

Pathway towards a Reform EURATOM

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Prof. Dr. Dörte Fouquet



Prof. Dr. Dörte Fouquet specialises in EU law and international legal relations with a focus on competition, infrastructure, energy and environmental law. She advises mainly companies, financial institutions, associations and governmental agencies in Germany and other EU Member States as well as EU institutions and at international level.

- ▶ Studies of law in Marburg and Hamburg
- ▶ 1982 research assistant at the University of Hamburg
- ▶ 1988 Ministry for Environment and Energy, Hamburg
- ▶ 1991 Hamburg and Schleswig-Holstein Liaison Office to the European Union, Brussels (Belgium)
- ▶ 1993-2010 partner at the Brussels office of the law firm Kuhbier
- ▶ 2011-2020 partner at BBH Brussels, since 2021 partner of counsel
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1. Introduction
2. EURATOM at a glance
3. Reform attempts in 2002/2004
4. The formal reform process – Overview
5. The structure of the preparatory reform work - Overview

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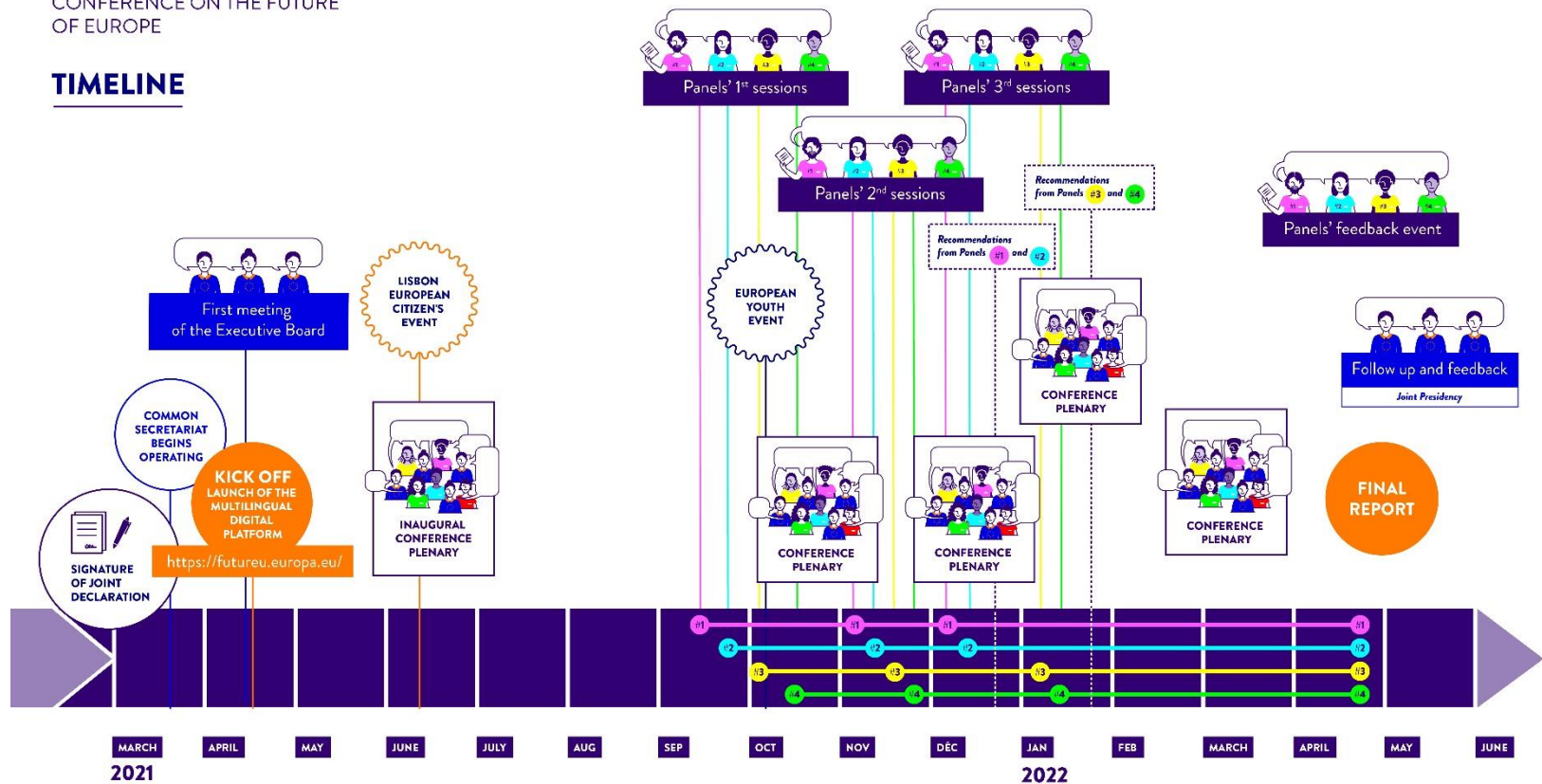
Important current barriers and openings

1. Barrier and Opportunity a like: Future of Europe – Conference 2020-2022
2. **The Conference Plenary concluded its work, EU Parliament intends to kick-start EU reforms.**
3. At its final meeting, April 2022, at the European Parliament in Strasbourg, the Conference Plenary reached a consensus on its final draft proposals. It has now adopted 49 proposals, which include more than 300 measures on how to achieve them, across 9 themes, based on 178 recommendations from the European Citizens' Panels, input from the National Panels and events, and 43 734 contributions on 16 274 ideas recorded on the multilingual digital platform.

Conference time line

CONFERENCE ON THE FUTURE OF EUROPE

TIMELINE



Despite first openings no concrete view on EURATOM

- ▶ During discussions with citizens in various MS, EURATOM was seen as part of the debate. But this seems to have gotten lost on this way.

Wishful thinking at EU level for renaissance of Nuclear

- ▶ The myth of climate protection
- ▶ The alliance of high level of EC with SMR investment of M. Bill Gates („Breakthrough“ money accepted by EC for joint climate research)
- ▶ The sneaking- in of nuclear and fossil gas in the Taxonomy Regulation of the EU – via a second Delegated act of the EC – without legislative co-decision procedure
- ▶ Two annulment procedures against this highjacking act before the EU Court (Austria ./ EC; MEP René Repasi ./ EC

The World Nuclear Industry Status Report 2022



- ▶ Nuclear Share Drops Below 10 Percent worldwide
- ▶ Nuclear energy's share of global commercial gross electricity generation in 2021 dropped to 9.8 percent—the first time below 10 percent and the lowest value in four decades—and 40 percent below the peak of 17.5 percent in 1996.
- ▶ (IAEA) statistics show a peak in officially operating reactors, both in terms of number (449) and capacity (396.5 gigawatt), in 2018. The IAEA's total of 437 reactors "in operation" in the world at the end of 2021 included 23 reactors that have not generated power since 2010–2013.

The World Nuclear Industry Status Report 2022 (II)



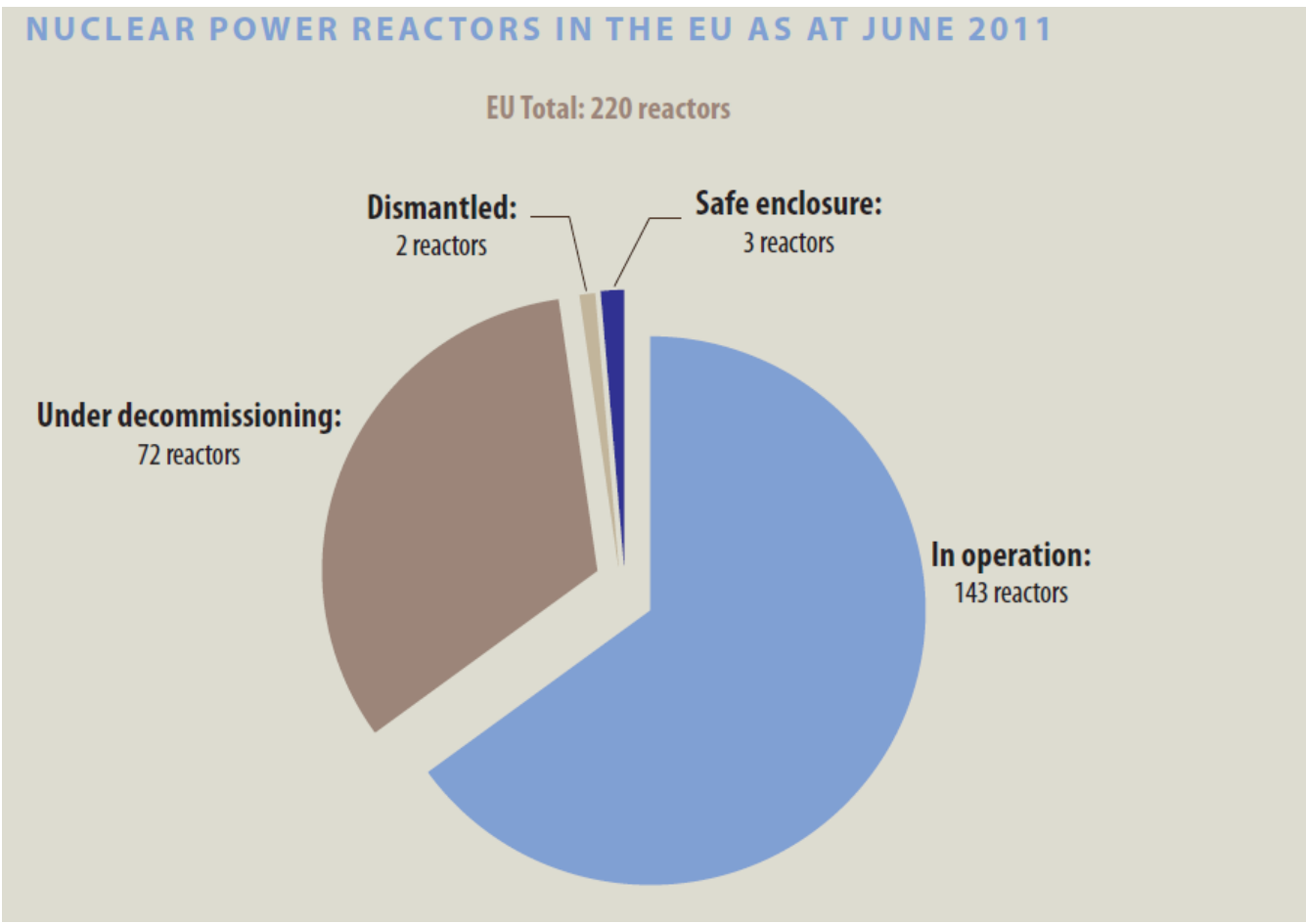
- ▶ Over the two decades 2002–2021, there were 98 startups and 105 closures.
- ▶ Of these, 50 startups were in China which did not close any reactors. Thus, outside China, there was a net decline by 57 units over the same period; net capacity dropped by 25 GW.
- ▶ First Time Status report reflects on nuclear and war
- ▶ Overwhelming EU Dependency from Russia and Kazakhstan for ores, material... etc (the nuclear sector in purchasing of material is the only sector not covered by sanctions against Russia)

Introduction

- ▶ EU Members States and operators - financial risks for ailing nuclear installations and to ensure safe decommissioning and final storage
- ▶ Any system change towards sustainable energy requests
 - Clear legal and economic rules on financial risks and responsibilities before co-sharing of responsibilities with the companies
 - Open information policies with full involvement of national and EU parliament and stakeholders (German KFK Commission model could be of help)
 - Open access to the full subsidy schemes involved including pairing with other aid scrutiny for the companies involved
 - Clear priority access and dispatch for and progressive national RES targets and policies (Renewables come first approach)
 - Constitutional convention process to start on phasing out of Nuclear
 - In parallel to BREXIT pathway

A graph on the dismantling task (Source EU Court of Auditors, IAEA) - roughly 200 reactors ahead?

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France ailing nuclear fleet

- ▶ The Aggression of Russia against the Ukraine is one awful and important factor for rise in electricity prices in the EU
- ▶ The failure of more than half of the French Nuclear park over months and with no end in sight - made France largely a net electricity import country – e.g. from Germany and Belgium – still not sufficient interconnection to Spain- and this reflects heavily on the spot price for electricity
- ▶ Paradoxon: Germany now has to put its last three NPPs in „Streckbetrieb“- letting them run still through this winter until April 2023 , normally phase-out December 2022; but no new fuel rods,

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EURATOM overview

- ▶ Founded by the Treaties of Rome of 1957 --creating a European market for nuclear power.
- ▶ Euratom is legally independent from the EU, shares the same EU institutions.
- ▶ Its membership :all EU Member States plus Switzerland (Associated State since 2014).
- ▶ Euratom -cooperation agreements with eight other countries: US, Japan, Canada, Australia, Kazakhstan, Ukraine, Uzbekistan and South Africa.

The EURATOM tasks and objectives

- ▶ Promote research on nuclear energy (Art. 2 (a)) and “...creating the conditions necessary for the speedy establishment and growth of nuclear industries”(Art. 1 Para 2).
- ▶ Establish uniform safety standards and ensure that they are applied.
- ▶ Ensure the regular supply of ores and nuclear fuels.
 - BUT: European Supply Agency never played an important role.
- ▶ Ensure that nuclear materials are not diverted to purposes other than those for which they are intended.
- ▶ Ensure free movement of capital for investment in nuclear energy and free movement of employment for specialists in the sector. Establish joint undertakings

The promotion trap

- ▶ 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.

Non Proliferation

- ▶ It is one of the objectives of EURATOM but EURATOM played a very limited role e.g. in the Non Proliferation Treaty setting.
 - EURATOM/ the EU is not signatory member, rather coordinates effort for its members in this field. EUrope was highly engaged in discussion in the early goes to ensure indefinite extension of the NPA in its Review Conference in April-May 1995
 - After 2000, EURATOM and the EU “suddenly ‘gone into neutral’”. Paradoxically, the Union seems to have gone back to an earlier stage that was dominated by specific joint declarations based on the lowest common denominator. The lack of any search for a European policy and a dynamic consensus that produces new initiatives is particularly striking.”
 - (The European Union and the non-proliferation of nuclear weapons, Camille Grand,2000)

The missing liability –

- ▶ Nuclear liability: globally and also on EU level rather a patchwork design with low denominator than a unified system with highest standards of responsibility.
- ▶ “The current EURATOM treaty has only an almost homeopathic approach to nuclear liability which is mentioned only under the current provisions of the Nuclear Common market and it’s above mentioned Art. 98 EURATOM. In the whole EURATOM treaty the word “insurance” figures just once.” (Fouquet, legal evaluation for the Green Group in EP, 2018)

The misery – a single Article

- ▶ Art. 98 EURATOM:
- ▶ “Member States shall take all measures necessary to facilitate the conclusion of insurance contracts covering nuclear risks.
- ▶ The Council, acting by a qualified majority on a proposal from the Commission, which shall first request the opinion of the Economic and Social Committee, shall, after consulting the European Parliament, issue directives for the application of this Article.”

The Patchwork in more detail

- ▶ Most of the EU Member States, who had joined before 2004, are contracting parties to the Paris Convention. Most, but not all of the contracting parties to the Paris Convention are contracting parties to its companion convention, the 1963 Brussels Supplementary Convention (BSC).
- ▶ The majority of the “new” EU Member States which joined after 2004 are contracting parties to the 1963 Vienna Convention.

Joint Protocol and 1997 Vienna Protocol

- ▶ Only some of the contracting parties to the Paris Convention are contracting parties to the Joint Protocol relating to the Application of the Vienna Convention and Paris Convention (1988 Joint Protocol), which provides a link between the Paris Convention and the 1963 Vienna Convention.
- ▶ On the contrary, all Member States that are contracting parties to the 1963 Vienna Convention are at the same time contracting parties to the 1988 Joint Protocol.
- ▶ Some “new” Member States have joined the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (1997 Vienna Protocol), and only two Member States have actually ratified it.

Convention on supplementary Compensation

- ▶ “Concerning the Convention under the International Atomic Energy Agency on supplementary compensation for nuclear damage of 12 September 1997, which entered into force only 18 years later, on 15 April 2015, it is noteworthy that from the circle of current Member States, the Czech Republic , Italy and Romania were the few EU Member States which signed this Convention. And only Romania ratified it.” (Fouquet, a.a.O.)

The Stigma

- ▶ Euratom Treaty is carrying the stigma of an undemocratic, outdated alien in the world of the liberalized energy market, hindering 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 a closed shop policy and mentality- with disturbing consequences for a democratic society in Europe.
- ▶ Fouquet D (2005) *"The Legal Perspective: the EURATOM Treaty and the new Constitution"* presentation to Energy Intelligence for Europe conference, 23 September, Copenhagen 2003, http://www.energyintelligence_for_Europe.dk

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Reform attempts in 2002/2003

- ▶ Initiatives for a complete overhaul of the Euratom Treaty in the beginning, but from the majority of interest it was used to revitalize the nuclear interest in Europe.
 - Neither the Presidium 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.
 - Source: D. Fouquet, in: The Euratom Treaty and Future Energy Options: Conditions for a Level Playing Field in the Energy Sector, CONFERENCE REPORT, September 23rd 2005, at the Danish Parliament Building, Christiansborg.

Who remembers – the sunset clause?

- ▶ In 2000 European Parliament passed a resolution that included a call for the EURATOM Treaty to be abandoned by 2007.
- ▶ If this proposal were adopted it would have enabled 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.
- ▶ Was not adopted under IGC.

Penelope-opening towards EURATOM reform

- December 2002: reparatory working document for the Commission in preparation of IGC, contains own chapter on EURATOM -Reform
- “The Euratom Treaty has been 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.”

Penelope Paper II

- 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.
- Contain “some of the best drafting of the existing treaties, have hardly been changed and are included in an Additional Act” (to the EU Treaty).
- Parliament restored to the institutional system, co-decision power e power to adopt, with the Council, “Laws” for basic standards “whereas at present it is very much outside the decision-making process”.
- 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.”

Guidelines under the Convent Discussion and following PENELOPE

- Title I, Article 1-3 should be deleted. (Nb. :Art. 3 was in the end removed from EURATOM)
- Title II, Chapter 1 (Promotion of Research) and Chapter 2 (Dissemination of Information)- (art. 4-29) should be repealed.
- Title II, Chapter 3 (Health and Safety) (art. 30-39) should be subsumed in the new Constitution “to conform with EU environmental and health legislation in line with similar directive for hazardous activities, based on present article 174 (ECT)”.
- Title II, Chapter 4 (Investment), art. 40-44) as well as corresponding art. 2 c), 173 and 203 should be repealed.
- Title II, Chapter 5 (Joint undertakings) should be repealed.
- Title II, Chapter 6: all provisions “relating to the safeguards and non-proliferation” should be included in a new article , but all other elements of Chapter 6 should be repealed.

Proposal under the Convent discussion

- Stronger safeguards and Non-Proliferation (new): a special article of the Constitution should be established to provide for Nuclear Safeguards and Non-Proliferation.
- Consequently provisions under Title II, Chapter 8 (Property Ownership) (Art. 86-91) should equally be included in a special article on Safeguards and Non-proliferation.
- Title II, Chapter 9 (The Nuclear Common Market) (Art. 92-100) should be repealed.
- Title II, Chapter 10 (External relations) (art. 101-106) should be re-pealed
- NOT TOUCHED OR DISCUSSED at all: Liability regime for the Union

EURATOM Reform declaration

- ▶ "We wish to make the following recommendations to the Convention in relation to the Euratom Treaty:
- ▶ The Convention has already achieved consensus on the following points:
- ▶ There should be a single constitution treaty. The Union should have a single legal personality and a single institutional structure.
- ▶ Therefore it is necessary to repeal the Euratom Treaty.
- ▶ We argue here that it is now appropriate -to abolish 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 different energy sources, thereby ceasing to give nuclear energy undue advantages over its rivals.
- ▶ We offer an analysis of the present functions of Euratom and make proposals concerning their transposition into the Part Two of the Constitution (see Praesidium preliminary draft Constitutional Treaty (CONV 369/02)), while proposing that others be simply repealed."
- ▶ *Official statement by Convention Members: Marie Nagy, Renee Wagner, Neil MacCormick Contribution to the Convention; THE EUROPEAN CONVENTION -THE SECRETARIAT - Brussels, 18 February 2003- CONV 563/03 - Contribution 250.*

Declaration of 2007- Annex to the TFEU

- ▶ Declaration No. 54 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007; reads as follows (Consolidated Version of the Treaty on the Functioning of the European Union, 26.10.2012 Official Journal of the European Union, C 326/47):
 - “Germany, Ireland, Hungary, Austria and Sweden note that the core provisions of the Treaty establishing the European Atomic Energy Community have not been substantially amended since its entry into force and need to be brought up to date. They therefore support the idea of a Conference of the Representatives of the Governments of the Member States, which should be convened as soon as possible.”
- ▶ Brexit may be the right moment to rekindle this initiative.
- ▶ In 2004, the German government outlined 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.
http://www.auswaertigesamt.de/EN/Aussenpolitik/GlobaleFragen/Klima/InternationaleOrganisationen_node.html (no longer accessible, last accessed in 2016)

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EURATOM Reform: The formality: Intergovernmental Conference or Ordinary Revision Procedure

- ▶ Conferences of representatives of the governments member states convene to discuss and agree treaty changes. These meetings are also known as 'intergovernmental conferences' (IGCs).
- ▶ Since the Lisbon Treaty in 2009, it is now called the 'ordinary revision procedure' (an also newly introduced simplified revision procedure is not applicable for EURATOM reform process)
 - <http://www.consilium.europa.eu/en/documents-publications/intergovernmental-conferences/>

Ordinary revision procedure /IGC

- ▶ A Member State, the Commission or **the European Parliament** (the latter also in view of EURATOM – see Art. 106 a EURATOM) can submit a proposal for Treaty change to the Council which, in turn, presents it to the European Council. National parliaments are notified. If financial matters are involved – EIB is integrated as well.
- ▶ If a majority of MS in the European Council are in favour of examining a proposal for treaty change, the president of the European Council convenes a 'convention'. The European Parliament and the Commission are consulted beforehand.
- ▶ Convention: representatives of national parliaments, heads of state or government, MEPs and the European Commission, discusses the draft treaty changes. Its recommendations adopted by consensus, then go to the IGC.
- ▶ The IGC, convened by the President of the European Council, decides treaty changes only unanimously.

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EURATOM and what it not does : e.g. Decommissioning

- ▶ Keeps quiet on decommissioning of Nuclear power Plants
- ▶ Council regulations on Decommissioning do exist- for Eastern Europe - but are based or on the specific bilateral agreement itself or –interestingly and in one case only- on the EURATOM Article for events, no necessary power has been provided for by EURATOM: Art. 203 EURATOM:
 - If action by the Community should prove necessary to attain one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures

Decommissioning Eastern Europe Regulations- Examples of Difference

- ▶ **COUNCIL REGULATION (EURATOM) No 1368/2013 of 13 December 2013 on Union support for the nuclear decommissioning assistance programmes in Bulgaria and Slovakia, and repealing Regulations (Euratom) No 549/2007 and (Euratom) No 647/2010**
 - “THE COUNCIL OF THE EUROPEAN UNION,
 - Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof....”

- ▶ **COUNCIL REGULATION (EURATOM) No 1369/2013 of 13 December 2013 on Union support for the nuclear decommissioning assistance programme in Lithuania, and repealing Regulation (EC) No 1990/2006**
 - “THE COUNCIL OF THE EUROPEAN UNION,
 - Having regard to the 2003 Act of Accession, and in particular Article 56 thereof and Protocol No 4 thereto,....”

- ▶ To sieve through EURATOM !
- ▶ Easy is to decide :
 - That all promotional aspects have to go, complete new preamble with highest emission protection and non – proliferation, strictest supervision and strictest liability as guidance
 - That EURATOM R&D support is to be moved to the general Treaties provisions and to full scrutiny of the European Parliament
 - That full co-decision procedure is established as strict principle with a sunset clause for full review of secondary legislation in order to achieve a greater role of the EP
- ▶ More difficult to decide:
 - How to enlarge competencies /introduce new competences and which ones and how to align current secondary legislation?

The objectives of EURATOM - and what we need especially

- ▶ Radiation Protection and Non Proliferation Regime enforced
- ▶ Liability Regime towards a full European liability scheme under EURATOM , in view of the new energy market evolved this should attract acceptance
- ▶ Enforced and real European Nuclear Security Inspectorate and Authority -covering the nuclear power plants and concerning temporary as well as final storage under a unified regulatory framework.
 - In this field we need to formulate a good balance of power and cooperation mechanism between European and national nuclear supervision, with a lot of leeway for national regulation but on a very strict level and with Obligation to supervise and control on EU level - in strict transparency

The objectives of EURATOM - and what we need especially (II)

- ▶ Encouragement and clear rules for a joined, obligatory supervision of Nuclear power plants within a certain radius to neighbouring country/countries
- ▶ Strict alliance of EURATOM with ESPOO and Aarhus rules
- ▶ Strict rules on fullest Life cycle responsibility of owners or former owners of NPP- Polluter pays Principle established

Step by Step – a strong preparation for the EURATOM IGC

- ▶ EP needs to provide overview, to review piece for piece all major legislation etc. under the key EURATOM articles . An evaluation needs to be met then if, transparency, control, sanctions etc. are fully established in the respective piece of legislation , communications, opinion etc. and an identification of weakness and how to improve in which format
- ▶ Take the Nuclear Safety Directive and its obvious deficits vis-à-vis ESPOO and Aarhus
- ▶ Waste Directive and Radiation protection Directive for population

Next step

- ▶ Member States willing to reform need to establish a working group preparing for a vote in the Council to open a reform process
- ▶ Again a simple majority would be sufficient for this step
- ▶ Very important is the formulation of a clear mandate for the reform convention

Bring France on board

- ▶ To call on France to accept democratic deficit of the EURATOM treaty and thus need for reform
- ▶ The only realistic pathway to get France- and thus Hungary Czech Republic.... open for a reform is in my view a parallel process for a specific old nuclear PP transition programme.
 - Content: sharing the burden for the shutdown, dismantling, final storage between the EU MS („Just transition old NPP“)
- ▶ Research focus under the Nuclear research programme - design only on topics related to this task

Thank you very much
for your attention.

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