases, it has sought to steer the choice of legal basis towards treaty articles where it has greater influence—from the Euratom Treaty to the EU Treaties.

2.3. The “shall not derogate” clause

In order to understand how the Euratom and the EU are connected we should also say a few words about article 106a.3 Euratom, which clarifies that the provisions of the TEU and the TFEU “shall not derogate” from the provisions of the Euratom Treaty. There was a similar provision prior to the Lisbon Treaty, but it was then placed in the EC Treaty. How should the “shall not derogate” clause be understood?

There are very few cases where the Court even mentions the clause. And in the few cases where it is mentioned, the Court has never found a derogation from the Euratom Treaty. One example is Joined Cases 188–90/80 Transparency Directive, which concerned a Directive based on the EEC Treaty. France argued that the Directive should be declared void since it failed to respect the rules defining the


49 For a discussion of the EP’s endeavor to gain more influence under the EU Treaties, see Adrienne Heritier, EXPLAINING INSTITUTIONAL CHANGE IN EUROPE (2007).


51 See EC Treaty, supra note 37, art. 305(2).

52 Joined Cases 188–90/80, France, Italy and United Kingdom v. Comm’n, EU:C:1982:257.
scope of the Euratom Treaty. The Court held that the submission could not be accepted because it had not been established that the provisions of the Directive derogated from the provisions of the Euratom Treaty. The clause was also mentioned in Case C-115/08 Temelín, in which the Court held that the principle of prohibition of discrimination on grounds of nationality, enshrined in article 12 EC Treaty, also applies to the Euratom Treaty. The CJEU stated that the “shall not derogate” clause had to be taken into account, but it did not explain how and if it was applied.

The Court took a somewhat clearer stance in Opinion 1/94 World Trade Organization, in which it addressed the question of whether the European Community had the competence to conclude alone also those parts of the WTO Agreement that concerned products and/or services falling exclusively within the scope of application of the Euratom Treaty. The Court stated that “[s]ince the Euratom Treaty contains no provisions relating to external trade, there is nothing to prevent agreements concluded pursuant . . . the EC Treaty from extending to international trade in Euratom products.” In Case C-594/18 P, Austria v. Commission, discussed more in detail below, the Court clarified this further. It referred to the “shall not derogate” clause and held that:

[S]ince the Euratom Treaty is a sectoral treaty directed at the development of nuclear energy, whereas the [TFEU] has much more far-reaching aims and confers upon the European Union extensive competences in numerous areas and sectors, the rules of the [TFEU] apply in the nuclear energy sector when the Euratom Treaty does not contain specific rules.

Thus, where the Euratom Treaty is silent, the EU Treaties may apply in the alternative in the nuclear sector. Yet, it should be pointed out that the clause also could have a stricter interpretation: if the Euratom Treaty (lex specialis) is silent, then the EU Treaties may not apply (as lex generalis) because there is a strict boundary between the Treaties. The competence remains with the member states. In other words, the rules of the TFEU cannot apply in the nuclear energy sector when the Euratom Treaty does not contain specific rules. But this is obviously not the route chosen by the Court.

As shall be explained below, there are also cases that are of importance for the treaty relationship, but where the clause is not mentioned at all.

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53 Temelín, supra note 15.
54 See id. ¶ 85.
56 Id. ¶ 24. For discussion, see Ulrich Everling, From European Communities to European Union, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLMANN 139, 141 (Armin von Bogdandy, Petros C. Mavroidis, & Yves Meny eds., 2002). See also C-62/88, Greece v. Council, EU:C:1990:153, ¶ 17 (where the Court did not mention the “shall not derogate” clause).
57 EU:C:2020:742.
58 Id. ¶ 32.
2.4. The treaty revision procedures and expansion

We have seen that some revisions of the institutional provisions have been made over the years, but that the Euratom Treaty has not been revised in substance. Can the design of the revision procedure explain this? In debates on the American Constitution, the amendment procedure is often seen as the designated cause to the low amendment rate. If the amendment threshold were lower, the amendment rate would go up, so the argument goes. Is the same argument applicable here?

The answer is simply: it is not. The TEU and the TFEU are amended according to the ordinary treaty revision procedure in article 48(2)–(4) TEU. Under this procedure, a conference of representatives of the governments of the member states shall be convened for the purpose of determining by common accord the amendments to be made. The amendments agreed shall then be ratified by all the member states in accordance with their respective constitutional requirements. The same procedure applies to the Euratom Treaty through a reference (article 106a Euratom Treaty). Generally, revision should be easier to achieve with majority decisions than with unanimity. But as the revision procedure is the same for the Euratom Treaty as for the TEU and the TFEU, this cannot explain why the Euratom Treaty has not been revised in substance.

As a matter of fact, even relatively small revisions of the Treaty’s substance are hard to achieve. The Euratom Treaty contains some simplified treaty revision procedures, which concerns specific chapters or parts of chapters. They shall apply “particularly if unforeseen circumstances create a situation of general shortage” respectively “where new circumstances so require.” The threshold for achieving revision is low: in comparison to the simplified revision procedure in article 48.6 TFEU (which does not apply to Euratom). The simplified revision procedures in the Euratom Treaty do not require the member states to approve the changes. Instead, the EU institutions take the decision on revision alone, without the involvement of the member states. Also, the Euratom procedures do not set up a limitation similar to the one in article 48.6 TEU which provides that the revision “shall not increase the competences conferred on the Union in the Treaties.” Thus, the Euratom procedures do not make explicit that it is the member states that are the “masters of the treaties,” holding on to the ultimate power of Treaty change.

Over the years, the European Commission has tried several times to activate the simplified procedures to amend the Treaty’s chapter 6, which concerns supply of


60 Euratom Treaty, supra note 3, arts. 76 (supplies), 85 (safeguards), 90 (ownership).

61 TFEU, supra note 4, art. 48.6 (not applicable to the Euratom because there is no reference in art. 106a Euratom Treaty to this provision).

62 Under the Euratom procedures, the Council shall act unanimously on a proposal from the Commission and after consulting the European Parliament.
nuclear material.63 As previously mentioned, some of the provisions in that chapter have long been regarded as obsolete.64 But the proposals from the Commission have neither been discussed in the Council, nor been voted on in plenary in the European Parliament,65 a revision has not been achieved.

We shall end this section by saying a few words about a closely related issue: expansion. The scope of the EU Treaties (TEU and TFEU) has expanded considerably over the years. For every treaty revision, new objectives and competences have been added and the old ones adjusted. As Weiler puts it, the “locus of true expansion” lies with the flexibility clause, article 352 TFEU.66 This provision empowers the Council to act “if action by the Union shall prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.”67 From the 1970s onwards, it was frequently applied and broadly interpreted. The CJEU and legal scholars alike have criticized the legislator’s broad interpretation: there seemed to be virtually no limit to what could fit into the generally termed treaty objectives.68 And in the course of its use, the member states have shown willingness to fill “legitimacy gaps” by amending the treaties.69 However, as should be pointed out, in the last few years, the expansion of EU law through the flexibility clause is over. The flexibility clause is merely used for “marginal issues.”70

The Euratom Treaty contains a similar provision: article 203.71 Over the years, it has been used about twenty times. It was used for the first time in the 1970s. This

64 In this context, Case 7/71, Commission v. France, EU:C:1971:121, should be mentioned, in which the Court confirmed that the supply provisions will remain in force until they are amended by the simplified or the ordinary revision procedure. In focus was Euratom Treaty, supra note 3, art. 76(2), which stated that “[s]even years after 1 January 1958, the Council may confirm [the Supply] provisions.” If this failed, new provisions had to be adopted. In this case, which ironically was the first Euratom case, France claimed that the provisions had become null and void, since the Council had not confirmed them. But the Court clarified that the provisions still apply because it could not be presumed that provisions of the Treaty have lapsed. For a commentary, see Peter N. Brush, Permanence of Powers: Commission of the European Communities v. France, CAL. W. INT’L INT’L L. J. 43 (1973).
67 TFEU, supra note 4, art. 352.
68 See, in particular, id. at 2446. See, e.g., Case 8/73, Massey-Ferguson, EU:C:1973:90, ¶ 4.
71 Under article 203 Euratom, the Parliament shall only be consulted. This stands in contrast to article 352 TFEU, which after the Lisbon Treaty provides that the Parliament shall give its consent to legislation. Prior to Lisbon, the European Parliament was only to be consulted. The Lisbon Treaty did not change article 203 Euratom Treaty.
indicates that new areas not foreseen by the Treaty have emerged. Yet, the use of article 203 Euratom Treaty has not been met with treaty revision and expansion. In other words, the Euratom Treaty contains a procedure that could lead to expansion, but this has not happened. Perhaps the explanation thereto lies in that the expansion is taking place within the EU Treaties instead: article 203 Euratom Treaty is often applied together with article 352 TFEU, as a joint legal basis.

This section has discussed the attempts to revise the treaty, reviewed some of the changes made of the institutional provisions, and explained how the Euratom and EU are linked. The section has also examined the revision procedures, and it has argued that their design hardly can explain why the Euratom Treaty has not been revised. The next section presents the analytical framework: historical institutionalism. It discusses some “sources of stability” as reasons why the treaty has not been revised.

3. Historical institutionalism: Explaining continuity

Historical institutionalism, which is a strain of “new institutionalism,” is considered an important tool in explaining and discussing institutional continuity and change. It entails an analysis of an institution’s origins and development over time, and its basic tenet is that history and institutions matter. Under this approach, history is understood as a matter of multiple causal variables that shape each other. Institutions, in turn, are commonly defined as formal or informal rules.

Historical institutionalism includes a diverse range of scholarship, and it is rich in both theoretical and empirical studies. It has been applied to various studies of EU

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72 New institutionalism is often divided into three different approaches: rational choice institutionalism, sociological institutionalism, and historical institutionalism. They share the view that “institutions matter” when explaining political (and here legal) outcomes. See Peter A. Hall & Rosemary C.R. Taylor, Political Science and the Three New Institutionalisms, 44 Pol. Stud. 936 (1996).


75 Steinmo, supra note 18, at 166.

76 Id. at 159. Hall and Taylor explain that historical institutionalists define institutions as “formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy.” They give the example of the rules of a constitutional order. Hall & Taylor, supra note 73, at 6–7. North defines institutions as “the rules of the game in a society or, more formally, . . . the humanly devised constraints that shape human behaviour.” Douglas North, Institutions, Institutional Change and Economic Performance (1990).
Explaining continuity and change: The case of the Euratom Treaty

The most conspicuous example is Pierson’s study of European integration as a path-dependent political process which unfolds over time. Other examples include the application of an agent-centered historical institutionalist approach to EU supranationalism, and an examination of the empowerment of the European Parliament as a co-equal legislator with the Council.

Historical institutionalism was coined and developed in the early 1990s. In the initial years, it focused on explaining continuity. The basic premise was that change is difficult to achieve because institutions can become resistant to change. According to historical institutionalists, there is also something puzzling about such resistance, because change is for one or another reason expected: the circumstances might have changed, there is an apparent inefficiency, or the original impetus is no longer there. In the literature, this phenomenon is sometimes referred to as “continuity,” “stasis,” “stability,” or “stickiness,” and there are some diverse attempts to explain how this occurs.

Indeed, seen through the lens of historical institutionalism, the Euratom looks like it has somehow become resistant to change, that is, resistant to treaty revisions: it looks like it suffers from “continuity,” “stasis,” “stability,” or “stickiness.” And as explained, change was expected because the other EU Treaties (the TEU and the TFEU) have been changed in substance several times over the years: historically, treaty revision has been an important tool for reform. Change was also expected because the Euratom Treaty contains many provisions that have become obsolete over time. How can historical institutionalism explain this?

One key concept in explaining continuity is path dependence, which can be understood in various ways. One conceptualization is that early decisions affect later decisions in that the costs of reversal become too high even in the face of inefficient outcomes. Close-related concepts are “positive feedbacks,” “increasing returns,” and, to use the terminology of rational choice, “transaction costs.”


Tim Büthe, Historical Institutionalism and Institutional Development in the EU: The Development of Supranational Authority over Government Subsidies (State Aid), in HISTORICAL INSTITUTIONALISM AND INTERNATIONAL RELATIONS: EXPLAINING INSTITUTIONAL DEVELOPMENT 3 (Thomas Rixen, Lora Anne Viola, & Michael Zürn eds., 2016).


One of the founding works is STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS (Sven Steinmo, Kathleen Thelen, & Frank Longstreth eds., 1992). On the early development, see Thelen, supra note 18, at 374–7.

James Mahoney, Path Dependence in Historical Sociology, 29 THEORY & SOC’Y 507 (2000); and Paul Pierson, Increasing Returns, Path Dependence, and the Study of Politics, 94 AM. POL. SCI. REV. 251, 252 (2000). One often-mentioned example is the “qwerty” keyboard, which refers to the first six letters that appear on the top left row of a keyboard (Q-W-E-R-T-Y). This keyboard was originally constructed for typewriters in the nineteenth century. The design would prevent jams and clashes by the metal arms when typing. Alternative designs that appear to be more efficient and ergonomic have been developed (that is, for computers), but are not commonly used or produced due to “stickiness.” For more examples, see Pierson, supra, at 252. See also Ozan O. Varol, Constitutional Stickiness, 49 U.C. DAVIS L. REV. 899 (2016).

Pierson, supra, at 254.

North, supra note 76.
Another close-related concept when it comes to explaining continuity is what Steinmo terms as “sources of stability.” One such “source of stability” is that there can be effects of a change that may be hard to predict: as expectations are formed around a certain set of rules, it is often preferable to continue with current manifestly inefficient rules. Another “source” is that institutions can become “locked in” (the literature also refers to this phenomenon as “inertia”). As people invest in learning the rules, change is resisted by those who do not want to bear new, so-called up-front costs. Yet another “source” is that institutions are often embedded within a larger set of institutions, and when an institution is changed, this can have implications for this larger set.

3.1. Sources of stability

Several of the sources of stability just mentioned might apply to the Euratom Treaty. Unfortunately, as noted in the introduction to this article, historical institutionalism does not provide us with a precise method for identifying them. It also suffers from problems with assessing alternative explanations; it is difficult to assess which of the factors is the most important. There might also be a multi-causal explanation rather than one single answer to the question on why a revision has not taken place. Despite these caveats, we shall mention some possible sources of stability before explaining how the Euratom has transformed in the absence of treaty revision.

As briefly discussed above, at the time of the process to draft the Constitutional Treaty (which eventually became the Lisbon Treaty), there was some concern that a revision of the Euratom Treaty in substance would have threatened the ratification process. Indeed, as historical institutionalism explains, changes will not occur if there is a fear that change of some rules may affect the overall picture. And as we have seen from the foregoing discussion on the relationship between the EU and Euratom, the Euratom is “embedded” in the larger institution: TEU and the TFEU. This larger set must have been more important than the need to reform the Euratom Treaty (rightfully so).

Thus, there seems to be an unwillingness to deal with a revision of the Euratom in parallel with more pressing issues. Of course, in a full political agenda, it is not strange that priorities must be made. But it is likely that there is something more here than merely a question of priorities: Nuclear energy policy is often characterized as a highly controversial issue, and a discussion on how to revise the Euratom Treaty could therefore affect how to revise the other treaties.

There is also the possibility that there has never been a need to amend the Treaty; European integration takes place with the help of other ventures instead: the TEU and the TFEU. Focus is somewhere else. Perhaps we are more likely to amend treaties that are more important to us. Perceived “unimportant” treaties can be left as they are.

85 Steinmo, supra note 18, at 167–169.
Alternatively, there is the possibility that the member states consider that the Euratom Treaty is significant and that it therefore should remain as it is.87

Another possible “source of stability” is linked to the very character of the Euratom. By comparison to the EU Treaties, which are broadly formulated (traité-cadre), many of the Euratom Treaty provisions are very detailed (traité-loi).88 They resemble more the EU’s secondary legislation (e.g. directives and regulations) rather than primary legislation (i.e. treaty text).89 Historical institutionalists point out that detailed provisions make it harder to agree on future content. Once detailed provisions have been adopted, it is harder to change them than provisions that are more of a framework character. As an alternative, detailed language might contribute to the Treaty not being taken seriously as a “constitutional document.” This would make it less urgent to revise it.90 However, this characteristic could also facilitate change as the discussions would mainly be kept on a technical and bureaucratic level, rather than on a political level.

Some of these aspects may explain why the Treaty has not been revised; but, for the above-mentioned reasons, historical institutionalism cannot help us much further. However, there is another possibility: in addition to the sources of stability already discussed, one reason for the absence of revisions is that the Euratom has transformed instead. In the next section, we shall look at how this came about.

4. Historical institutionalism: The transformation of Euratom

Historical institutionalism has developed considerably since the 1990s. One of the more important developments is that it no longer only focuses on continuity, but also on how to achieve change.91 In the 1990s, the notion of change was often described as sudden; some scholars argue that only “exogenous shocks” can move actors off a
path (similar concepts are “critical junctures”\textsuperscript{92} or “punctuated equilibrium”\textsuperscript{93}). Such a “shock” may consist in external disturbance or crisis. Only until a shock occurs do institutions remain stable.

The exogenous shock view has been criticized as it implies that institutional change is purely a product of fate. As a response to this critique, some historical institutionalists started to argue that change is not necessarily sudden, but that it can occur gradually.\textsuperscript{94} Some historical institutionalists also argued that change can take place from within (endogenous or incremental), produced by the very behavior an institution itself generates.\textsuperscript{95} Thus, it now seems that change can have both exogenous and endogenous factors, and that it can be both sudden and slow.\textsuperscript{96}

Streeck and Thelen identify five different modes (or patterns) of such gradual institutional change: displacement, layering, drift, conversion, and exhaustion.\textsuperscript{97} 

\textbf{Displacement} means that one institution replaces another institution. Change occurs through cultivation of alternative institutional forms. \textbf{Layering} means that new elements are introduced by amendments or revisions on top of old elements. The old system may be unchangeable, but through amendment, its domain shrinks. Sometimes, the old and new system cannot coexist peacefully, and the new system eventually displaces the old system. \textbf{Drift} stems from the insight that institutional stability requires active maintenance—instiutions must be “reset” and “refocused” as the economic, political, and social environment changes. \textbf{Conversion} means that institutions are adapted to serve new goals, functions, or purposes. The underlying rationale is that it takes longer to build new institutions than to use existing ones to new purposes. Finally, \textbf{exhaustion} means institutional breakdown (rather than change). It is a process that takes place gradually (but not abruptly). It is important to point out that Streeck and Theelen do not explain institutional change (the explanation remains unclear). Rather, what they do is to explore various patterns of institutional change.\textsuperscript{98}

These modes can illustrate what is happening with the Euratom in the absence of treaty revision. Each of them will now be discussed.

\textsuperscript{92} See Ruth Berins Collier & David Collier, \textit{Shaping the Political Agenda: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America} (1991) (defining critical junctures as “a period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesized to produce distinct legacies.” Id. at 29). See also Giovanni Capoccia & R. Daniel Kelemen, \textit{The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism}, 59 \textit{World Pol.} 341 (2007).

\textsuperscript{93} According to this punctuated equilibrium approach, institutions are characterized both by periods of stability, and by crises, which punctuate stability. Stephen D. Krasner, \textit{Approaches to the State: Alternative Conceptions and Historical Dynamics} 16 \textit{Comp. Pol.} 223 (1984).


\textsuperscript{95} Streeck & Thelen, \textit{supra} note 22.

\textsuperscript{96} Some scholars also emphasize ideas as part of historical institutionalism. See Steinmo, \textit{supra} note 18.

\textsuperscript{97} Streeck & Thelen, \textit{supra} note 22, at 19ff. See further James Mahoney & Kathleen Thelen, \textit{A Theory of Gradual Institutional Change, in Explaining Institutional Change} 1 (James Mahoney & Kathleen Thelen eds., 2010).

\textsuperscript{98} Steinmo, \textit{supra} note 18, at 168.
4.1. Conversion

The Euratom was mainly set up for economic reasons. The idea was to boost the industry with cheap energy after the World War II. The Euratom was also established to secure the energy supply. The Middle East was volatile, and there were widespread concerns that Europe was too dependent on oil from that region. Nuclear energy was the solution. Of course, the Euratom was also established as a way to deal with Germany: to ensure that Germany would not covertly develop nuclear weapons.

The Treaty’s main purpose (that is, to boost the economy with cheap energy) is reflected in the Euratom’s primary task. Article 1 states: “It shall be the task of the Community 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.” Simply put, the Euratom is about promoting nuclear industry. Consequently, almost all of the Euratom’s activities (as listed in the treaty) revolve around nuclear industrial development. As noted in the introduction to this article, the Treaty contains, inter alia, provisions on a nuclear common market, investment, and supply.

But although nuclear industrial development was originally conceived as the central task, this is no longer the case. It is not to go too far to say that the original rationale, or raison d’être, is no longer relevant. In practice, there are some new policy areas, which the Treaty was not originally attended for, and which can be said to constitute a new rationale. One such policy area is nuclear safety. For a long time, it was believed that there was no legal basis to adopt nuclear safety legislation; the competence remained with the member states. This changed by the Nuclear Safety case, in which the Court “broadened” the Euratom competence to cover this policy field.

The case concerns the Euratom’s accession to the Nuclear Safety Convention, more specifically, the Declaration of Competence that the Council had attached to its decision approving the Convention. Such Declarations are often attached to so-called mixed agreements, where the European Union (or here, the Euratom) participates alongside its member states. In a Declaration of Competence, the EU states the extent to which an international agreement is governed by EU competence. In this


case, the Euratom had acceded to the Convention, but the Commission brought an action for partial annulment of the Council decision that approved the accession. The Commission claimed that the Declaration infringed Community law in that it did not refer to all the competences of the Euratom in the fields covered by the Convention.

The central issue in the case was of whether the Euratom’s “Health and Safety” provisions (articles 30 to 39) provided competence in matters of nuclear safety. Prior to this case, these provisions were only used to adopt legislation on “radiation protection,” understood as protection for the general public and workers from risks from ionizing radiation. It was about the setting of “dose limits” and limits for “maximum exposure.” The question was whether these provisions could also cover regulation of the technological safety of nuclear installations (i.e. “nuclear safety”). The Commission and the Council disagreed on this issue: while the Commission argued that the Treaty covered nuclear safety, the Council was of the view that this competence was retained by the member states.

The Court explained that the interpretation of the “Health and Safety” provisions had to be carried out in the light of the Treaty objective (Preamble) to “create the conditions of safety necessary to eliminate hazards to the life and health of the public,” as well as article 2(b), which states that the Euratom shall “establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied.” The Court held that “it is apparent that such protection cannot be achieved without controlling the sources of harmful radiation.” The Court then pointed out that it had interpreted the “Health and Safety” provisions broadly on several occasions in order to give them “practical effect.” In light of these considerations, the Court found that the “Health and Safety” provisions should be interpreted broadly. After having examined the specific competences in the Treaty, the Court concluded that the declaration must be partially annulled in so far as it did not refer to all relevant articles of the convention.

The implications of this case are far-reaching. It is a landmark case in the sense that it opened up a field where it was believed that the Euratom only had limited competence. Following the Court’s judgement, the Euratom started to adopt legislation on nuclear safety, and today, most of the activities take place in this field. This change is more than profound; one can even argue that the Treaty has found a new rationale.

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103 As should be pointed out, it has, however, never been the case that the “Health and Safety” provisions have had little or no practical effect. To the contrary, the Euratom has adopted quite a significant body of law on “radiation protection” on the basis of these provisions. See, e.g., Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionizing radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom, and 2003/122/Euratom, 2014 O.J. (L 13) 1.


105 This shift in focus from nuclear industrial development to nuclear safety occurred gradually. Following the Chernobyl accident (that is, prior to the judgment), legislation was adopted on the “external” aspects of nuclear safety in order to improve nuclear safety in some Eastern European countries that were not perceived safe.
The evolution described above can be characterized as what Streeck and Thelen term “conversion,” where existing institutions are used for new functions or purposes. The underlying rationale is that it takes longer to build new institutions than to use existing institutions for new purposes. In the case of Euratom, the Court clarified that the Treaty can indeed be used for nuclear safety purposes, although originally, the treaty founders clearly did not intend this; the Treaty can be used for purposes that better fit the political realities of today (that is, better than nuclear industrial development). The Euratom has “converted” in this way because it is better to use the Treaty in new ways than to amend it (or to amend the EU Treaties). This conversion can also explain why the Treaty is still there: now it is needed as a legal basis for nuclear safety.

4.2. Displacement and layering

In addition to “conversion,” we can note another development in the process of transformation: “displacement.” As explained, displacement means that one institution replaces another. It happens because there is a cultivation of alternative institutional forms. “Layering” is similar to displacement, but means that new elements are introduced by amendments or revisions on top of old elements. If the old and new system cannot co-exist peacefully, the new system eventually displaces the old system.

Applied to the present case, we can note that the EU’s competences have expanded quite significantly over the years.106 While the original EEC focused on economic integration, the EU is now pursuing a range of socio-political objectives in addition to the economic ones. Given this expansion, there is now a functional overlap between the Euratom and the EU; in some areas, the EU Treaties can be used instead of the Euratom. A few examples are provided below in order to illustrate this evolution. They show that while the Euratom has some important functions, the EU could equally perform many of these functions.107 Whether this evolution is a matter of displacement, or layering, depends on if the “old Euratom system” can coexist peacefully with the “new EU system.”

a) Environment

The first example of displacement or layering is found in the area of environmental law. The original EEC Treaty contained no provisions on the environment. Therefore, when the EEC started to turn its attention to this policy area in the 1970s, the legislation had to be based on article 235 EEC Treaty (now article 352 TFEU, the “flexibility clause”) and article 100a (now article 114 TFEU, internal market). Over the years, the EU (then EEC) environmental policy became more and more pronounced. The Single European Act introduced an explicit legal basis for the environment (now articles 191

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107 Instead of interpreting the Euratom provisions expansively, the environmental provisions under the TFEU could possibly have been used instead.
to 193 TFEU). The Amsterdam Treaty clarified that environmental protection must be integrated into the definition and implementation of other EC policies (now article 11 TFEU), and the Lisbon Treaty introduced a provision which provides that the Union shall work for “a high level of protection and improvement of the quality of the environment” (article 3.3 TFEU). Due to this evolution, there is today a potential overlap between the EU environmental provisions and the previously mentioned Euratom provisions on “Health and Safety” (articles 30 to 39), which aim to regulate human exposure to artificial ionizing radiation.

The “Health and Safety” provisions do not expressly mention the “environment,” but “water, soil or airspace.” However, practice has led to the inclusion of the concept of the environment also within the Euratom. For example, the CJEU stated in the Land de Sarre case that the Euratom provisions aim at protecting the environment. Moreover, the most recent core legislative instrument on Health and Safety, the “basic safety standards Directive,” now also refers to the “environment.” The Directive establishes uniform basic safety standards for the protection of the health of individuals, subject to occupational, medical, and public exposure against the dangers arising from ionising radiation. The first such Directive was adopted in 1959, and it has since then been updated several times, but only the most recent version contains a reference to the environment. Thus, both the treaty provisions and secondary legislation are now closely linked to environmental policy. There is also EU legislation that illustrates this close relationship. One example is the Environmental Impact Assessment (EIA) Directive, which is based on the environmental legal basis (article 192 TFEU). It applies to nuclear installations, but interestingly, it does not mention the Euratom Treaty.

We should also mention Case C-594/18 P Austria v. Commission, which concerned the issue of the application of state aid rules to the nuclear sector. In this case,
Austria sought to establish that some EU environmental principles (the principle of protection of the environment, the precautionary principle, the “polluter pays” principle, and the principle of sustainability) preclude the grant of state aid for the construction or operation of a nuclear power plant. The Court noted that “such principles are not laid down in [the Euratom] Treaty” and that article 106a(3) of the Euratom Treaty “cannot oust the application of . . . [the EU environmental provisions and principles].”117 The Court also made clear that the Euratom “Health and Safety” provisions “do not deal exhaustively with the environmental issues that concern the nuclear energy sector [and] therefore, the Euratom Treaty does not preclude the application in that sector of the rules of EU law on the environment.”118 It should be added that the Court dismissed Austria’s submission that the state aid in issue should be declared incompatible with EU law on other legal grounds.

b) Energy in the TFEU

Another example of displacement (or possibly layering) is in the area of what we term “general energy policy.” An explicit legal basis for “general energy” was only introduced by the Lisbon Treaty (2009), although, despite the previous absence of a legal basis, the EU adopted quite diverse legislation by making use of, for example, the legal bases on the internal market (now article 114 TFEU), environmental protection (now article 192 TFEU), and the flexibility clause (now article 352 TFEU).119

In Case C-490/10, European Parliament v. Council, the Court addressed for the first time the relationship between this new legal basis (article 194 TFEU) and the Euratom Treaty.120 The case concerned the new Notification Regulation, which the Council had adopted in 2010.121 The Regulation was based on the identical provisions in article 337 TFEU and article 187 Euratom Treaty. Under these provisions, the Commission may collect any information required for the performance of the tasks entrusted to it. The European Parliament brought an action to the CJEU for annulment and claimed that the Regulation should have been adopted solely on the basis of article 194 TFEU, which would give it a greater role in the legislative process. The Council disagreed.

The Court pointed out that article 194 TFEU constitutes the legal basis for acts that are “necessary” to achieve the energy objectives.122 It found that the Regulation was to be considered “necessary” in this sense; the collection of information was intended to allow the Commission to achieve the specific objectives set out in article 194 TFEU.

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Court decided that article 337 TFEU and article 187 Euratom Treaty were an incorrect legal basis, and that the Regulation should have been based solely on article 194 TFEU.\footnote{Id. ¶ 86.} The Court clarified that the “aim and content” of the Regulation concern the implementation of the EU policy “on energy in general”\footnote{Id. ¶ 82.} and that “the information relating to the nuclear infrastructure is thus only a component of all the relevant information concerning the energy system of the European Union as a whole.”\footnote{Id. ¶ 83 (emphasis added).}

This reasoning opens up for a broad application of article 194 TFEU. It limits not only the scope of article 187 Euratom Treaty, but also the scope of the Euratom Treaty as a whole—because when can nuclear energy not be considered “only a component”? Surprisingly, the Court did not discuss the “shall not derogate clause” in article 106a.3 Euratom Treaty. One may wonder what exactly is the point of this provision if, in this case, article 194 TFEU is not regarded as “derogating” from article 187 Euratom Treaty.

The Court’s approach here seems also to be discarding its “centre of gravity” approach, developed under the EC Treaty. In that context, the Court has held that if more than one provision fits the content or aim, the provision in the “centre of gravity” of the legal act shall prevail, that is, the predominant or main component of the legal act. And when it is not possible to identify a main component (because two or more components are “indissociably linked”), it might be necessary to use a joint legal basis.\footnote{Opinion 2/2000, Cartagena Protocol on Biosafety, EU:C:2001:664, ¶ 23.} Perhaps for this reason, where there are “overlaps” between the Treaties, a joint legal basis is often used.\footnote{A joint legal basis was not possible in the EC–EU relationship—a choice had to be made between the Treaties (the provision stipulating this was EC Treaty, supra note 37, art. 47).} But Case C-490/10, Parliament v. Council might have changed this practice. One example is the Community Civil Protection Mechanism, which can be used for all kinds of emergencies, including nuclear accidents and radiological emergencies.\footnote{Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, 2013 O.J. (L 347) 924; Council Decision 2007/779/EC, Euratom of 8 November 2007 establishing a Community Civil Protection Mechanism (recast), 2007 O.J. (L 314) 9; Council Decision (Euratom) 2001/792/EC of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, 2001 O.J. (L 297) 7.} It was adopted on a joint legal basis in 2001, on the previously mentioned flexibility clauses in the respective Treaties. In 2013, it was replaced by the Union Civil Protection Mechanism. But it was now adopted on a single legal basis in the TFEU: the new treaty article on civil protection, introduced by the Lisbon Treaty.

In the context of the EC Treaty, the Court has also held that a joint legal basis can only apply if the decision-making procedures are compatible.\footnote{See Case C-155/07, Parliament v. Council, EU:C:2008:605, ¶¶ 73–85; Case C-300/89, Commission v. Council, EU:C:1991:244, ¶ 20; Case 138/79, Roquette Frères v. Council EU:C:1980:249, ¶ 33.} They are not regarded as compatible if one legal basis stipulates unanimity in the Council and the other one requires majority decision. If different legal bases are stipulating different roles for the European Parliament, the “most democratic” legal basis shall be chosen. But when it
comes to the choice between the Euratom Treaty and the TFEU, this course becomes problematic because the European Parliament has a generally more limited role under the Euratom Treaty than under the TFEU.\footnote{See also Case C-130/10, European Parliament v. Council, EU:C:2012:472.} This is also where the “shall not derogate” clause comes into play—it would otherwise be void of all meaning. But the Court’s “only a component” approach in Case C-490/10, Parliament v. Council might be a way to get around this.

This example of “general energy” indicates that what we witness now is a matter of displacement, as the old and new system do not seem to be able to coexist peacefully (the “old system” is here the system prior to the Lisbon Treaty and the “new system” is the one post Lisbon). It seems to be the Court that has the leading role in this process, that the European Parliament has sought to further this evolution, and that the Council seeks to block it.

c) State aid

Yet another example concerns state aid. Of the three original Treaties, only the Euratom did not contain state aid rules.\footnote{The EEC Treaty contained state aid rules and specific derogations from state aid rules for agriculture and transport. The now repealed ECSC Treaty contained an explicit and absolute prohibition of state aids. See EEC Treaty, supra note 15; ECSC Treaty, supra note 24.} Until only recently, a debated question was whether this absence was intentional, and whether the provisions in the TFEU could apply to the nuclear sector or if the nuclear sector was excluded from state aid discipline.\footnote{See, e.g., Thomas F. Cusack, A Tale of Two Treaties: An Assessment of the Euratom Treaty in Relation to the EC Treaty, 40 Common Mkt. L. Rev. 117, 130–2 (2003); Jürgen Grünwald, Das Energierecht der Europäischen Gemeinschaften: EGKS–EURATOM–EG: Grundlagen, Geschichte, Geltende Regelungen 234–9 (2003); Leigh Hancher, State Aid in the Energy Sector, in EC State Aids 457 (Leigh Hancher, Tom Ottervanger, & Piet Jan Slot eds., 2006).}

One central question was whether the application of the state aid rules amounts to a derogation of the Euratom provisions under the “shall not derogate” clause in article 106a.3 Euratom Treaty. It was suggested that the provisions on “Investment” (articles 40–4 Euratom Treaty), which oblige persons and undertakings to communicate to the Commission their investment projects, exhaust its powers in this area.\footnote{Cusack, supra note 133, at 132. Cf. Harold Nyssens & Dominik Schnichels, Energy, in The EC Law of Competition 1361, 1365 n.55 (Jonathan Faull & Ali Nikpay eds., 2007).} Another issue discussed was how the state aid rules could be reconciled with the Euratom Treaty’s “general scheme and spirit,”\footnote{See also Communication from the Commission: Guidelines on State aid for environmental protection and energy 2014–2020, June 28, 2014, 2014 O.J. (C 200) 1.} specifically with article 1 Euratom Treaty, which states that it is the task of Euratom to create “the conditions necessary for the speedy establishment and growth of nuclear industries”: under rules on treaty interpretation in public international law, a treaty is to be interpreted according to its “object and purpose.”
The issue on the application of state aid to the nuclear sector was briefly touched upon in the previously mentioned Joined Cases 188–90/80 Transparency Directive.\footnote{Joined Cases 188–90/80, France, Italy v. Commission, EU:C:1982:257.} The Court pointed to the “shall not derogate” clause and stated that the Directive in issue could not be declared void as far as it covers undertakings in the nuclear sector, because France had not established that it derogated from the Euratom Treaty provisions.\footnote{Id. ¶ 32.} But the Court did not clarify that the state aid provisions would generally apply to Euratom undertakings.

Although theoretically considered an open question,\footnote{See Henrik Børnbye, Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow’s Electricity Production 375–86 (2010); Angus Johnston & Guy Block, EU Energy Law 386 n.51 (2012); Hancher, supra note 134, at 458 note 69.} in practice, the Commission applied state aid rules to the nuclear sector. However, it was careful to avoid arriving at a definitive position on the relationship between the Euratom Treaty and the EU Treaties.\footnote{See, e.g., Commission Decision of 22 September 2004 on the State Aid which the United Kingdom is planning to implement for British Energy plc., 2005/407/EC, 2005 O.J. (L 142) 26, ¶¶ 240–5, 326; Commission Decision of 4 April 2006 on the State Aid which the United Kingdom is planning to implement for the establishment of the Nuclear Decommissioning Authority (notified under document number C(2006) 650, 2006 O.J. (L 268) 37; Commission Decision of 25 September 2007 on Measure No. C 45/2006 (ex-NN 62/A/2006), implemented by France in connection with the construction by AREVA NP (formerly Framatome ANP) of a nuclear power station for Teollisuuden Voima Oy (Doc. No. C(2007) 4323) 2008/281/EC; Commission Decision COM(2001) 3967 final (Dec. 11, 2001); Aid C 31/2002 Transitional Regime for the Belgian electricity market, 2002 O.J. (C 222) 2; Aid E 3/02 Aid to Electricité de France (EdF), 2003 O.J. (C 164) 7.} The Commission either declared that a contested measure was “not aid” or found the aid justified. It was also careful in taking the Euratom Treaty objectives into account.\footnote{See Børnbye, supra note 137, at 386.} Even some Euratom legislation now referred to state aid rules.\footnote{See e.g., Council Regulation (Euratom) No. 139/2012 of 19 December 2011 laying down the rules for the participation of undertakings, research centres and universities in indirect actions under the Framework Programme of the European Atomic Energy Community and for the dissemination of research results (2012–2013), 2012 O.J. (L 47) 1.} But to silently accept that the State aid rules applied to the nuclear sector was of course not a satisfactory situation.

It was only recently, in the above-mentioned Case C-594/18 P Austria v. Commission,\footnote{Case C-594/18 P, Austria v. Commission, EU:C:2020:742.} where the Court for the first time clarified the relationship between the Euratom Treaty and the state aid rules of the TFEU. The Court’s judgment confirms a judgment by the General Court, which upheld a Commission decision approving an aid scheme planned by the United Kingdom for the construction of two reactor unites at “Hinkley Point C.” Austria, which does not have any nuclear power plants on its territory, appealed the Commission’s decision to the General Court and then to the CJEU.

The Court referred to the “shall not derogate” clause and held that the Euratom Treaty is a sectorial treaty. The TFEU, the Court explained, which has more far-reaching aims and powers, applies in the nuclear sector when the Euratom Treaty does not contain specific rules. It then held: “since the Euratom Treaty does
not contain rules concerning State aid, [the State aid rules in the TFEU] may be applied in that sector.”\(^\text{142}\) The Court then pointed to the Treaty preamble, which states that it seeks to create the conditions necessary for the development of a powerful nuclear industry. It also pointed to article 1 (referred to above), and to article 2(c) which provides that the Euratom is to “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,” as well as to articles 40 and 41, which show that investment in nuclear reactors is envisaged by the Treaty. The Court held that the objectives pursued by the Treaty cover the construction of nuclear power stations, and that the application of state aid rules is not contrary to those objectives. It concluded that the state aid rules apply to the nuclear sector.

This example of layering is somewhat different from the examples above (environment and energy), as it is not a case of overlaps between the Treaties; rather, it can be described as a “gap” in the Euratom Treaty that is filled with State aid provisions in the TFEU. Yet, it is an example of layering as new elements are introduced on top of old elements.

4.3. Drift

Change through “drift” means that institutions retain their formal integrity, although they “drift” away from social reality. Streeck and Thelen explain that institutional stability does not occur automatically, despite what is sometimes referred to as “stickiness.” Rather, institutions need to be “recalibrated” (or “reset” or “refocused”) in response to political and economic changes in order to maintain stability. Sometimes, such recalibration needs to be done in a fundamental way. If this is not done, institutions can be subject to change through drift. On the surface, institutions that have not been recalibrated might look stable, but it is only a chimera because what is going on is a fundamental change of the institution.

Applied to the Euratom, is drift what is about to happen? We must recall here the discussion above on how the Euratom has evolved from its original rationale. While the Euratom was originally (and still formally is) about nuclear industrial development, it is today about nuclear safety. As the Euratom can now be used for nuclear safety purposes, it is no longer to be seen as a remnant from the 1950s, but as an important legal basis for a significant policy field. This evolution, which can also be described as “recalibration,” is necessary for the Euratom in order to survive. It provides the Euratom with some added value and “output legitimacy.”\(^\text{143}\)

So, it can be argued that the Euratom is not transforming through drift, as recalibration is taking place. However, it contains provisions that are not adjusted, but are increasingly outmoded, and in that sense, drift is what is going on.

\(^\text{142}\) Id. ¶ 32.

\(^\text{143}\) On “input legitimacy” and “output legitimacy,” see Fritz W. Scharpf, Governing in Europe: Effective and Democratic? (1999).
4.4. Exhaustion

A few words should finally be said about exhaustion, which, as mentioned, means institutional breakdown rather than change. It is a process that takes place gradually. Applied to the Euratom, is exhaustion what we can expect, or has it already happened? If the Euratom is not needed (because we can use the TEU and the TFEU instead), should we not repeal it? In the introduction to this article, we noted that dormant provisions can be problematic when it comes to the EU Treaties (the Euratom included), and that keeping a treaty that is not used is not a preferable situation (because they are “constitutional” in nature). One could also imagine that problems could arise concerning legal uncertainty when it comes to applying and interpreting the Euratom Treaty (or when applying and interpreting the EU Treaties).

However, as also noted, the Euratom Treaty cannot be characterized as a dead letter as a whole: as we have seen, some provisions are applied, but not in the way that was originally intended. The Treaty also contains provisions that have remained relevant. One example is the Euratom’s system of so-called nuclear safeguards. Under this system, which works in parallel to the safeguard system established by the IAEA, the European Commission sends inspectors to the member states to check that nuclear material is not being diverted and used for military purposes. The main function of the Euratom safeguard system today is to fulfil international obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and obligations linked to the trade agreements. In addition, some commentators argue that a regional safeguards system may foster political stability between the member states as the region as a whole develops a generally peaceful attitude.

If the Euratom were to be repealed, these provisions on nuclear safeguards would have to be replaced. One could easily imagine that the negotiations would be difficult as this is such a sensitive policy area. One difficulty would be where to place the

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144 Euratom Treaty, supra note 3, art. 77–85.
provisions as they are “supranational” in nature: for example, the Commission can issue sanctions directly to the nuclear operators and the provisions are under the CJEU’s jurisdiction. Therefore, the most “natural” place would be among the policy areas in the TFEU where the provisions have the same “supranational” quality as the Euratom safeguard provisions. But unlike the provisions in the TFEU, the Euratom safeguards provisions are very detailed. The Treaty founders intended them to be applied autonomously, with limited recourse to secondary legislation. So in this sense, they are essentially different from the TFEU provisions.

Thus, exhaustion is not what we see yet when it comes to the Euratom. It has rather transformed in line with the other modes discussed above.

5. Conclusions

The first aim of the article was to discuss some possible reasons to why the Euratom Treaty has not been revised. By using the historical institutionalism approach, the article identified some sources of stability. One such source is that the Treaty will not be revised if there is a fear that a revision may affect the overall picture. Another possible “source” was linked to the very character of the Euratom: many of the treaty provisions are very detailed (traité-loi) and this makes it hard to agree on future content.

This part of the study adds to our understanding of why the EU treaties are revised or not revised. But for reasons already stated, this part could only provide limited results. The question of why the Treaty has not been revised remains: further research should be undertaken to explore it. While one way of doing this could be to perform interviews, it seems that the answer is more complex than merely saying that the member states, “the masters of the treaties,” do not agree because their interests diverge on nuclear issues: nuclear energy is not the only policy area where the member states do not agree.

The second aim of the article was to show that the Euratom has transformed in the absence of treaty revision. The analysis was based on the conceptual framework proposed by Streeck and Thelen. It showed that a gradual institutional change has taken place through displacement (one institution replaces another), layering (new elements are introduced by amendments or revisions on top of old elements), drift (institutions retain their formal integrity, although they “drift” away from social reality), and conversion (existing institutions are used for new functions or purposes). Exhaustion (institutional breakdown) is not something that we can yet observe. As we have seen, these modes are not clear-cut but overlapping: the same evolution can be described in different terms.

One of the most significant changes takes place through “conversion”: the CJEU has given the Treaty a broad interpretation so that it now covers new policy areas, not previously intended. The Euratom’s original rationale (to promote the nuclear industry) has been replaced by needs that better fit the political realities of today (nuclear safety). The use of the Euratom for nuclear safety purposes justifies the Treaty’s
existence in terms of “out-put legitimacy.” The Euratom Treaty still has an important role to play, which is perhaps less controversial than the original rationale (to promote the nuclear industry). One could, of course, object that if we want the Treaties to reflect practice, “conversion” is not a satisfactory situation. If the Euratom of today is about nuclear safety and less about promoting the nuclear industry, this should be reflected in the Treaty. Also, relying on the Court in this manner can be problematic for EU member states with a strong positivist legal culture.  

We have also seen how the Euratom has transformed along the lines of displacement and layering. Examples were found in the area of EU environmental law, “general” energy policy, and state aid. Over the years, new legal bases have been added to the TFEU “at the expense of” the Euratom Treaty. The “shall not derogate” clause in article 106a.3 Euratom Treaty, which is supposed to control the treaty relationship, does not seem to provide much “protection” in this sense, although, as pointed out, an alternative interpretation of the clause would be possible. The analysis also showed that the Euratom has “drifted” away from social reality—that is, political needs. Many of the provisions are increasingly outmoded, but some of the provisions have been “recalibrated.”

In addition to the implications just mentioned of not revising the treaty, and to allow the Euratom to transform, there is the problem with dormant provisions (briefly discussed in the introduction): they may cause problems with legitimacy if invoked again after a long dormant period. And if not invoked, it is still a problem because the Treaty does not reflect reality. Moreover, the inability to revise the Treaty might make it harder to perform an active and modern nuclear energy policy.

How can it be explained that change takes place through the modes identified by Streeck and Thelen rather than by treaty revision? One reason could be that treaty revision is too costly in comparison: if an institution such as the Euratom can be changed by less costly procedures (through displacement, layering, drift, conversion, and exhaustion), it does not have to be modified through treaty revision. Thus, the two aims of the article are interlinked: the answer to the question of why the treaty has not been revised might be that the Euratom has been able to transform. In addition, it should be recalled that repealing policy areas is a relatively unknown exercise for the EU. New policy areas have been added by treaty revision, but seldom (if ever) have policy areas been repealed. In other words, there is uncertainty about how this is to be done.

Finally, the focus on Euratom does not imply that the EU (here: as distinct from Euratom) might not have transformed in this way too: indeed, many scholars recognize that institutional change in the EU originates not only in treaty revisions, but also in practice by the political institutions and the EU courts, and between formal

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148 However, evolution through adjudication can also be a way of “preserving” the role of the CJEU. Kathleen M. Sullivan, Constitutional Amendmentitis, 23 Am. PROSPECT 20 (1995). Some scholars argue that this is a sign that we in fact have a “living constitution” which “evolves, changes over time, and adapts to new circumstances.” David Strauss, The Living Constitution 1 (2010).

149 See TEU, supra note 4, art. 48(2) (stipulating, only post Lisbon, that proposals may “serve either to increase or to reduce the competences conferred on the Union in the Treaties.” Emphasis added).
treaty revisions. Moreover, the impact of such change is not necessarily less profound than formal treaty revisions. As Weiler points out in his seminal article “The Transformation of Europe,” there was no seismic event, no “Big Bang” when it comes to the transformed polity of the European Union; the introduction of the Maastricht Treaty was not as revolutionary and significant as one may think. The 1992 “eruptions” were rather shaped by earlier Community mutations, and many of them were “interstitial.” Change which takes place through treaty revision is neither the most frequent, nor the most profound way to change the European Union.

The present study shows that the Euratom has been able to transform too, but that this transformation has not been confirmed by treaty revisions. And the question is how far it can transform until treaty revision in some form (including abolishment) becomes inevitable.

150 See, e.g., Contested Competences in Europe: Incomplete Contracts and Interstitial Institutional Change (Henry Farrell & Adrienne Héritier eds., 2007); Héritier, supra note 49, at 47.
151 Weiler, supra note 66.