

# Energy intelligence for Europe

## The Euratom Treaty and future energy options: Conditions for a level playing field in the energy sector

*Copenhagen, 23 September 2005*

### **Transcript of the presentation "The Legal Perspective: The Euratom Treaty and the new Constitution" by Dr. Dörte Fouquet, Attorney, European Renewables Energies Association**

Good morning ladies and gentlemen, I am glad to be here and I am always glad to be in Copenhagen. My speech today in the morning is a bit of a challenge, because it may be very legal, but I try to make it not so legal. The Euratom Treaty and the new Constitution would be my subject. To start with an introduction and to outline the setting: The Euratom Treaty in my view and in the view of many others carries the stigma of an undemocratic, outdated alien in the world of the liberalised energy market. The Treaty hinders the development of an open sustainable energy market in Europe. The organisation of nuclear power on the basis of the Euratom Treaty and the Member States' own national legislation leads to the behaviour of closed shop policy with disturbing consequences in my view for a democratic society in Europe.

The discussion around the drafting of the European Constitution had elements and initiatives for a complete overhaul of the Euratom Treaty in the beginning, but from the majority of interest it was used to revitalise the nuclear interest in Europe. We do not have a new Constitution yet. Two years ago, during the procedure, the parties involved – as I said – wished to reintegrate in one way or the other the Euratom Treaty into the draft Constitution. Neither the Praesidium of the Convention to the Treaty, nor the Secretariat, nor the majority of the European Commission were willing or agreed on the necessity to abolish or at least reform the Euratom Treaty. They have simply sought to preserve and to re-justify it, following the implementation of the Maastricht, Amsterdam and Nice Treaties. The official philosophy, if one can find such, is just to increase clarity through a new unified structure, integrating or harmonising it in one way or the other the Euratom articles with the general Treaty Articles.

According to the draft EU constitution, Euratom now is supposed to remain a stand-alone treaty with own legal personality. A so-called sunset clause approach of those who want to get rid of it has not succeeded yet. But at least the attempt to merge Euratom with the Constitution was also defeated. In my view, it is better so. Now we have the time to analyse the risks and costs of a phasing-out under different alternatives, be it via a unanimous procedure within the inter-governmental conference rules or be it by an approach, that those member-states which will leave the Euratom Treaty in accordance with relevant international rules. I will come back to that.

As I said and I may shorten that a little bit, even in the past when we had changes via e.g. the Amsterdam Treaty, the basis of Euratom, which had some changes in its articles as well,

remained stable and unchanged. That is in my opinion important to know. And also that the basic distinctions between the legal personalities of the different communities are still valid. Because, as I said, we have not had up till now one single European community.

I now come to the point, where Europe at least in my opinion lost clarity in its energy policy. This happened with Directive 6962 of the Parliament and the Council, 19 December 1996, regarding common rules for the common market in the electricity field. Europe created after long years of discussion and preparation the opening towards a single market in energy. No energy source has been legally exempted from the application of this directive. The directive did not create a separate market for nuclear power, but the nuclear sector in my view uses the Euratom Treaty and specific national legislation to maintain and create a market in a market and deeply disturb the internal market for energy by a dramatic concentration process of market power and oligopolistic structures, especially coming from France and Germany and in Central Europe, with consequences for energy security and energy independence in the whole Europe. The undemocratic mode, in which nuclear energy policies are imbedded in Europe, leads to a situation where openness and clarity and a level playing field are not applied to the necessary democratic and economic extent.

You all know the main examples, which we all discuss and will also discuss today. I think the basic ones are: The non-integration of co-decision and control right by the European Parliament in all basic questions related to Euratom, especially nuclear research structure and budgeting, the management of lavish reserve funds for future dismantling of nuclear power stations in the hands of nuclear power operating utilities, the generous cap – to make it very short – of responsibility in case of nuclear accidents.

The European Parliament and also the European Commission underline for example often the importance - in order for the internal energy market to function - of appropriate legislation requiring the establishment of funds for decommissioning and waste management to ensure the availability of the funds in due time and to ensure that funds are not used for I would say improper activities in that sense. But the majority of the European Council seems to be a little hard hearing in this respect.

In my view the Euratom Treaty – which dates back to 1958 – is a problematic dinosaur, because it has a clear priority in favour of only one power industry in Europe. I will quote (because very often the Treaty is not so well-known in its content): The Treaty starts in a way that recognises that nuclear power represents “an essential resource for ensuring the expansion and invigoration of production and for effecting progress in peaceful achievement” and with a conviction “that only a common effort undertaken without delay can lead to achievements commensurate with the creative capacities of their countries”.

Almost fifty years ago the parties of the Treaty were convinced and resolved that the development of a powerful nuclear industry, which would provide extensive energy resources would lead to the modernisation of technical processes and contribute through its many applications to the prosperity of their people. This should not be belittled. At that time, many of an elder generation who may even sit here were convinced of this. Lets get them credit for that.

The main task of the Euratom Treaty is laid down in Article 1: “It shall be the aim of the Community to contribute to the raising of the standard of living in Member States and to the development of commercial exchanges with other countries by the creation of conditions necessary for the speedy establishment and growth of nuclear industries”.

Since then a lot has happened in the world of energy and competition in an ever-enlarging Europe, which makes this Treaty an anachronism and a perverted vehicle for vested interest of concentrated power in a liberalised market, which is crippled by privileges given to the nuclear industry (I concentrate on the nuclear, but maybe we have other industries as well). Apart from this economic tool given by the Euratom Treaty and its extremely generous funding, the world has faced a multitude of nuclear incidents with Chernobyl as its most gruelling consequence. The dual use of nuclear power – it is also used for military purposes – constitutes a daily threat.

Many countries in Europe do not have nuclear power or have decided to phase out their use of nuclear power, replacing this with and a new sustainable energy-efficient structure, based on highly efficient technology without nuclear and increasingly on the replacement of fossil fuels and nuclear by renewable energies and are encouraging the independence of power supply on the local, regional and state level.

The German law on the peaceful use of nuclear energy and the protection against the risks of nuclear energy in its wording from 22 April 2002 proscribes under Article 1 that the use of nuclear energy for commercial production of energy has to be ended. This means that 45 years after the birth of Euratom, a complete change of energy policy has occurred in this country and I would say in many other countries, which have decided to follow the same path.

Countries such as Denmark do not rely on nuclear energy themselves, but are provided with electricity by many nuclear power stations in neighbouring countries. All these countries without nuclear power as well as countries, which have recognised the anti-competitiveness and the non-sustainability of Euratom's structure have an interest in ending Euratom and to integrate the necessary safety conditions in the Treaty in the general EU Treaty, be it the new Constitution or just an amendment to the existing EU Treaty.

In February 2003 a submission by Convention members for the Constitution was put forward. This called for the abolishment of the special economic zone that Euratom has created and to respect the principles of fair competition and create a level playing field for the different energy sources, thereby ceasing the undue influence of nuclear power compared with its rivals. The reason for this initiative was the electricity market liberalisation and the democratic deficit in this field.

In my opinion we need a phasing-in as well as a phasing-out. I do not see this happening currently and I hope that this conference and that the evaluation of governments after this conference may help strengthening this path. The only concrete action to my knowledge has been the statement of several countries such as Austria, Germany and Sweden, asking for an intergovernmental conference of the Euratom member states to start discussion on what to do and how to do it.

The German government for example – if you go into the webpage of the German government itself – outlines the following: “The purpose of the EURATOM Treaty as adopted against the historical background of the 1950s, namely the promotion of nuclear energy in the European Atomic Energy Community, does not automatically oblige member states to promote the use and development of nuclear energy as a commercial energy source within their territories. It is rather for each member state to decide whether and to what extent it wishes to use nuclear energy, as the technology advances. The EU Commission has also come to this conclusion: “It is generally thought that it is up to each member state to decide to

introduce or maintain nuclear power as an energy source.” The German Government's policy on the phasing-out of nuclear power and the “consensus” reached with the energy industry on 14 June 2000 are thus not at odds with the Euratom Treaty<sup>1</sup>”.

This is quite a defensive stance and not illuminating or taken on promises from two years ago, where Germany also subscribed to encourage a conference of the Euratom states on phasing out of nuclear. Some opinion tries to suggest that Euratom is as eternal as is the Bible for Christianity. They based their opinion on Article 208 in Euratom, which stipulates the following: “This Treaty is concluded for an unlimited period”. But such a conclusion is legal nonsense. A treaty without exit date can under conditions always be modified or ended. The Euratom community can via the organisation and e.g. management of an inter-governmental conference try to find a unanimous solution to end the treaty. Realistically, one should try to do that as a member state, focusing on competition danger, but it is a difficult way. It would be helpful if member states acted together - those member states, which agree that Euratom should go away. In a way, they should in a parallel fashion opt for a way following the procedure and rules under the international common law in combination with the Vienna Convention on International Treaties. Since Euratom, as I said, has no specific rules, we have to end the Treaty under this limit in the context of international law and procedures.

There is a unanimous view in legal terms that such a treaty can be ended or phased out under specific conditions. There is no unanimous view whether these conditions have been met.

I now come to the major reasons of international law. The first reason is the nature of the treaty in question. It is outlined in Article 56 of the Vienna Convention on the Law of Treaties<sup>2</sup> and I will quote that: “*Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal:* (1) A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty”.

The Vienna Convention, though, dates back from 26 May 1969 and is therefore younger as the Euratom Treaty. It does not have the effect to go before its own appearance so to say. We can nevertheless use this good wording of the Treaty, because the wording is only repeating a general rule in international law, which has been established long before the Vienna Convention. That is why I still base my approach on that. So a country such as Germany or Denmark should look at the energy policy in relation to the philosophy and the objectives of the Euratom Treaty in the late fifties and could certainly list table a of conditions, which could lead to a withdrawal right on the basis of the nature of the Treaty. And I have quoted elements of the Treaty, which makes it quite clear that we now have a times-has-gone-by-situation. I have that in detail, but we can come to it during discussion.

The second approach to phase out and to ask for the right to withdrawal, which is a unilateral approach if you like, is to combine forces with several likeminded nations. But it means that you would step out and that the torso of the Euratom Treaty would remain. This is a fundamental change of circumstances, the second normally known international term and it also reflects a long-standing internationally accepted ground for phasing out an international commitment.

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<sup>1</sup> Statement by the German Government on the webpage: [http://www.auswaertiges-amt.de/www/en/aussenpolitik/vn/nuklearpolitik/euratom\\_html](http://www.auswaertiges-amt.de/www/en/aussenpolitik/vn/nuklearpolitik/euratom_html)

<sup>2</sup> <http://www.un.org/law/ilc/texts/treaties.htm>

In the Vienna Convention, that would be Article 62, which outlines the detailed provisions for such fundamental change of circumstances<sup>3</sup>. If one compares this you will find a lot of those circumstances where you can say that nuclear power is no longer an indispensable source for the development and the encouragement of for example the Danish or the German industry and economy. There are many, many other things one could look at in order to encourage countries such as Germany, which has a very biased energy policy one has to say. One should look at the official reasoning, which in Germany has a legal value in itself to the phase-out modification of the German Nuclear Law to find enough to go out in a very correct way based on this.

At least, countries should finally make their homework, should start this reflection and should see, what consequences does it have for our economy, because it is also OK. Yes, Germany phases out and yes, Germany has done a lot in renewable energy and yes, it is the main driver for market closure in the general market because of oligopolistic tendencies. I can only quote the merger of and E.ON. and Ruhrgas as a catastrophic event for the legal policies in Europe. There are other examples, where they certainly fall short.

But at least, the discussion should be opened and countries such as Denmark, Austria and Ireland should press for example Germany to come to terms. If the current situation is apart from what feelings you have towards nuclear, one should realize that there is an obligation of member states to be loyal towards European law. Since the directive for the liberalization of the energy market has come into force, the time has also come, where the phase-out process should start. This is long overdue. Thank you.

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<sup>3</sup> Pursuant to Article 62 (*Fundamental change of circumstances*), “(1) a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. (2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty (a) if the treaty establishes a boundary or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. (3) If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty”, <http://www.un.org/law/ilc/texts/treaties.htm>