

# Options for the EURATOM Treaty in the Framework of a New European Constitution

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## Summary

The Praesidium has published its first complete draft Constitution for Europe, which will now be debated within the Convention, before being presented to the EU Summit on the 20<sup>th</sup> June in Thessaloniki. The new Constitution will then be discussed within the next Inter-Governmental Conference (IGC) expected to conclude later in 2003 or 2004. The new Constitution was designed to simplifying the EU Treaties in preparation for the enlargement of the EU in May 2004.

The EURATOM Treaty is one of the founding Treaties of the current EU and is an anomaly as it has not been reformed by the previous IGCs and remains as a stand alone treaty established to support a particular technology – in this case nuclear power.

A number of options for the future shape of the EURATOM Treaty have been put forward. But remarkably there has been NO discussion in the plenary of the Convention on the future of the EURATOM Treaty to date.

The options put forward do date are summarised in this paper. These are:

- ?? The **Praesidium paper**, suggests no reform of the EURATOM Treaty, but rather proposes to include the Treaty in the new Constitution as an annex. The only changes within the Treaty would be the legal requirements to enable this annexing to occur. Therefore, the Treaty would retain its pre-amble despite being universally recognised as no longer valid.
- ?? **The European Commission** have proposed that a revised EURATOM Treaty, an act on Civil Nuclear, be annexed to the future Constitutions. The Act effectively retains all the current powers of the Treaty but proposes to remove the preamble.
- ?? A number of suggestions have been put forward by **Convention Members**, one of which proposes the radical reform of EURATOM. The Nagy et al. proposal suggests that only powers relating to health and safety and non-proliferation be transposed into the future Constitution. In all other areas the powers of the Treaty are now obsolete and should be abandoned or can be subsumed within the new Constitution.
- ?? The **Sunset Option** is currently gaining support both on the Member State level and within the Convention. This suggests that given the lack of time and the highly political nature of the EURATOM Treaty substantive debate be delayed. The new Constitution would acknowledge that the EURATOM Treaty in its present form is no longer appropriate and the Treaty be phased-out by 2007 to mirror the 50-year operational life of the European Coal and Steel Community.
- ?? **Member State unilateral action**. Clearly, if Member States so wished they could withdraw from the EURATOM Treaty if the future Constitution gave too much power or status to the EURATOM Treaty. They could propose an intergovernmental conference of the EURATOM Member States with the objective of finding an unanimous solution to end the Treaty and in parallel they could, alone or together

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with likeminded members opt for a way out under the international common law rules/ the Vienna Convention on international treaties.

The lack of debate in the Convention has resulted in the Praesidium proposal being put forward. This is the worst option for the future Constitution, as it retains the EURATOM Treaty in its entirety. This undermines the work of the Convention as they have avoided the necessary reform of a key plank of EU legislation. Furthermore, the inclusion of an unreformed EURATOM Treaty, with its mandate to promote nuclear power, threatens the future Constitution as it may negatively influence the referendums in a number of Member States.

**It is now imperative that the members of the Convention take action and debate the future of the EURATOM Treaty.**

#### A) Praesidium

In September 2002, the Secretariat of the Convention sent a discussion paper to the Praesidium for information concerning the beginning of the “*simplification procedure*”<sup>3</sup>. This document considers the question of not only merging the four treaties but also of merging the founding treaties. Astonishingly, the paper describes them as “*large number of founding treaties*”<sup>4</sup> regarding the Communities and the European Union without detailing them and at a time when one of the three founding treaties, ECSC, was already phasing out. The paper then describes previous attempts to create a merged treaty of the founding treaties. They all were not realised, “*...partly because the new Merger Treaty ... would have required ratification by the Member States. Some Member States did not want to see the occasion used to reopen discussion on matters that were firmly established: the EAEC<sup>5</sup> Treaty was in this respect a particularly sensitive point. Others were concerned that the substantive amendments introduced by the Treaty of Amsterdam would not stand out with sufficient clarity in a codified or merged text...*”<sup>6</sup> “The paper also underlines that a merger of the community treaties has raised “*sensitive questions, which undoubtedly require political choices.*”<sup>7</sup>.

In March 2003, the Praesidium published a paper ‘Suggested approach for the EURATOM Treaty’. This approach explicitly does not think it “*appropriate*” to become involved in an operation “*to amend the EURATOM Treaty substantially*”<sup>8</sup>. This is the guiding principle for the whole suggestion. There is no mentioning or willingness to rethink the sense, timeliness or the need for a reflection in view of the liberalisation of the energy market.

The Praesidium favours the amendment of the EURATOM Treaty, allowing it to continue to exist independently. The adjustments should be done by means of a Protocol annexed to the Constitutional Treaty. The suggestion is to introduce a so-called general clause into the EURATOM Treaty as new Article 107, with the consequence that apart from specific exemptions, all articles under Title III of the EURATOM Treaty (provisions governing the institutions) and Title IV (Financial Provisions) would be replaced by “*the institutional and financial provisions of the Treaty establishing a Constitution for Europe.*”

According to this suggestion, the amended EURATOM Treaty “*would not change its nature, as it would continue to be primary legislation*”. And “*the fact, that it is still a separate Treaty would not preclude a merging of the legal personalities of the EURATOM Community and of the European Union*”. Therefore the suggestion

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<sup>3</sup> see The European Convention Secretariat, CONV 250/02 (Simplification of the treaties and drawing up of a constitutional treaty)

<sup>4</sup> see p. 8 of Secretariat’s Paper

<sup>5</sup> EURATOM

<sup>6</sup> see p. 10, of Secretariat’s Paper

<sup>7</sup> see p. 9, Fn 4, of Secretariat’s Paper

<sup>8</sup> see par. 2 of the Suggestion

wants to “repeal Art. 184 of the EURATOM Treaty”, and in consequence the EURATOM community would have no more legal personality.<sup>9</sup>

The suggestion does not specify which Articles of the new Union’s treaty will apply exactly and thus there is still a probability that there may be a specific provision concerning decision making in the field of Nuclear within the framework of the Constitution. But at present, the Draft proposal of the Convention foresees the following on legislative acts, which would then also be applicable for EURATOM and which might mean greater involvement of the European Parliament:

The text of the new proposal is included as an annex to this document.

### B) The European Commission

The first “preliminary draft” –known as the Penelope Paper - prepared by a specific task force in the Commission, headed by Francois Lamoureux, Director General of DG TREN, published in December 2002 envisages the following strategy for the EURATOM Treaty:

- a) The EURATOM Treaty would be substantially slimmed down by removing a series of provisions which:
  - ?? duplicated those already included in the Constitution (and previously in the Treaty establishing the European Community), i.e. the chapters on the promotion of research and dissemination of information, on the institutions and on external relations; or
  - ?? were obsolete and had never been applied: this is the case in particular of part of the chapter on supplies, especially the provisions on the right of option on ores and the chapter on property ownership, which has never been applied.
- b) Conversely, the provisions retained are those on the setting of standards (Chapter III on health and safety) with small adjustments to incorporate nuclear safety, Chapter IV on investments (with more explicit authorisation power), Chapter V on joint undertakings and Chapter VII on safeguards. These chapters, which contain some of the best drafting of the existing treaties, have hardly been changed and are included in an Additional Act.
- c) Parliament is restored to the institutional system, as it is given the power to adopt, with the Council, “Laws” for basic standards whereas at present it is very much outside the decision-making process. There remain only a few cases where the Council would decide on its own, on a proposal from the Commission, for instance where specific rules concerning the non-disclosure of confidential information apply....”

### C) Convention Members

In February 2003<sup>10</sup> a submission by a group of Convention Members or Alternates, including, Nagy, Wagner and MacCormick, was put forward. This called for, the abolishment of the 'special economic zone' that the EURATOM created, and to respect the principles of fair competition and the creation of a level playing field for

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<sup>9</sup> see par 8 of the Suggestion, the reason for one legal personality is explained as following (par.9): “Merging the legal personalities means that the agreements concluded by the Commission pursuant to Article 101 TEAEC commit the Union. If the legal personalities are not merged, these agreements would be concluded by the EURATOM Community. Third States and international organisations might therefore, where appropriate, have to conclude agreements either with the European Union or with the EURATOM Community, depending on the subject. This situation, **while being technically possible from a legal point of view**, would probably conflict with the Convention's intention to simplify.”

<sup>10</sup> Contribution by Ms Marie Nagy, Ms Renée Wagner and Mr Neil MacCormick, alternate members of the Convention: "The Future of the EURATOM Treaty in the Framework of the European Constitution. Ms Marie Nagy, Ms Renée Wagner and Mr Neil MacCormick, alternate members of the Convention, February 23<sup>rd</sup> 2003, CONV 563/03

different energy sources, thereby ceasing to give nuclear energy undue advantages over its rivals. This proposal would have the effect of abolishing the EURATOM Treaty. The justification put forward is that: -

**Competition Policies / Electricity Market Liberalisation:** The Lisbon Summit called for increased liberalisation of key sectors such as energy. A consumer-friendly and environmental-friendly liberalisation of the electricity industry requires increased transparency, fair access to grids, rights for consumers and a level playing field between generators. The EURATOM Treaty, with its requirement for the Community to create the *'conditions necessary for the speedy establishment and growth of nuclear industries'* contradicts the requirement for equal treatment of electricity generators. Furthermore, it creates advantages for the nuclear industry such as EURATOM Loans and a specific nuclear R&D program and has been used by the European Commission to justify their lack of action to tackle the questions of market distortion created by state aids to the nuclear industry. Since the liberalisation of the energy markets, there must be no more special provisions concerning nuclear reactors as an energy source, outside the Competition framework of the EC Treaty.

**Recent Proposals of the Commission to extend its powers regarding nuclear technology:** Proposals from the Commission to increase their regulatory role under EURATOM have been put forward (the so called 'nuclear package') and will be considered by the European Council after it has received the non-binding opinion of the European Parliament. The adoption of this is far from certain given the uncertainties surrounding the legal basis for these directives. Such a proposal must not be considered until the role and control of EURATOM has been reviewed.

**EURATOM has a democratic deficit:** The EURATOM Treaty is largely shielded from the scrutiny of the European Parliament, as there is no co-decision for its operational functions. As the Commission notes in its own draft constitution for the future of Europe, *"The legislative role of the European Parliament must be confirmed by general use of the co-decision procedure"*. Such a change must affect the provisions currently contained in the EURATOM Treaty and would at minimum require the modification of the decision mechanisms prescribed in it.

**No present consensus on nuclear energy among Member States:** Policies regarding the use of nuclear power have become increasingly divergent among Member States. Whereas some have an active phase-out policy others continue to support their nuclear sector. Therefore the 1957 consensus on nuclear energy no longer exists, and this changed situation has to be reflected in the new constitution.

#### D) Sunset Clause:

In 2000 the European Parliament passed a resolution that included a call for the EURATOM Treaty to be abandoned by 2007. This would enable the EURATOM Treaty to have operated for 50 years, and thus mirror one of the other founding Treaties, the European Coal and Steel Community, which ended in 2002. Furthermore, 2007 would coincide with end of the 6<sup>th</sup> Framework program and allow the merger of Community research programs in the future.

If this proposal were adopted it would enable the Convention and subsequent IGC to acknowledge that the fundamental reform of EURATOM was necessary, but allow more time for the process of assessing which parts of the Treaty should remain and in what framework.

#### E) Member States Opt-out:

Ultimately, Member States have the opportunity to withdraw from the EURATOM Treaty. One or a number of Member States could put forward such a proposal if the future of EURATOM is safeguarded in a future European Constitutions. This might require a referendum or at least parliamentary approval, but there is no

legal reason why a Member State should not take unilateral action to withdraw their participation in the EURATOM Treaty. Even though EURATOM has no specific end date, it can be ended by unanimous decision via a Intergovernmental Conference of the EURATOM member states. Member States can also leave the EURATOM treaty, following the procedure and rules under international common law in combination with the Vienna Convention on International Treaties.

Conclusion:

For many months some Member States and Members of the Praesidium and Convention have been reluctant to discuss options for the future of the EURATOM Treaty. Some reluctance is due to a desire to support nuclear power and the view that the EURATOM Treaty is an essential part of the renaissance of nuclear power in the EU. Furthermore, these pro-nuclear forces are proposing to use the development of a new EU Constitution to further support nuclear power by excluding nuclear power from competition in the electricity market and add powers to set nuclear safety standards. Others do not wish to discuss the EURATOM Treaty as support for its existence is split and thus discussions on its future may slowdown work on the Constitution or even risk its ratification by Member States.

The role of the EU institutions in controlling Member State's energy policy is a difficult and highly political area; this is reflected in the lack of an Energy Chapter within current legislation. Nevertheless, the EU has developed and implemented legislation on the liberalisation of energy markets, both gas and electricity. The continuation of the EURATOM Treaty is in contradiction to this legislation, as the electricity market directive requires a level playing field between generators and thus does not support the specific requirement to expand the use of nuclear energy.

However, it is clear that citizens in Member States do not want the continuation of the special treatment afforded to nuclear power through the EURATOM Treaty. This was made clear in the March 2003 Eurobarometer poll, in which only 10% of the EU population wanted additional research for nuclear fission. Furthermore, over 120 Non-Government Organisations have signed a petition to the Convention calling for the radical reform of EURATOM. It is therefore clear that the reform of the EURATOM Treaty should be guaranteed in the framework of a new EU Constitution. Failure to do so will undermine the work on the Convention and on a future Constitution.

The Convention should therefore propose that the EURATOM Treaty be radically reformed and demand that the IGC ensure that only those elements of the EURATOM Treaty relating to nuclear safety, protection of the environment and non-proliferation should be integrated into those chapters of the future convention which will deal with environmental protection and health protection. This should either be done in 2004 or if necessary by 2007.

If the Convention does not address the EURATOM issue then it is necessary for the IGC to take action. This would need to be promoted by those Member States that do not wish to grant nuclear power special status. They should analyse the risks and costs of a phasing out the Treaty under the different alternatives, be it via an unanimous procedure within the IGC rules or if necessary Member States should leave the Treaty in accordance with the relevant international rules.

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PROTOCOL AMENDING THE EURATOM TREATY

THE HIGH CONTRACTING PARTIES,

RECALLING the necessity that the provisions of the Treaty establishing the European Atomic Energy Community should continue to have full legal effect,

DESIROUS however to adapt that Treaty to the new rules established by the Treaty establishing a Constitution for Europe, in particular in the institutional and financial fields,

HAVE ADOPTED the following provisions, which are annexed to the Treaty establishing a Constitution for Europe and amend the Treaty establishing the European Atomic Energy Community as follows:

Article 1

The word "Community" shall be replaced by "Union".

Article 2

Article 3 shall be repealed.

Article 3

The heading of Title III "Institutional provisions" shall be replaced by the following: "Institutional and financial provisions".

Article 4

Articles 107 to 170 shall be replaced by the following:

"Article 107

Without prejudice to the specific provisions laid down in Articles 134, 135, 144, 145, 171, 172, 174 and 176, the institutional and financial provisions of the Treaty establishing a Constitution for Europe (Articles I-XX to I-ZZ and Articles III-XX to III-ZZ) and Article I-45 of that Treaty shall apply to this Treaty".

Article 5

The heading of Title IV "Financial provisions" shall be replaced by the following:

"Specific financial provisions".

Article 6

Articles 173, 173a, 175 and 177 to 183a and 184 shall be repealed.

## Article 7

Article 190 shall be replaced by the following:

"The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Statute of the Court of Justice, be determined by the Council, acting unanimously".

## Article 8

Article 198 shall be amended as follows:

"(a) This Treaty shall not apply to the Faeroe Islands".

## Article 9

Article 201 shall be amended as follows:

"The Union shall establish close cooperation with the Organisation for Economic Cooperation and Development, the details of which shall be determined by common accord".

## Article 10

Article 206 shall be amended as follows:

"The Union may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.

These agreements shall be concluded by the Council, acting unanimously after consulting the European Parliament.

Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article N of the Treaty on European Union".