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The Draft Constitution for Europe: Good News for the Environment?

Clare Coffey

The primary concern in drafting the European Union's new, but not yet finalized, constitution has been to maintain the existing EU Treaty provisions in terms of the environment, environmental integration into other EU policies, and sustainable development. In addition, to some extent the new constitution will enhance the political rights of EU citizens by requiring greater openness. However, the lack of progress in relation to enhancing the access to justice will frustrate environmental nongovernmental organizations who would like to initiate legal action at EU level. Notwithstanding the draft as it now exists, however, ultimately the rather secretive Inter-Governmental Conference will decide on the final version of the constitution, an effort that will take many more months.

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Introduction

In Nice in December 2000, Heads of State and Government of the Member States of the European Union (EU), officially launched a debate on the Future of Europe. The intention was to promote a public discussion, ahead of the much more formal and closed inter-governmental negotiations² to revise the European Treaties³ scheduled to

begin in 2004. The Future of Europe debate was launched at a time when the EU was on the one hand receiving historically low levels of support from its citizens, while on the other hand it was facing its greatest challenge yet: coping with enlargement to include a large number of States from central and southern Europe. There were, furthermore, growing demands on the EU to fulfill a greater role at the international level.

All too aware of previous failed attempts to secure adequate reform of the EU's already creaking institutions, an EU Summit in December 2001 (Laeken) called for the establishment of a Convention on the Future of Europe, to ensure that preparation for the next treaty revision would be as "broadly-based and transparent as possible". The Convention's 105 members were to be drawn from national governments, parliaments of the Member States as well as the ten accession countries,⁴ the European Parliament and the

¹ The author would like to thank Peter Beyer (Ecologic) who commented on an earlier draft of this article.

² Formally known as an Inter-Governmental Conference (IGC).

³ These include the Treaty on European Union and the Treaty on European Community, as well as the European Atomic Energy (EURATOM) Treaty.

⁴ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

European Commission. The Convention was tasked with considering a number of key issues arising for the EU's future development,⁵ and to identify possible responses.

Eighteen months later, after an accelerating pace of debate and drafting, the Convention's Chairman, Valéry Giscard d'Estaing, presented a draft text to EU Heads of State and Government in Thessaloniki, Greece, in June 2003. The text lays out the beginnings of what is to be an entirely new "Treaty establishing a constitution for Europe" that should, according to Giscard d'Estaing, last for the next 50 years. Even if this should prove wrong, this text is set to determine the direction the Union will take in the next years.

Previous changes introduced to the European Treaties have progressively strengthened the EU's commitment to environment and sustainable development. The possibility of the existing Treaties being amended again therefore offers the prospect of further improvements, although it also opens the possibility of a rollback of existing provisions. This article outlines briefly the environmental gains made during previous treaty revisions, before reviewing, from an environmental standpoint, the Convention's attempt to overhaul the European Treaties.

A Potted History of Greening the European Treaties (1957-1997)⁶

There was no mention of the environment or sustainable development in the original 1957

Treaty of Rome upon which the European Economic Community (EEC, now the European Community - EC) was based. Rather, as reflected in Article 2 of the Treaty, the Community was established in order to promote a harmonious development of economic activities, and a continuous and balanced expansion, eventually to result in a common market and the harmonisation of national economic policies.

Despite the lack of reference to the environment, some environmental policies were adopted in the early years of the EEC, primarily on the basis that they supported the creation of the internal market. A more decisive step was taken in 1972, when Heads of State meeting in Paris declared that "economic policy is not an end in itself" but that it should result in an improvement in the quality of life and living standards. They went on to state that "particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind."

It took another 15 years, with the adoption of the 1987 Single European Act, that clear objectives, principles and a legal base for environmental measures were inserted into the Treaty, including the principles that "environmental protection requirements shall be a component of the community's other policies". These important changes paved the way for the adoption of a wide range of new environmental legislation, but also for the "greening" of economic policies.

Further progress was secured in 1992, with the signature of the Maastricht Treaty, which inserted the objective of "sustainable and non-inflationary growth" into the EC Treaty,⁷ reflecting (but only partially so) the emergence of the sustainable development concept in the late 1980s. Maastricht also resulted in a strengthening of the environmental principles by inserting the precautionary principle, and

⁵ The 'Laeken Declaration on the Future of the European Union', adopted at the Laeken Summit on 14-15 December 2001, identified five major areas: the division of legal competences in the EU, simplification of the EU's instruments, improved democracy, transparency and efficiency, and possible restructuring or simplification of the Treaties, moving towards an EU constitution.

⁶ See Haigh N, 1998, Introducing the concept of sustainable development into the Treaties of the European Union, in *The Transition to Sustainability: the politics of Agenda 21 in Europe*, edited by T O'Riordan and H Voisey, Earthscan.

⁷ Article 2, Treaty on European Community.

the requirement that environmental protection should be integrated into other Community policies. It also made qualified majority voting by the Council of Ministers, rather than simple unanimity, standard for adopting environmental legislation, thus making it much easier to agree legislation.

Many of the “loose ends” left by previous Treaty amendments were addressed in 1997 by the Amsterdam Treaty. This clarified the commitment to sustainable development and environmental protection, by inserting the objective of promoting the “harmonious, balanced and sustainable development of economic activities,” and “a high level of protection and improvement of the quality of the environment”. The “environmental integration requirement” was given a more prominent position near the front of the Treaty, and explicitly linked to achieving sustainable development. The change in position alone has been seen as evidence of a stronger political support for environmental integration, if not actually strengthening it in legal terms.⁸ It certainly became impossible for sectoral parts of the European Commission and Council of Ministers to argue that environmental integration was not a matter for them.

Thus, over a 40-year period, the EC Treaty evolved from a position of paying no attention to environment or sustainable development, to one where environment, sustainable development and the requirement to integrate environmental considerations within sectoral policies, were clearly stated among the basic principles of the Community.

The Draft Constitutional Treaty: Keeping Up or Falling Behind?

At the start of the work of the Convention on the Future of Europe, many had expected that it would confine itself to presenting options to improve the European Treaties, or to propos-

ing a “chapeau” to the treaties to increase their accessibility to the public. During the course of the Convention’s work, however, it became evident that an entirely new treaty was going to be drafted ahead of the 2004 inter-governmental negotiations, to replace all the existing European Treaties.

This had potentially serious implications for environmental policy and the commitment to sustainability, since it meant that all Treaty provisions would be reviewed and potentially discarded. The first concern was therefore to maintain the existing provisions on sustainable development and environmental integration that had been secured following many years of effort.

The redrafting of the Treaties of course also provided an opportunity to update various other Treaty provisions, which had failed to keep pace with the Union’s changing values. Most obvious candidates for revision included the titles on agriculture, regional development, transport and external trade, all of which contained rather outmoded language. There was also a chance to strengthen the provisions governing the EU’s institutions, to reflect the good governance discourse, and specifically the 1998 Århus Convention on access to information, public participation and justice, which the Community signed in 1998.⁹

As it happened, a draft of the first articles of the constitutional treaty presented in February 2003 did not take the opportunity to make environmental improvements; rather, the text was a major step back.¹⁰ It did refer to sustainable development and environmental protection but not in a satisfactory way. Instead of a high degree of environmental protection, it required only the “promotion of environmental protection” and eliminated the objec-

⁹ The European Community is still in the process of transposing the provisions of the Convention, and has therefore not yet ratified it.

¹⁰ Draft of Articles 1 to 16 of the Constitutional Treaty, European Convention Secretariat, Brussels, 6 February 2003, CONV 528/03

⁸ See Bär S and Kraemer RA, 1998, European environmental policy after Amsterdam, in *Journal of Environmental Law*, Vol 10 No 2, Oxford University Press.

tive of *improving* the quality of the environment, currently included in Article 2 of the EC Treaty. Moreover, much to the dismay of environmental interests, any reference to environmental integration was omitted from the text. The February text consequently triggered a period of intensive advocacy work to preserve existing provisions and to improve upon them. The work involved, *inter alia*, non-governmental organisations,¹¹ EU Environment Ministers and the Environment Commissioner,¹² and European Parliamentarians. The various efforts to secure improvements in the Convention's work continued right up until the final draft text was officially presented to Heads of State and Government, in June 2003.

The Convention's Final Draft Text

As a result of the intensive and rather unprecedented level of advocacy work, at both national and EU level, the draft constitutional treaty of June 2003 showed some improvement, compared to the text forwarded in February. In assessing overall progress made, two key questions are: does the draft text live up to the commitments currently in the European Treaties, and does it go beyond the existing commitments. The following provides a brief analysis, in response to these questions.

Sustainable Development and Environmental Protection

The Amsterdam Treaty had placed the promotion of "balanced and sustainable devel-

opment of economic activities, and sustainable and non-inflationary growth, ..., a high level of protection and improvement of the environment" explicitly among its basic principles, in Article 2 of the EC Treaty. After some rearranging of words, the Union's objectives in the new draft constitutional text now include the following:

- "The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment." (Article I-3(3))
- "In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth..." (Article I-3(4))

The new draft text therefore repeats the existing provisions of the Treaty and, although perhaps not elegantly formulated, more closely reflects the three "pillars" of sustainable development: economic, social and environmental. However, while Article 3 requires the Union is to "work" for the sustainable development of Europe, the preceding Article 2 states (perhaps more definitively) that the Union shall "offer" a single market where competition is free and undistorted.

Environmental Integration

The first draft text issued in February 2003 failed to mention environmental integration, or the link with sustainable development, and consequently represented a dangerous retreat from the present European Treaties.

Following successful lobbying, the June draft text now repeats the exact wording on environmental integration, as introduced by the Amsterdam Treaty. Moreover, the integration requirement is extended to cover all policy areas of the Union, including justice and

¹¹ Including national environmental NGOs and the 'Green 8', a loose coalition of the main Brussels-based NGOs: BirdLife International, Climate Action Network Europe, European Environmental Bureau, Friends of Nature International, Friends of the Earth Europe, Greenpeace, European Federation for Transport & Environment and World Wide Fund for Nature.

¹² See e.g., Presidency Conclusions of the Environment Council meeting, 4 March 2003, conclusions of the Informal Ministerial meeting on the environment, May 2003, and Commissioner Wallström's initiative for a 'Draft Protocol on Sustainable Development'.

home affairs, and common foreign and security policies previously not covered.¹³

However, instead of placing the integration requirement at the front of the Treaty, it is given a less prominent position at the beginning of Part III. Part III concerns the policies and functioning of the Union's institutions, and the integration requirement is placed alongside other "cross-cutting" provisions, such as those relating to consistency between policies, elimination of discrimination and consumer protection. Although the new position of the environmental integration requirement is arguably appropriate, the legal and political implications of moving it from the front to the middle of the Treaty are uncertain.

Access to Information, Public Participation and Justice

The draft constitution proposes the following improvements, in line with the rights set out under the 1998 Århus Convention. Note, however, that many of the Århus provisions will be implemented by the EU through secondary legislation.

Access to Information

In order to improve transparency and accountability of the Union's institutions, the draft constitutional text calls for their work to be conducted "as openly as possible" (Article I-45). Specifically, the European Parliament and the Council of Ministers are to meet in public when discussing and adopting legislative proposals. Existing provisions concerning the right of access to Union documents are repeated in the draft constitution, but now covering the other bodies and agencies of the Union, as well as the main institutions.

¹³ Furthermore, note that the Charter of Fundamental Rights, incorporated in Part II of the draft text, requires a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. (Article II-37)

Public Participation

The institutions, it is proposed, should give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action. To this end, the institutions are to maintain an open, transparent and regular dialogue with these associations and civil society. The European Commission is to carry out broad prior consultation with parties concerned, in order to ensure transparency and coherence in policies. Interestingly, citizens can invite the Commission to come forward with a proposal, if this has support from at least one million people from a significant number of Member States.

Access to Justice

The draft repeats existing provisions regarding the European Ombudsman, who is to receive, investigate and report on complaints of maladministration by the Union's institutions (apart from the European Court of Justice – ECJ).

As concerns the ECJ, the draft constitution repeats existing provisions that the ECJ is to rule on actions brought, *inter alia*, by a natural or legal person. There is still a requirement for individuals to show that an act is addressed to that person or is of "direct and individual concern to him or her". (Article III-270) In other words, the draft constitution does not make it any easier for individuals or environmental non-governmental organisations to secure legal standing, arguably against the spirit of the Århus Convention.

"Greening" Specific Policy Areas

While the requirement for environmental integration has been successively strengthened, since its introduction in 1987, specific areas dealing with, for example, agriculture or transport policy, have not been revised to reflect environmental priorities. For example, the objectives of the EU's Common Agricultural Policy include increasing "agricultural

productivity by promoting technical progress". This was, therefore, one of the main areas where a draft constitution could have proposed significant environmental improvements.

In practice, the draft constitution suggests purely technical changes to the different policy areas, the main exception being a proposed new section on energy policy. Here, the Convention gave a clear environmental steer, as follows:

with regard for the need to preserve and improve the environment, Union policy on energy shall aim to (a) ensure the functioning of the energy market, (b) ensure security of energy supply in the Union, and (c) promote energy efficiency and saving and the development of new and renewable forms of energy. (Article III-157)

The wording has implications for some major policy areas including climate change, although measures adopted under this section "shall not affect a Member State's choice between different energy sources" seemingly limit action to demand-side measures. This contrasts with the separate Euratom Treaty whose primary purpose is to promote the supply of nuclear energy in Europe. Despite concerted efforts to the contrary, the Convention has proposed neither to repeal the Euratom Treaty, nor to incorporate it into the new constitutional text.

Without introducing environmental provisions into existing policy areas, the draft text does suggest an extension of the powers of the European Parliament – the only EU institution elected by universal suffrage. The Parliament currently has joint decision-making powers with the Council of Ministers in a limited number of areas (including environmental policy). The draft constitution proposes that these powers be extended to most policy areas, including agriculture and regional development.

Conclusion

In following the drafting of the EU's future constitution, the primary concern has been to maintain the existing Treaty provisions in the field of the environment, sustainable development and environmental integration, secured at Amsterdam in 1997. To a large extent, this has been achieved with the final draft constitution presented in June 2003. The fact that these provisions had been partially omitted from the February draft is now widely believed to have been more of an oversight than a deliberate attempt to roll back EU policy in these areas.

The opportunity has also been taken to deepen, to some extent, the political rights of European citizens, by requiring greater openness, dialogue and consultation, although the lack of progress in relation to access to justice will be frustrating to environmental non-governmental organisations wishing to start legal action at the European level. Significantly, the Convention failed to modernise the language of the various EU policy areas; rather a shame for a constitution that is supposed to last until 2050.

As this article goes to print, the constitutional baton is being passed to the Member States whose Foreign Ministers will be preparing for the formal and normally rather secretive Inter-Governmental Conference (IGC) that will definitively decide on the form and content of the new EU constitution. For those working to improve the environment, the IGC presents yet another opportunity to secure improvements, particularly in the policy areas.

It will be many months yet before the final outcome of this latest revision of the European Treaties is known, and much longer still before a new constitution is ratified and enters into force in what will by then almost certainly be a 25-strong European Union.



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