

In December 2003, Heads of States and Governments will most likely come to a decision on a Constitution for Europe. A modern Constitution able to stand the test of time must provide a reliable basis for the protection as well as the rational use of the natural foundations of human life. By analysing the draft Constitution and by assessing its impacts on the environment, this Ecologic Brief aims to assist in raising the profile of the environment within the constitutional discussion. It clarifies the issues at stake, assesses environmental impacts and sketches options and solutions for change. Thus, Ecologic continues the tradition of "Greening the Treaties" and hopes to contribute to guiding the constitutional development in the right direction.

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## Ecologic Briefs A Sustainable Constitution for Europe



### Energy Policy in the Constitutional Treaty

### Future Options for a European Energy Policy and Implications for the Environment

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## Preface: The Convention, the IGC 2004 and the new, sustainable and equitable Europe

A European Constitution – only a few years ago, this subject was taboo to many. But now, the Convention for the Future of Europe has drafted a Constitutional Treaty that is to be agreed and concluded by an Intergovernmental Conference (IGC). The parliaments and the citizens of the Member States will then decide on the Constitution's entry into force. In order to formulate the Constitution, the Convention consolidated and restructured the different European Treaties.

It is an unusual and at the same time historic step in the great civilisatory project of securing, for the long term, peace, rights and freedoms, and the integration of Europe. Will the IGC based on the work of the Convention succeed in creating a constitution which can stand for a long time with only minor changes and additions? Or is Europe to continue, as it has hitherto done, changing its primary law every few years? The dice have not yet been thrown. The IGC now has the possibilities to remedy the deficiencies in the Constitutional Treaty drafted by the Convention for the Future of Europe.

A Constitution able to stand the test of time must also provide a reliable basis for the protection as well as the rational and considerate use of the natural foundations of human life. Because of the EU's importance for global environmental policies, the respective articles on environmental protection, nature conservation, and the rational use of natural resources must be drafted with a broad view. In this respect, the draft Constitutional Treaty is now not as bad as had to be feared when first drafted. Progress, in the sense of achieving equal standing for environmental policy above all with economic policy but also with social policies and redistribution, has not been achieved. The three dimensions of sustainable development are thus still far from an equilibrium.

This Ecologic Brief addresses a subject of particular importance in the current process of constitution development. It clarifies the issues and sketches solutions to be discussed and evaluated. The Brief is part of a series of contributions to the European constitutional debates, and Ecologic thus continues its tradition of work on "Greening the Treaties". With the EcoFuturum project and in dialogue with citizens, Ecologic assists in the creation of the new Constitution of Europe. We have the support of the General Secretariat of the European Commission and we act in partnership with other institutes in five Member States and three Accession States. I hope that the discussions thus initiated have an impact in that they help to guide the constitutional development in the right direction.

R. Andreas Kraemer, Director of Ecologic Institute, Berlin, September 2003

## Introduction

Energy infrastructure is long lasting in nature and can only be changed slowly. Therefore political leadership and perseverance are needed to initiate the change towards a sustainable energy system

Energy policy is a central element in the process leading up to more sustainable modes of production and consumption. The challenges to be met by a sustainable energy system are fundamental: a finite resource base, and satisfying the energy demand of a growing economy at reasonable prices while drastically reducing greenhouse gas emissions. The energy sector has a special responsibility in the context of climate change, as it alone accounts for 32% of European CO<sub>2</sub>-Emissions. While total CO<sub>2</sub> emissions from the energy sector declined until 1994, they are on the rise again as of late, albeit slowly.

Climate change is not the only environmental impact of energy production and distribution. The same energy sources that are attractive because of their low carbon intensity are frequently controversial for other reasons. This is most obvious for nuclear fission: atomic energy is CO<sub>2</sub>-neutral, but carries the risk of potentially disastrous accidents and produces nuclear wastes – the disposal of which has not been solved satisfactorily anywhere. Hydroelectricity is also CO<sub>2</sub>-neutral, but requires massive interference with the morphology of rivers. Other renewable energy sources, such as wind or solar energy, are relatively uncontroversial, except for their visual blights upon the scenery. They, however, cannot yet provide constant amounts of electricity at competitive prices.

The energy system forms part of the physical infrastructure and is thus long lasting in nature; rapid changes are possible only at high cost. If these costs are to be avoided, energy system reform is only possible over time. Nuclear power plants illustrate how the impact of past decisions can last for several decades.

In the past, energy policy in the European Union, used to fall under the responsibility of Member States. Tendencies toward a greater Community role in the field of energy policy began to emerge in the late 1980s against the backdrop of the growing climate discussion and the emergence of plans to create a single market for energy. An explicit reference to Community measures in the field of energy was introduced in 1992 with the Treaty of Maastricht. However, the amendment of Article 3 of the EC Treaty did not give European institutions the competence to carry out such measures.

In the process of drafting the European Constitutional Treaty, the European Convention has, for the first time, facilitated a full European energy policy. The newly introduced energy chapter defines the mandate for a European energy policy and introduces shared competencies in this field.

At the same time, merging of the founding treaties also brought the future of the Euratom treaty back on the agenda. Previously, Euratom had become an almost-forgotten leftover from the founding days of the European Institutions. As opposition to nuclear energy increases, and with the decision of a number of EU Member States to phase out this technology, the use and legitimacy of the Euratom treaty has become highly questionable. Consequently, the idea that the Euratom Treaty should be merged into the future EU Constitution met heavy resistance from different sides. The Convention Praesidium's statement that the future of Euratom was not within its mandate did not dissolve these objections.

As most of the energy-related contributions to the Convention focused on the future of Euratom, other questions in the field of energy were somewhat sidelined:

- What does the Constitutional Treaty, and the energy chapter in particular, imply for the future energy policy in Europe?
- Are the interests of a sustainable European energy system best served by the energy chapter, or are there sufficient levers and instruments in other policy areas?
- How will the internal market for energy be supported by the Constitutional Treaty, and what does the internal market entail for the energy mix and the energy system's impact upon the environment?

## The Current Situation

Until now, energy policy was relegated to the Member States, with European institutions only playing a limited role

**Energy Policy in the European Union**

At present, energy policy falls under the sovereignty of the Member States. European primary law does not provide for a Community energy policy. Instead, Article 3 of the EC-treaty only specifies the objectives of Article 2 by naming measures in the field of energy policy as possible EU activity. At the same time, some sectoral policies have had a profound impact on the Member States' energy policies, notably in the field of environmental policy and competition. These interactions are explained in more detail below.

### Energy in the Existing Body of Primary Law

The treatment of energy policy in European statutory law is somewhat ambiguous. On the one hand, the 1951 Treaty of Paris, which established the European Coal and Steel Community (ECSC), and the 1957 Euratom Treaty, founding treaties of the European integration process, were set up to support cooperation and mutual control in energy-related questions. Little more than a decade after the end of World War II, they were seen as an important tool for controlling military activities. However, as the integration process continued, the ECSC and Euratom Treaties progressively declined in importance. While the ECSC Treaty formally expired in 2002, the Euratom Treaty has no such provision and remains in force. Yet its *raison d'être* is disputed, as will be discussed in more detail below.

At the same time, apart from the ECSC and Euratom provisions related to coal and nuclear energy, energy policy rested mainly within the Member States' competence. Following the 1992 amendment of the EC Treaty through the Maastricht Treaty, Article 3 stipulates that EU activity contain measures in the field of energy policy. However, this provision does not grant the European institutions the competence to carry out measures in the sphere of energy. Community measures in the energy sector were therefore mainly based on Article 308 of the EC Treaty; this article confers on European institutions the power to take action where necessary in order to attain the objectives of the Treaty.

### Other EU Policies with an Impact on Energy

As the objectives for measures in the field of energy are not specified in the EC Treaty, they had to be derived from other sections of the Treaty instead. Consequently, other policy areas have had a profound impact on

energy sector operation. The most visible impact has been the creation of an internal market for electricity and natural gas. A further influence stems from environmental policy, particularly the promotion of energy efficiency and renewable energy sources. These influences are discussed below.

- **Internal market and competition policy** The liberalisation of the grid-based energy markets (i.e., electricity and gas) has been central to European energy policy for the last two decades. It has its origins in the 1987 Single European Act, and has been pushed forward under the auspices of DG Competition since 1992. The commitment to achieving a single market has received further emphasis through the renewed commitment by the Lisbon European Council in April 2000, which agreed to accelerate the completion of the internal energy market. The Council maintained that the creation of a complete and fully operational internal market would form an essential prerequisite for the Lisbon target of turning the EU into the most competitive knowledge-based economy in the world by 2010. Energy would thereby be a further sector in which state monopolies give way to a liberalised single European market – following the telecommunication sector, public transport, and, potentially, water supply.

In the absence of more specific Treaty provisions, Community measures pertaining to the internal energy market have been based mainly on Article 308 of the EC Treaty.

A crucial prerequisite for energy market liberalisation is the creation of a level playing field between competitors – not only between different utilities, but also between energy from different sources. In addition, it is widely accepted among economists and regulators that the market forces in a liberalised energy market will only lead to a desirable outcome, if the external costs of energy production are internalised to a large degree. Otherwise, pollution-intensive energy sources would gain a competitive advantage at the expense of the environment and public health.

This means that support for single energy sources is generally not compatible with the ideal of a liberalised energy market. In order to ensure effective market functioning, subsidies for selected energy sources should be phased out as a general rule. To account for the external costs of energy production, taxation or tradable permit schemes are necessary. At the same time, however, it is unlikely that subsidies for coal or nuclear energy will be phased out anytime soon. Moreover, sources such as nuclear fission have received massive support over extended periods of time. In the name of fair play, it may be necessary to grant temporary support to newly developing energy sources, in particular to renewable energies.

• **Environment** The influence of environmental policy on energy policy stems primarily from Articles 6 and 174 ff. of the EC treaty. The integration requirement of Article 6 stipulates that environmental protection requirements must be integrated into the design and implementation of all Community policies and activities, thus including measures in the field of energy. In addition, the objectives of Community environmental policy (as laid down in Article 174, paragraph 1 of the EC treaty) relate directly to the energy sector. This pertains in particular to the requirement to promote a prudent and rational use of natural resources, and the objective of preserving, protecting and improving the quality of the environment. In addition, although not explicitly mentioned in the Treaties, the Commission and the European Council stated upon several occasions that climate change is a prime case for integrating environmental protection requirements into energy policy.

At the same time, Community energy competencies deriving from environmental provisions are limited by Article 175, paragraph 2 (c), which requires unanimity for “measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply.”

• **Fiscal policy** Fiscal policy influences both the environmental performance of the energy sector and the creation of an internal market. As explained above, the effective functioning of a market requires the internalisation of external costs. Fiscal policy is one option to achieve this. Currently, Community decisions on fiscal policy generally have to be reached unanimously. The unanimity requirement is mirrored in the Section on the Environment (Article 175, paragraph 2 (a)) for environmental measures that are primarily of fiscal nature. As a consequence, the common minimum taxation on energy was adopted only after lengthy and intense negotiations lasting several years. One call for reform of the European treaties thus demanded the introduction of qualified majority voting for energy taxation with environmental protection as its main objective.

#### **Energy and the Environment: the Cardiff Process**

The adoption of the Treaty of Amsterdam in 1999 marked an important step in European environmental policy, and indirectly also influenced Community activities in the field of energy. Article 6 of the Treaty requires that environmental concerns have to be integrated into the planning and implementation of all other Community policies. Thereby, the political weight of environmental concerns was increased considerably. In order to implement Article 6, the so-called Cardiff Process was launched, whereby the European Council invited several formations of the Council of

Ministers to come up with strategies on how to achieve environmental mainstreaming in their respective sectors and their activities. Among the first to be invited was the Energy Council, which delivered a strategy to the 1999 Helsinki European Council.

Sectoral strategy development and adoption were some of the earlier manifestations of a future European energy policy. The systematic integration of environmental concerns meant that objectives, targets, timetables and measures of European energy policy had to be formulated and calibrated to ensure coherence with environmental and social objectives. Concerning the sustainability of the current energy policy, the Council formation’s strategy paper maintained that the existing objectives of Community energy policy – competitiveness, security of supply, and environmental protection – could be directly related to the social, economic and environmental dimensions of sustainable development. Consequently, the proposed action programme mainly consisted of already-existing activities in the areas of energy efficiency and the promotion of renewable energy sources.

In the meantime, the future of the Cardiff process is uncertain. The Helsinki and Gothenburg European Summits endorsed the sectoral integration strategy for the energy sector in 1999 and 2000, which is still binding and valid. Recently, the commitment to the Cardiff Process has been re-emphasised by the Brussels European Council. Nonetheless, developments such as the European Sustainable Development Strategy, and – most importantly – the Lisbon Strategy for Employment and Competitiveness, have recently received greater attention both internally, and in the public eye.

#### **The Euratom Treaty**

The Euratom Treaty is a political oddity. Although public opinion is largely opposed to nuclear energy, and although several Member States have phased out nuclear power or have begun to do so, the EU-15 countries continue to be members of a Community whose main objective is the “speedy establishment and growth of nuclear industries.” Having existed for nearly half a century without any substantive reform, the Treaty appears to have been largely forgotten by politicians and citizens alike – except for the nuclear industry and nuclear scientists. Overridden and marginalised by political realities, Euratom is a political fossil that has lost most of its *raison d’être*. It wasn’t until the European Convention set out to merge all bodies of European primary law into a single Treaty that the question of how to deal with the Euratom Treaty re-emerged with new actuality.

The Euratom Treaty has survived for almost half a century without substantial changes, although a majority of Europeans and of EU governments are opposed to nuclear energy

## History of the Treaty

The Treaty establishing the European Atomic Energy Community (Euratom Treaty) was signed in 1957, and its primary objective was to create the conditions “for the development of a powerful nuclear industry.” It originated during a period of unquestioned optimism about nuclear energy, which was seen as the key to growth, welfare and prosperity and as a virtually inexhaustible energy supply. At the same time, nuclear energy was regarded as a vehicle for economic and political integration in Europe, and thus facilitated mutual control of French and German nuclear energy sectors. The Euratom Treaty was signed in conjunction with the Treaty establishing the European Economic Community (Treaty of Rome). The European Atomic Energy Community was created when the Euratom Treaty entered into force in 1958. In contrast, however, to the other founding treaties, the Euratom Treaty has never been substantially revised. Whereas the Treaty establishing the European Coal and Steel Community expired in July 2002 – fifty years after it came into force – the Euratom Treaty contains no expiry provision.

## Contents and Competencies

The foremost goal of the Euratom Treaty, the promotion of the European nuclear industry, is to be achieved through the promotion of research, dissemination of information, investment facilitation, the creation of a common market, and the supply of nuclear fuels to users.

Some of these activities – such as research funding and facilitation of investment through Euratom loans – are still operational. Through the Euratom Loan Facility, more than Euro 2.5 billion in loans were disbursed since its inception in 1977, until disbursements ceased in 1987 due to a lack of demand for new nuclear installations. Since the late 1990s, Euratom loans have also been granted to Central and Eastern European countries in order to improve the safety of existing nuclear installations; Bulgaria and the Ukraine have received some Euro 800 million in Euratom loans.

At the same time, the Euratom Treaty also contains several provisions that either never came to pass, or never acquired their planned role. Examples are the EAEC's sole right of option and ownership of fissile material, or the envisaged supply mechanism under the Euratom Supply Agency.

## Criticism of the Euratom Treaty

Apart from the legal aspects concerning the future of the European Atomic Energy Community and its place in the body of European primary law, the Euratom Treaty has also been under heavy criticism for its substantive provisions. Part of the criticism derives from the fact that the political tide has changed, and that the unquestioning, optimistic view of

nuclear energy embodied in Euratom has long ceased to exist. Other shortcomings are owed to the fact that the Treaty has never been fundamentally revised, and therefore contradicts the spirit of other Community policies and objectives. The following points are criticised most frequently:

- **Democratic deficit** The European Parliament was still nascent when the Euratom Treaty was first drawn up in 1957. In addition, democratic control of the nuclear industry was neither a priority nor regarded as desirable at the time. Consequently, the Treaty does not provide for the codecision procedure between Commission and Parliament; thus the European Parliament's function in Treaty execution is merely advisory.

- **Lack of political support for nuclear energy** Of the current 15 EU Member States, five have never used nuclear energy. Austria and Italy have phased out nuclear energy. Four other countries (Belgium, Germany, Sweden and the Netherlands) have decided to stop using nuclear energy. This leaves Finland, France, Spain and the UK as nuclear energy supporters. Of these, only Finland is planning to construct a new nuclear power plant, while the British nuclear industry is struggling with financial and confidence crises in a liberalised energy market. This means that the majority of members of the European Atomic Energy Community are opposed to, or at least sceptical of nuclear energy. This situation will also persist after the EU enlargement in 2004. Although the Euratom Treaty is likely to gain new supporters with the accession of the Czech Republic, Hungary, Lithuania and Slovenia, the majority of the Candidate Countries are non-nuclear.

- **Lack of public acceptance** Not only governments, but also a majority of European citizens are opposed to nuclear energy. In a 2002 Eurobarometer survey on attitudes towards the environment, nuclear energy and radioactive waste ranked highest among all environmental concerns – well ahead of global warming. Nuclear risks were named as a serious concern by half of the respondents.

- **Conflict with other policies** The Euratom Treaty conflicts de facto with other European policies, most notably the common energy market and environmental policy. Support provided through Euratom loans and research funding effectively established a special economic zone for nuclear energy. At the same time, neither environmental liability nor cost internalisation are enforced for nuclear energy providers. This situation contradicts de facto the objectives of a common energy market, which requires an equal treatment of energy producers and energy sources, and which should be based on the internalisation of external costs.

- **Redundancy and overlap with other treaties** Several Euratom Treaty-provisions, i.e. those on institutions and on financing mechanisms, are similar or identical to provisions of the EC Treaty. These provisions should be deleted in order to further simplify the Treaties.

- **Separate legal personality** The Euratom Treaty establishes a separate legal personality for the European Atomic Energy Community alongside the European Community, causing confusion and lack of transparency. One question regarding the simplification of the European Community's institutional structure was whether and how the various legal personalities should be merged.

- **Sustained imbalance in research and development** The Euratom Treaty sustains extensive research funding. Although some is devoted to nuclear safety and waste disposal, the majority of funds continue to go into nuclear fusion research. In the course of the 6th Research Framework programme, Euro 700 million of Euratom funds have been budgeted for fusion research, down from Euro 788 million in the 5th Framework programme. This institutionalised support gives nuclear scientist a comfortable position. However, the results of almost half a century of funding have been disappointing, notably in the case of nuclear fusion. At the same time, nuclear research funding surpasses that of all other energy sources, thereby tying up funds that could otherwise contribute to increases in energy efficiency, or to further advances in renewable energies.

- **Obsolete provisions and ideas** The Euratom Treaty provides for a number of outdated institutions – some of which were never implemented. One example is the establishment of a European agency for the joint acquisition and supply of fissile material. By contrast, other more pressing concerns remain unaddressed by the Treaty.

- **Lack of nuclear safety standards** One of Euratom's most frequently criticised shortcomings is that it does not provide for binding standards on nuclear safety. Instead the Euratom Treaty only establishes "basic standards" for radiation safety precautions at the workplace and the vicinity of the installation. The Treaty neither contains provisions relating to the storage or the ultimate disposal of nuclear waste, nor accident safety requirements for installations or protection against terrorist attacks. Provisions on environmental damage liability are also absent. The EU Commission (DG TREN) has recently set out to change this by proposing the development of common nuclear safety standards under the Euratom Treaty. This "Nuclear Package" was published in November 2002, and has not been decided upon thus far.

## Energy in the Constitutional Treaty

There are several passages in the Constitutional Treaty that bear upon energy policy, some of which are closely interrelated. Three main energy-related aspects of the Constitutional Treaty deserve further consideration:

- The newly introduced energy chapter (Article III-152);
  - The future of the Euratom Treaty;
  - Other provisions of the Treaty that influence energy policy.
- These will be analysed in detail in the following sections.

### The Energy Chapter

The introduction of a separate chapter on energy is a landmark in European energy policy. The energy chapter establishes shared competence for energy policy and strengthens the EU role in this field. At the same time, the energy-related competencies that could be derived from other titles are finally bundled in one chapter – as opposed to being scattered across different sections of the Treaties. Furthermore, primary law now explicitly regulates the objectives of European energy policy. Previously, the absence of a separate section specifying targets for energy policy meant that the objectives for Community activities in this field were not defined from an energy perspective, but had to be inferred instead from other policies. Article III-157 of the European Convention specifies the objectives of European energy as follows:

*"In establishing an internal market and 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."*

The objectives for a European energy policy thereby resemble earlier formulations, such as those expressed in the Energy Council's strategy for integrating environmental concerns into energy policy. The strategy, which was submitted to the 1999 Helsinki European Council as part of the Cardiff process, listed security of supply, competitiveness, and protection of the environment as objectives of Community activities in the field of energy.

In contrast, however, to the integration strategy, the energy chapter in the Constitutional Treaty does not refer explicitly to sustainable development. The preservation and improvement of the quality of the environment is not specified as an objective, but named as a requirement for energy policy.

The energy chapter marks a good example of integrating environmental concerns into the goals of European energy policy – if the commitments are followed up upon.



Also, the establishment of an internal market is listed as a higher-ranking objective.

The call to promote development of “new and renewable” forms of energy has raised the attention of Convention Members and civil society actors alike. Different interpretations of this expression have been suggested. First, it can either be understood as promoting new forms of energy as well as energy from renewable sources. This interpretation is in line with the historical origin of the term, which was coined in the 1970s to include both renewables and unused fossil resources like oil shale and oil sands. It would also imply that new, non-renewable technologies should be supported, such as hydrogen and fuel cells, decentralised energy systems and energy recycling. Nuclear fusion and new fission reactor technologies, however, do not fall under this provision, as these technologies are already covered by the Euratom Treaty, the more specific and, thus, exclusive legal regime<sup>1</sup>. A second interpretation of new and renewable is that support should be given to energy forms that are both “new AND renewable.” In this view, the formulation is used to distinguish between “old” renewable energy sources, such as large-scale hydroelectricity, and genuine, “new” renewable energy sources, such as wind and solar energy.

### The Euratom Treaty

The integration of the European Treaties into one Constitutional Treaty opened a window of opportunity to repeal or reform the Treaty

The future of the Euratom Treaty has been a contentious aspect of the Convention's work. The Laeken Declaration on the Future of the European Union specified that the Convention was to draft a Constitutional Treaty that would simplify and integrate the founding Treaties of European integration, and the Treaties amending them. Although not explicitly mentioned, this mandate was understood to include the Euratom Treaty – an interpretation shared, for example, by the Convention Working Group on legal personality. The Laeken Declaration also called for the merging of the different legal personalities established through these treaties, thereby creating a single legal personality for the European Union.

Several options were put forward on how the Euratom Treaty could be formally integrated into the Constitutional Treaty. These included

- transferring the majority of the Euratom Treaty directly into the Constitution (unless provisions were duplicated by other treaties),
- linking the Treaty to the Constitution by means of a protocol or an annex,

<sup>1</sup> The consequences resulting from the abolishment of this specific regime are, however, debatable.

- leaving it as a stand-alone treaty, (thereby contradicting the integration objective), or
- allowing the Euratom Treaty to expire with the entry into force of the Constitutional Treaty.

Other proposals aimed to change the substance of the Treaty, either cautiously by shifting the emphasis of Euratom towards nuclear safety, or radically by turning it into a climate and energy treaty aimed at promoting sustainable renewable energy.

A related issue is that of legal personality. The Laeken mandate was to arrive at a single European Union with a single legal personality, which would integrate and inherit the legal personalities of the existing European Communities (i.e. the European Atomic Energy Community and the European Community). One consequence of the merger of legal personalities would have been that Euratom and EU membership would have become inseparable<sup>2</sup>.

The prospect of enshrining support for atomic energy in a European constitution and of merging the Atomic Energy Community with the reformed European Union stirred widespread protest and opposition among civil society actors and governments of non-nuclear Member States. The issue of the Euratom Treaty has been targeted in a joint campaign by all major environmental NGOs, and addressed in numerous contributions from Convention members. Positions presented range from the outright abolition of the Euratom Treaty to a minimal formal update.

By contrast, the Convention Praesidium took the position that the Laeken mandate did not entitle the Convention to discuss any substantial changes of the Euratom Treaty. Its reluctance to address the issue has been criticised by environmental groups as an attempt to suppress discussion. Nevertheless, a number of proposals and contributions on the issue were submitted to the Convention, summarised as follows:

### Contributions to the Convention

One of the earliest contributions addressing the Euratom question was submitted by Hänsch et al. in July 2002 (CONV 189/02). Hänsch et al. called for the integration of the Euratom Treaty into the Constitution, after having reviewed and amended the Treaty in accordance with nuclear safety, and the introduction of the co-decision procedure. This submission was further elaborated in an additional contribution by Klaus Hänsch, tabled in October 2002 (CONV 344/02). In an evaluation of different procedural options, Hänsch discards the options of repealing the Treaty, as this would re-nationalise competencies and make coordination more difficult. Other

<sup>2</sup> By contrast, now there is at least a theoretical possibility for a state to be a Member State of the European Union, but not of Euratom.

options (mentioned but not elaborated) include the minimum requirement of democratising the Treaty, as well as more ambitious solutions – such as converting it into a European energy or climate treaty for the promotion of renewable energy sources. Hänsch maintains that this would give the treaty “new modernity and purposefulness.”

López Garrido et al. (CONV 329/02, October 2002), touched briefly on the issue by proposing a revision and update of Euratom with a view to nuclear safety, research, and foreign relations.

The Convention Working Group III on legal personality, in their final report published in October 2002 (CONV 305/02), addressed the question of including Euratom in the Constitutional Treaty. A minority of working group members maintained that the inclusion of Euratom into the Constitution was not a strict necessity given the specific nature of the Treaty. In general, however, the Working Group concluded that

*“The underlying case for merging the Euratom Treaty is the same as for merging the TEC. The Euratom merger would in addition allow a large number of Euratom Treaty provisions that are identical or similar to the TEC to be deleted. However, in view of certain specific problems relating to the Euratom Treaty, it was felt that the possible implications of merging this Treaty needed to be further investigated.”*

In response to the working group contribution, Farnleitner et al. tabled a contribution to the issue of the single legal personality in October 2002 (CONV 358/02). They argued that the issue of a single legal personality could not be separated from the content and purpose of the Euratom Treaty. Consequently they urged for an extensive reform of the Euratom Treaty before it could be included in the Constitutional Treaty. The proposed amendments include nuclear safety provisions, ensuring fair competition amongst different energy sources, and the introduction of democratic procedures by strengthening the role of the European Parliament.

One of the more far-reaching contributions was proposed by Nagi et al., February 2003 (CONV 563/03). They recommended that the majority of the provisions contained in the Euratom Treaty not be integrated into the Constitutional Treaty, but rather simply repealed as they are fundamentally at odds with other European policies and political realities in most Member States. Nagi et al. argued that the Euratom Treaty is incompatible with the liberalisation of the electricity market, that it is undemocratic, and that it is not supported by the majority of Member States. They hold that only certain sections of the treaty, i.e. relating to health and safety and to non-proliferation, should be transposed into the Constitutional Treaty, and that the rest should simply be abolished.

Based on these contributions, and as a reflection of growing criticism, the Praesidium announced its suggested approach for the Euratom Treaty in March 2003 (CONV 621/03). Above all, the Praesidium stated that it did

not see a basis for the Convention to “become involved in an operation to amend the Euratom Treaty substantially.” It proposed only a slight, formal adjustment of Euratom by means of a protocol annexed to the Constitutional Treaty. The Praesidium suggested introducing a general clause as a new Article 107 of the Euratom Treaty, whereby almost all articles under Titles III and IV of the Euratom Treaty relating to institutions and financial provisions, would be replaced by the corresponding section in the Constitutional Treaty.

### The Current Solution

Despite the Convention President’s unwillingness to address the substance of Euratom, a compromise was eventually reached, mainly due to individual Convention Members who threw in their political weight to arrive at a solution. Shortly before the finalisation of the draft Treaty in July 2003, the merger of the EC and Euratom legal personalities was eventually discarded. In the draft of the Constitutional Treaty that will be submitted to the Intergovernmental Conference, the Euratom Treaty will merely be annexed to the Constitutional Treaty, but not integrated further. Consequently, the European Atomic Energy Community would continue to exist independently and with a separate legal personality, awaiting its fate through reform or by repeal.

As a spokesperson of the Convention maintained, the compromise was not necessarily anti-nuclear, but rather to “leave the subject untouched.” However, given DG TREN’s calls for an integration of the Treaty, the trade-off was nonetheless seen as a blow to Energy Commissioner Loyola de Palacio. Environmental groups, by contrast, welcomed the solution. Falling short of abolition or substantive reform of Euratom, the Treaty is left to linger in limbo, bound to become further marginalised. Environmental groups also welcomed the (theoretical) possibility for Member States to walk out on the Euratom Treaty without leaving the European Union (see discussion below).

### Other Sections Impacting European Energy Policy

One objective of concentrating the Union’s competencies in the field of energy into a special chapter was to do away with the scattered provisions and inferred objectives that had previously characterised energy policy.

### Competition & Internal Market

The section on competition and the internal market makes no explicit reference to the internal market for energy. In fact, the provision of EC Treaty Article 308 – which previously served as a basis for Community measures in the field of energy – has been moved to Article 17 paragraph 1, and is no longer restricted to the operation of the common market.

Following a last-minute compromise, the Euratom Treaty is left to linger in limbo. The opportunity remains to abolish the Treaty – or to wait and see it become marginalised further.

Therefore, the link between energy and the internal market is provided through the energy chapter, which refers to the establishment of the internal market, referred to as a basic framework condition. It is unsatisfactory from an environmental perspective that internalisation of external costs of the energy system is not mentioned explicitly in the energy or internal market chapters, whereas subsidies and support payments are regulated in detail.

### Environment

The environmental integration requirement, formerly contained in Article 6 of the EC treaty, is now found in Article III-4 of the Constitutional Treaty. Despite earlier attempts to weaken the provision, the integration requirement retained its strong wording<sup>3</sup>:

*“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities referred to in this Part, in particular with a view to promoting sustainable development.”*

The chapter on environmental policy (now contained in Article III-129 ff. of the Constitutional Treaty / formerly Article 174 ff. of the EC Treaty) has remained unchanged. On the positive side, this means that such fundamental principles as the precautionary principle and the polluter-pays-principle are also maintained by the Constitutional Treaty. At the same time, some provisions that limit the scope of environmental policies vis-à-vis other sectors have also remained unchanged. In the case of energy, the most relevant and critical points transposed are the unanimity requirements for fiscal measures, and for such measures that significantly affect a Member State's energy supply and choice between energy sources. Both provisions were retained despite renewed calls for their withdrawal.

### Fiscal Policy

In the field of fiscal policy, several members of the Convention have proposed to introduce an exception from the unanimity requirement for taxation. For tax measures related to the environment in general, and to environmentally motivated energy taxes in particular, Convention members Fischer, Fayot and Tiilikainen requested the introduction of qualified majority voting. This suggestion was partly motivated by the negotiation-marathon on EU-wide energy taxation. It was not, however, included in the final draft.

<sup>3</sup> Cf. Beyer, Peter 2003: *The European Constitution – An Evaluation from an environmental perspective*. Berlin: Ecologic briefs

## The Way Forward

### Challenges facing a European Energy Policy

The energy sector has a key contribution to make towards achieving sustainable development in the European Union. Energy, the basis of all economic activity, has to be available at reasonable cost and with high security of supply. The European system of energy production has to be competitive, both in the internal market and abroad. This includes in particular the development of new, ground-breaking technologies to drastically increase energy efficiency and to tap renewable sources of energy, giving the European energy sector a technological lead over its competitors abroad. At the same time, it is mandatory that the energy system makes more prudent use of natural resources, as the era of vast amounts of fossil fuels, available at low cost, is nearing its end. The requirement to minimise the environmental impact of energy production has gained particular relevance through the threat of a global climate change. As it accounts for a third of all CO<sub>2</sub>-Emissions, the energy sector has a special contribution to make towards stabilising atmospheric green house gas concentrations at a level where dangerous anthropogenic interference with the climate system can be prevented.

Finally, security considerations have recently gained importance: this applies above all to the security of supply with raw materials, given the fact that the majority of global oil and gas resources are found in politically highly unstable regions. Yet it also applies to the protection of the energy system against the threat of terrorist attacks, as well as the dangers associated with proliferation of fissile material.

For most of these challenges, goals and strategies are sufficiently defined. Achievements, however, lag behind. For example, the CO<sub>2</sub>-emissions of the energy sector have been increasing since 1994, as have the energy sector's relative contribution to European emissions. And while relative decoupling of economic growth and energy consumption has been achieved, the necessary absolute decoupling of growth and emissions remains unattainable. There is also still a widespread conception that competitiveness and the security of supply are at odds with goals such as the protection of the environment and the prudent use of natural resources.

Increasing energy efficiency and the share of renewables can ensure competitiveness, security of supply, and protection of the environment

### Elements of a Sustainable European Energy Policy

At a time where much of Europe's energy infrastructure is in need of replacement and renewal, a window of opportunity has opened in which to shift the course of European energy policy onto a more sustainable path. To ensure competitiveness, security of supply, and the protection of the environment, sustainable energy policy has to employ a mix of radically increased energy efficiency, a rapid development of renewable energy sources and the use of small-scale, decentralised technologies like fuel cells and cogeneration. This process is compatible with, or even benefits from a liberalised and competitive internal market for energy. To ensure socially desirable outcomes, the full internalisation of external costs has to be part of such a liberalised internal market.

### Measures to Implement a Sustainable Energy System

Increased support and development of renewable energies must be a central cornerstone of a sustainable European energy policy. Renewable energy technologies have received some support in the past, but much scope remains for their further development towards marketable solutions. In contrast to uranium- and carbon-based technologies, the development of renewable energy technologies is still in its early phase. Large increases in efficiency and reliability can still be expected. At the same time, competing energy forms like coal and nuclear energy are major recipients of state subsidies. They have a strong and institutionalised support base in politics and academia and they have received substantial research funding for decades – not least of all through the Euratom Treaty and the large nuclear research community it sustains.

Increasing energy efficiency is often neglected as a subdomain of energy policy although it represents the most promising option to satisfy the world's growing energy needs without jeopardising global ecosystems in the process. A drastically increased efficiency in the production, transmission, storage, and use of energy will help to reduce energy demand and, through the technological experience gained, place European firms a step ahead of their competitors abroad. Likewise, reducing the share of energy-intensive goods in private and public consumption is necessary to curb energy demand, either by raising awareness through better information provision, or by redirecting public procurement policies.

Finally, nuclear energy should not form part of a sustainable European energy system. One reason for this is the rapidly diminishing acceptance for nuclear energy. The majority of Member States have never used nuclear energy, already phased it out, or is in the process of doing so. The question of ultimate waste disposal also remains unsolved, and continues to be one of the gravest environmental concerns among European citizens. The risk of catastrophic nuclear accidents is neither considered

acceptable by a majority of Europeans, nor is it commercially viable. If operators had to assume full liability for the consequences of a nuclear accident, nuclear energy would become commercially infeasible. Finally, as British experience has recently shown, it is also questionable whether highly centralised and capital-intensive energy forms such as nuclear energy are optimally suited to compete in a liberalised energy market.

### Pushing Forward the Internal Market for Energy

Surprisingly enough, DG Competition and Friends of the Earth both supported the idea of pressing for the completion of a Europe-wide internal market for energy. However, liberalisation will only work if it is supported by intelligent regulation. Thus, some essential prerequisites have to be met if the liberalisation of the energy market is to deliver the benefits that economic theory promises. First of all, the external costs of energy production, storage, and transmission have to be fully internalised. If this is not the case, producers with environmentally harmful production methods would gain a competitive advantage at the expense of the environment. Internalisation of external costs can best be achieved through market-based instruments like taxation, tradable permit schemes, or environmental liability.

A second prerequisite is fair and efficient functioning of the market. In order to create a level playing field for all energy producers, several conditions must be met:

- fair and non-discriminatory access to the grid,
- independent and reliable information provision for the consumer,
- managerial separation of power generation, supply and networks, and
- phasing out of support for specific energy sources or producers.

If the above conditions are fulfilled, flexible and decentralised small-scale technologies are set to gain from a liberalised energy market, including energy from renewable sources. In this way, an economically integrated energy system based on a variety of decentralised production measures also marks the best way to ensure security of supply, and to ensure ongoing innovation in the energy market.

### The Role of the Energy Chapter

The introduction of the energy chapter in the Constitutional Treaty opens up new options for a European energy policy. The goals of promoting energy efficiency and renewable energy sources in order to ensure protection of the environment and development of the internal market have received constitutional status. The energy chapter thereby provides for some of the tools that are needed to achieve a re-orientation of energy

If external costs are internalised, a liberalised energy market will favour decentralised and flexible energy sources, such as gas-fired cogeneration or renewables.

policy as outlined above. By also giving a stronger role to European institutions, it facilitates more extensive Community measures than previously possible. In general, this is a positive development, as energy supply takes place in an increasingly competitive environment. The development and maturation of sustainable energy technologies is a time-consuming and costly process that can impact competitiveness in the short run by imposing higher costs on producers. In the past, energy suppliers and energy-intensive firms have often argued that national strategies for increasing energy efficiency and the share of renewables would constitute an unacceptable disadvantage for domestic firms. However, the enlarged EU is a sufficiently large and well-integrated market to allow for development and maturation of sustainable energy technologies. Through its great economic weight, it has the potential to set trends in technological developments. This marks a great potential for an ambitious energy policy that would meet the environmental challenge ahead and open up new business opportunities.

At the same time: while the introduction of an energy chapter in the Constitutional Treaty opens up new opportunities, it alone does not necessarily constitute a step forward. The question is whether new opportunities will indeed be seized to move towards a sustainable energy system, or whether European energy policy will be highjacked by the well-established proponents of technologically and politically outdated energy forms like coal and nuclear power.

Although it is laudable that the support of energy efficiency and renewable energy sources has received constitutional status, the wording alone does not guarantee a proactive and environmentally sound energy policy. Inside the European Commission, it is questionable whether the interests of a sustainable energy system are better served by the new situation – whereby responsibility for energy policy is shifted away from DGs Environment and Competition, and towards DG TREN. This is not unproblematic given the views of some members of DG TREN, who advocate nuclear energy as a sustainable and climate-friendly form of energy.

The most promising option is therefore not only to carefully monitor the adherence to the objectives stated in the energy and environment chapters, but also to press for the full internalisation of external costs in a liberalised energy market. This will benefit decentralised, flexible, and environmentally sound forms of energy: the technological leaps that have been achieved in this field indicate that energy-efficient technologies and renewables can play a central role in a competitive energy market.

### The Future of the Euratom-Treaty

Reform of the European Treaties by the Convention opened a window of opportunity to address the long-forgotten issue of the Euratom Treaty. The current solution leaves this window half-open. As Euratom will remain a stand-alone Treaty, the pressing need to deal with it is gone. Yet at the same time, the issue has been put on the political agenda. Public and political interest in the subject has been raised, and the absurdity of having a treaty promoting the nuclear industry in a largely non-nuclear European Union has been demonstrated.

Of the different strategies that have been put forward, the following would appear as most appropriate from an environmental perspective:

- The radical approach is to phase out the Euratom Treaty altogether. Like the European Steel and Coal Community, which had become obsolete and expired in 2002, the duration of Euratom could be limited to 50 years. This would mean that Euratom expires in 2007. Certain provisions, i.e. pertaining to health and safety or to non-proliferation could then be transferred into an annex to the Constitutional Treaty if they are not already covered by the energy chapter.
- The walk-out option is to gather a sufficient support among non-nuclear Member States to suspend their membership in the European Atomic Energy Community unilaterally. This negated form of enhanced cooperation seems politically elegant, but as there is no precedent for a country leaving an EU treaty, it is questionable whether and how this option is legally feasible – and whether non-nuclear governments are determined enough to carry through with this process.
- The parallel approach is to leave Euratom to dry out as a fossil, and to initiate instead the transition towards a sustainable energy system based on the provisions in the energy and environment chapters. By pressing for a competitive internal market with the internalisation of external costs and strict environmental liability, nuclear energy can be further marginalised. In doing so, radically increased energy efficiency has to receive special emphasis: so that the energy that is now provided by nuclear power plants can simply be saved. This approach is not without risk, however: the EU enlargement and the need to reduce CO<sub>2</sub>-emissions could both favour a renaissance of nuclear energy. This would also allow Euratom to assume a new function.

Highly centralised and capital-intensive technologies such as nuclear energy are unsuited to survive in a competitive internal market with full cost internalisation. They have persisted only through political support and the socialisation of environmental risks.

- Adjust and improve Euratom. A further option is either to transform Euratom into a “Eurenew” or Climate-Treaty with the objective of advancing renewable energy technologies, or to complement Euratom with such a treaty. One reason for the necessity of such a treaty is that conventional energy sources like coal or nuclear have had a well-established institutional support base in politics, academics and business, giving them a persistent advantage over newcomers like wind or solar energy. However, it is dubious whether this option would find adequate political support, and whether the officials responsible for implementation would develop a sense of ownership for such a treaty. A further setback is that such an option would give Euratom – or its successor – renewed legitimacy, thereby cementing its existence.

Of the different options, the parallel approach therefore appears as the most promising and realistic option. Euratom is a legal fossil, which contradicts the will of a majority of European citizens and governments, and stands in the way of pushing forward a liberalised energy market. The Economist magazine acknowledges that nuclear energy, with its risk of catastrophic accidents and the unsolved question of ultimate disposal, was only able to survive in the past thanks to politically motivated support. However, if it becomes doubtful whether this support will continue to exist in the future, nuclear energy would most likely not form part of an energy company's portfolio in a liberalised market.

The arguments that nuclear energy is necessary to ensure the security of energy supply and that a phase-out of nuclear would accelerate global warming are not convincing. Security of supply can best be ensured through a diversified, decentralised and well-integrated energy market, but most of all through rapidly increased energy efficiency. The claim that a phase-out of nuclear would result in increased use of fossil fuels and therefore accelerate global warming is short-sighted. It only holds if energy consumption remains constant, and if renewable energies remain restricted to their current, marginal role. Neither of these factors are a given, but are goals that energy policy must seek to achieve.

At the same time, seeing is believing – and therefore the attractiveness of a sustainable energy system, with radically reduced energy demand and a substantial share of energy from renewable sources will increase when its foundation becomes visible. If the European Union can maintain and extend its technological leadership in this field, this will be one of the most convincing arguments that support for nuclear energy is politically misplaced and economically superfluous.

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## Ecologic Briefs – Selection A Sustainable Constitution for Europe

The European Constitution

Democracy, Efficiency, Transparency

The Division of Competencies

Energy Policy in the Constitutional Treaty

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