



The Draft Constitution for Europe: maintaining progress towards a green constitution

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1 Introduction

The debate on the Future of Europe was officially launched at Nice in December 2000, ahead of the next Inter-governmental Conference (IGC) scheduled for 2004. In order to ensure that preparation for the IGC was as 'broadly-based and transparent as possible', the Convention on the Future of Europe was set up and began work in February 2002. The idea was to create a 'public' forum to discuss reform of the Treaties upon which all EU and EC activities are based.

The Laeken Summit identified five major agenda items for the Convention, including the division of legal competences between the EU and the Member States, simplification and revision of EU legislative instruments, improved democracy, transparency and efficiency, and possible restructuring or simplification of the Treaties, including possible incorporation of the Charter on Fundamental Rights. The Convention was to consider these and other key issues arising for the EU's future development and identify various possible responses. The final document was to outline different options, or recommendations if consensus had been reached, and was to provide the starting point for discussions in the IGC.

Following considerable debate, the Convention Chairman Valéry Giscard d'Estaing presented a first draft text in October 2002 and more detailed text followed in February 2003. The drafts did not confine themselves to presenting options, or proposing a 'chapeau' to the European treaties to increase their accessibility to the public, as some had expected. Rather, they contained the beginnings of an entirely new treaty establishing a constitution for Europe which should, according to the Convention, replace the existing Treaties.

The possibility of the existing Treaties being replaced has serious implications for EU environmental policy and the commitment to sustainability. The first concern must be to maintain the existing Treaty provisions on sustainable development and environmental integration that were secured at Amsterdam, following many years of

effort by European environmental organisations and supportive Member States. The opportunity should also be taken to update various other Treaty provisions, such as those relating to agriculture or external trade, by introducing appropriate environmental objectives. There is, finally, also an opportunity to strengthen the EU's institutions, bringing them in line with globally accepted principles of good environmental governance.

2 Maintaining Current Commitments

Following changes introduced by the Amsterdam Treaty, the European Union (EU) and the European Community (EC) now have the promotion of sustainable development explicitly stated among their objectives, as defined in Article 2 of the EC Treaty.

Another important advance under the Treaty of Amsterdam concerned the pre-existing 'environmental integration requirement' – the provision that environmental protection requirements must be integrated into other EC policies. This was given a more prominent position and added emphasis by being moved out of the Environment Title of the Treaty and put it in a new Article 6 of the EC Treaty, near the front. It was consequently impossible for other Directorates-General of the European Commission and Council formations to argue that environmental integration was a matter for DG Environment and the Environment Council alone. The increased prominence given to environmental considerations as part of the Common Fisheries Policy and Common Agricultural Policy reform discussions bears testimony to this. Article 6 has also been referred to in an important judgement of the European Court of Justice.¹ Significantly, Article 6 says that such integration is to promote sustainable development, thus putting some flesh on the bare bones of the new task of sustainable development in Article 2.

The October draft constitution omitted any reference to sustainable development. The latest draft (February) includes sustainable development as one of the Union's main objectives, although not one of its values. The draft text nevertheless represents a very dangerous retreat from the text in the present Treaty in that it does not refer to environmental integration and the link between environmental protection and achievement of sustainable development. **The draft treaty should be at least as ambitious as the present Articles 2 and 6 of the EC Treaty, keeping environmental integration and sustainable development, as well as the link between the two, among the EU's core objectives.**

3 Inserting Additional Environmental Objectives

The Treaty of Amsterdam, or indeed the Treaty of Nice, did not amend specific articles dealing with agriculture, transport, regional policy and the common commercial policy. **If, however, the text of these articles is opened up as part of the current discussions, then the opportunity should be taken to introduce appropriate environmental language.**

¹ See *Concordia Bus Finland and Helsinki kaupunki, HKL-Bussiliikenne* (Case C-513/99, 17 September 2002)

Detailed suggestions for updating articles relating to agriculture, fisheries, transport, tourism, the internal market, external trade and development, and economic and social cohesion are set out in a 1995 IEEP report² and are still largely relevant today. A few of the most pressing changes are set out in the annex to this paper.

4 Modernising the EU Institutions

Good governance has become a major pre-occupation of the EU, most obviously demonstrated by the Convention and the 2001 White Paper on European Governance. The EC has also signed the Aarhus Convention on access to information, public participation and access to justice, and is therefore committed to its implementation.

Against this background, the existing Treaty provisions governing the EU institutions suffer from a number of weaknesses that should be addressed in the new constitution, as follows.

- The secrecy of the **Council** has several negative effects, including making scrutiny more difficult. Improvements were secured, under the Amsterdam Treaty, regarding public access to Council documents. The workings of the Council were revised at the Seville European Council in June 2002, with Council debates on acts to be adopted by co-decision procedure now to be open to the public, but only during the initial and final stages of the procedure.
- The European **Commission** has sought to secure greater and more systematic public participation in the development of EU policies. The Amsterdam Treaty also states that the Commission should ‘consult widely before proposing legislation and, wherever appropriate, publish consultation documents’³. However, there is no further requirement under the EC Treaty for the Commission to ensure public participation.
- The Treaty states that any natural or legal person can take a case to the **European Court of Justice** ‘against a decision addressed to that person or against a decision which ... is of direct and individual interest to the former’. The overall effect of Article 230 has been to prevent citizens and citizens’ organisations from challenging environmentally important decisions, as confirmed in 1998 in a case brought by Greenpeace and others (C-321/95).

The constitution should propose requirements for: the Council, when acting in its legislative capacity, to open its meetings to the public; the Commission to ensure early and active public participation in all policy-making; and the European Court of Justice to give NGOs access to justice.

5 Conclusion

The omission of sustainable development and environmental integration from the first draft constitution is believed to have been an oversight rather than a more deliberate

² *The 1996 Intergovernmental Conference: Integrating the Environment into Other EU Policies*, IEEP London, April 1995. A report prepared at the request of the Department of the Environment (UK)

³ Protocol on the application of the principles of subsidiarity and proportionality

attempt to roll back EU policy on environmental protection and sustainable development. Sustainable development has since found its way back into the draft constitution but it is clear that maintaining the language of the existing Treaties, notably environmental integration and its link with sustainable development, should remain the central requirement.

From a political perspective, it is difficult to see any serious opposition to maintaining the environmental provisions in the existing Treaties, and it would be unacceptable to withdraw from these, particularly given the global commitments made by the EU at the Johannesburg World Summit in 2002. Those wishing to maintain the status quo, are likely to have many allies amongst Member States, and support from civil society groups. A weakening of the basic environmental provisions, on the other hand, would risk a major campaign by environmental NGOs against the Constitution.

Given the other issues being addressed by the Convention, it may not be immediately apparent that it has such significance for the environment and sustainability agenda. There is a danger that this aspect could be overlooked as the draft constitution is finalised and Member States adopt harder positions in the Inter-governmental Conference that follows. It is hoped that this aspect of current and future texts will be scrutinised with care by relevant national ministries and that advantage will be taken of the opportunities available.

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Annex Inserting Environmental Objectives into the Treaties

Agriculture (Title II)

The agricultural articles are clearly in need of updating, reflecting as they do the priorities of the 1950s rather than those of the 21st Century. Article 39 makes no reference to the environment, no reference to rural development per se, no reference to forestry and no reference to other issues increasingly perceived to be relevant to agricultural policy objectives, including farm animal welfare. Article 39 also contains very limited provisions upon which to base a Common Fisheries Policy.

Reform of the Treaty could be a clear signal to the outside world, of the political will to change the CAP and CFP in the coming decade. A new treaty could also strengthen the European Parliament's role in decision-making under the CAP and CFP. This is clearly a sensitive topic.

Common Commercial Policy (Title IX)

Currently there is no reference to the requirements of sustainable development in relation to EU external trade, even though the relationships between environment, development and trade are critical. Article 131 TEC states only that the CCP should contribute to 'the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.'

The Community has exclusive competence in the area of external trade, with the Commission negotiating on behalf of the EC, and on the basis of mandates provided by the Article 133 standing committee appointed by the Council. This arrangement has long been criticised due to the continued failure to open up the Article 133 committee proceedings to the public, particularly given similar moves within the Council. The European Parliament's limited role in developing trade policy also contradicts attempts to increase the EU's democratic legitimacy.

Economic and Social Cohesion (Title XVII)

Despite the absence of any Treaty requirement for the Economic and Social Cohesion Policy to aim for *sustainable* development, references to sustainable development have repeatedly been inserted into the Structural Fund and Cohesion Fund Regulations. Both are now to promote overall harmonious 'sustainable' development, and strengthen economic and social, as well as 'environmental' cohesion. However, experience suggests that, while there has been some progress in using the funds to support in sustainable development, Member States tend to regard these environmental requirements as secondary to the traditional priorities of economic development, in particular growth in GDP and employment.

Given that sustainable development and environmental integration are among the main objectives of the EC, as reflected in the Structural and Cohesion Fund regulations, there is a clear need for harmonious sustainable development to become the overarching objective of EU cohesion policy, recognising the need for environmental protection and improvement as a prerequisite for sustainable regional development.

Environment (Title XIX)

Article 93 of the Treaty of Rome as amended by the Treaty of Amsterdam states that all legislation of a fiscal nature must be adopted by a unanimous vote in the Council of Ministers, and Article 175(2) makes it clear that this remains the case for ecological taxation, in that environmental measures 'primarily of a fiscal nature' fall outside the scope of qualified majority voting (QMV).

This requirement has been perhaps the main obstacle to passing Community measures to harmonise taxation for environmental reasons: it led to the collapse of proposals for a carbon/energy tax; resulted in a serious weakening of the minimum duty rates set under the Mineral Oils Directives; and continues to delay the more recent proposal on taxation of energy products despite repeated calls from heads of state and government for ECOFIN to resolve the issue.

Many national finance ministries remain extremely reluctant to countenance any Treaty provision which might compromise their freedom of action in setting tax levels; but from the environmental perspective it would be helpful for the QMV provisions to be extended at least to 'fiscal measures to prevent environmental damage'.