



EU Competences in Forestry Policy

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Preface

The present paper is an abridged version of the research report published on 30 June 2004 as an outcome of the research agreement between the Finnish Ministry of Agriculture and Forestry and the Institute of International Economic Law of Helsinki University (KATTI). Researchers based at the Pellervo Economic Research Institute (PTT) and at the Faculty of Forestry in the University of Joensuu (in Eastern Finland) have also contributed to this project.

This Report concerns forestry-related regulation within the European Union. It was prompted by a proposal, presented in the spring of 2004, advocating the inclusion of a legal basis for forests and forestry in *the Draft Treaty establishing a Constitution for Europe*. The Report therefore first discusses the relevant provisions of the existing Treaties before analysing future developments in the light of the new Draft Constitutional Treaty (the version of 18 July 2003). Finally it offers several scenarios outlining the potential effects of new forms of Union-level regulation on Finnish forestry policy. In devising the most likely scenarios, the focus has been on the contents of the "Forestry proposal" and on the impact of its possible adoption. EU competences in forestry policy are, however, also discussed in a much broader context.

Focusing on an analysis of the EC/EU Treaties, the Report draws on the expertise of the researchers from the relevant policy sectors. The bulk of the work consisted of meetings of the research team. The final Report has been compiled by Kai Kokko, LL.D., a researcher at the Institute of International Economic Law (KATTI) of the University of Helsinki. Dr Kokko has also acted as the coordinator of this project. The other members of the team are: Research Director Ritva Toivonen and researcher Marko Mäki-Hakola from the PTT institute, Professor Paavo Pelkonen and researcher Liisa Tahvanainen from the University of Joensuu's Faculty of Forestry, and myself. In questions relating to European Law, we have consulted Professor Tuomas Ojanen from the University of Turku. Researcher Raija-Riitta Enroth, from the Finnish Forest Research Institute (METLA), has kindly advised us on the main principles governing EU forestry policy, and Administrator Perttu Pyykkönen from the PTT institute has lent his expertise on the topic of agricultural aids.

Our partners from the Ministry of Agriculture and Forestry have been Counsellor of Forestry Anders Portin, Senior Adviser Anne Vehviläinen and Senior Adviser Tapio Rauvala. I would like to extend my warmest thanks to all the participants for their valuable contributions and to the representatives of the Ministry for their helpful cooperation.

Helsinki, 28 February 2005

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1. Background

1.1. The role of forestry in the enlarged Union

1.1.1. The significance of forestry for the national economy varies among EU Member States. In Finland, forestry accounts for over 2% of the GDP; in Sweden and Austria its share is less than 1%, while in the Baltic countries and Slovakia, the figure is slightly over 1%. Among the new Member States, the importance of the forestry sector for employment is higher than average, especially in the Baltic countries. In Finland, over 1% of all those in employment work for the forestry sector – the highest percentage within EU15. The corresponding average figures are 0.7% and 0.2% for the new and the old Member States, respectively. Forestry lays the foundation for the forest-based industries whose significance for GDP and employment in all Member States by far outweighs that of forestry.

1.1.2. Ten new countries joined the EU on 1 May 2004. The forested area of the 15 old Member States is currently about 137 million hectares¹. About 95 million hectares of commercial forests are used for timber production. Of the total of about 24 million hectares of forest area in the new Member States, roughly 21 million hectares are in commercial use.

1.1.3. Although the role of forests varies considerably from one Member State to another, it is possible to identify countries which share a similar profile. Finland, Sweden and Slovenia are some of the countries with the largest forest cover percentage, over 50%, while in Austria, Estonia and Latvia, the figure is almost 50%. In most EU countries, however, forests account for roughly one third of the total land area, without a clear distinction between the “old” and the “new” Member States. In quantitative terms, the main forest countries are Sweden (27 million ha) and Finland (22 million ha). Poland has the densest forest cover of all the new Member States (9 million ha).

1.1.4. The afforestation of large areas remains the goal of many EU15 countries (notably Spain, Italy, Portugal, Great Britain and Ireland), and receives Community support under Chapter VIII of the Council Regulation on

rural development². Afforestation has been encouraged by structural changes in the agricultural sector and various environmental considerations, such as the prevention of erosion and the establishment of carbon sinks³.

1.1.5. The average extent of forest use in timber production is slightly lower in the new Member States than within EU15, where about 60-70% of the annual increment is felled. However, the situation varies greatly between the Member States: in Estonia the degree of forest use has risen by over 100%. Within the entire EU, however, the overall felling rate remains lower than the net increment, which means that the volume of the growing stock increases annually.

1.1.6. Environmental protection has various implications for the forestry sector. On the one hand, an increased environmental awareness may well encourage the use of timber in Europe, since it is a renewable raw material, the processing of wood products is not very energy-intensive, and wood products moreover contribute to carbon sequestration. On the other hand, forest management strategies focused on environmental issues, as well as the multiple use of forests together with the growing share of protection forests and conservation areas are factors that affect the supply of raw materials for the forest products industry. It is also important to consider in what ways the EU is going to take account of forests as carbon sinks and forest biodiversity in its future environmental policy.

1.2. EU competences: legal bases and distribution

1.2.1. The competences of the European Union are derived from the Treaty establishing the European Community⁴ and the Treaty on European Union⁵. The EC Treaty determines the different sectors of common policies, and the Community pursues its action in line with the competences and objectives defined therein. By vir-

¹ Definition by the FAO: “forest and other wooded land”.

² Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.

³ Under the Kyoto Protocol, the promotion of forest area is counted as an establishment of carbon sinks, i.e. processes aimed at the sequestration and disposal of greenhouse gases. The Kyoto Protocol is based on the UN Framework Convention on Climate Change, signed on 9 May 1992, first laying down the definition for a “carbon sink”.

⁴ Treaty establishing the European Community, originally signed in Rome on 25 March 1957.

⁵ Treaty on European Union, originally signed in Maastricht on 7 February 1992.

tue of Article 281 of the EC Treaty, the Community has legal personality and thus enjoys legal capacity in the fields of civil law and international law, entitling it to conclude agreements, for example. In order to facilitate the present discussion, the terms EC and EU will be used interchangeably, although the draft Constitutional Treaty⁶ is actually the first instrument to officially confer legal personality on the EU.⁷

1.2.2. According to the *principle of primacy*, EU competence takes precedence over national competences. Article 10 of the EC Treaty defines the so-called *loyalty principle* as follows:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

The Constitutional Treaty was adopted with certain revisions and amendments in the Summit of the EU Heads of State and Government, held during June 17-18, 2004.⁸ The primacy of EU competence is stated explicitly in Article I-10(1). The loyalty principle, in turn, is enshrined in paragraph 2 of the said Article. The loyalty between the Union and its Member States is further enhanced by the *principle of loyal cooperation*, as defined in Article I-5 (2).

1.2.3. Article 5(2) of the EC Treaty makes a distinction between areas of *exclusive Community competence* and other types of competence. At present, the latter mainly refers to the *shared competence* of the Community and of the Member States. Non-exclusive competence is governed by the *principles of subsidiarity and proportionality*. On the principle of subsidiarity, Article 5(2) of the EC Treaty provides that

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or

effects of the proposed action, be better achieved by the Community.

Subsidiarity can be understood both as a political principle and as a legal norm.

The principle of proportionality is defined under Article 5(3) of the EC Treaty as follows:

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

1.2.4. Article I-9 of the Constitutional Treaty lists the fundamental principles governing the conferral of competences and defines the role of subsidiarity and proportionality in the exercise of those competences. No significant changes to these principles are likely to be introduced into European law, although as a new feature the new Treaty does underline the necessity of involving the different national administrative levels in the application of the subsidiarity principle. The aim of the Protocol on the principles of subsidiarity and proportionality, annexed to the Constitutional Treaty, is to ensure that decisions will be taken as closely as possible to the citizens of the Union. If the Constitutional Treaty does enter into force, national parliaments are empowered to monitor the application of the subsidiarity principle in accordance with Article I-9 and the annexed Protocol.

1.2.5. As a new element, Article I-11 of the Constitutional Treaty identifies different categories of competence including 1) exclusive and 2) shared competence. The new category is competence

to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

The policy areas belonging to each category of competence are further specified in Articles I-12 to I-16 of the Treaty. It should be noted, however, that a given sector does *not* belong in its entirety to a single category of competence only, and these Treaty provisions should consequently be regarded as a general guideline for determining the main category of competence of an individual policy sector. This observation has relevance for the application of the subsidiarity principle as well.

1.2.6. EU competences can be viewed in relation to both the Member States and other countries. The external relations of the Union are governed by the competences conferred by the Treaties. Yet competence cannot be determined on the basis of the specific provisions of

⁶ See OJ No C 169, 18.7.2003.

⁷ See Article I-6 of the Constitutional Treaty.

⁸ The present discussion, however, is based on the draft Treaty establishing a Constitution for Europe, of 18 July 2003.

a given policy sector alone; it has to be estimated more globally in relation to the other Treaty provisions and the EU measures that implement them. The principle of the primacy of European law affects the relations between the Member States and third countries. The Common foreign and security policy now gains even more impetus in the Constitutional Treaty, notably under Article III-225.

1.2.7. Competences can be extended to new sectors principally by *revising the Treaties*. Amendments to the Treaties are subject to approval by the EU Heads of State and Government in Intergovernmental Conferences (IGC). Another possibility is to *interpret the Treaties*, especially the objectives of the Union (i.e. of the Community, to be more specific) defined therein. The limits of interpretation, however, become apparent, especially in cases of shared competence.

1.2.8. If, in spite of its competences, the EU does not make progress in the different policy sectors – on forestry issues, for example – interested Member States may ask the Commission to establish *closer cooperation* between them in the sectors referred to in the EC Treaty. Other Member States may later join in that cooperation. The Economic and Monetary Union (EMU) serves as an example of existing closer cooperation. Yet enhanced cooperation may only be used as a last resort when the Council of Ministers have first established that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.⁹

1.3. Scenarios and outline

1.3.1. In the following, we shall present four scenarios in an attempt to analyse how EU competences and possible changes in them might affect the forestry sector. The first scenario (**Zero Option**) is based on the assumption that the draft Treaty establishing a Constitution for Europe will not be adopted and/or ratified by all the Member States, and that any further progress will therefore be possible only by revising the existing Treaties. The second scenario (**Option 1**) assumes that the Constitutional Treaty will be adopted as such, without providing for a specific competence in forestry policy. In the third scenario (**Option 2**), the new Treaty will enter into force and EU competence in forestry policy will be integrated into it as suggested by certain Member States in May 2004.¹⁰ In the fourth scenario (**Option 2+**), the adopted new Treaty will provide for EU competence in forestry issues beyond the scope set out in the above-mentioned "Forestry proposal".¹¹

1.3.2. This paper is divided into 6 chapters. In addition to discussing actual EU forestry policy, it takes stock of the current state of the different EU policy sectors closely linked to forests and forestry. Finally we shall present four potential scenarios made possible by the entry into force of the Constitutional Treaty. In the light of pertinent international developments (the Ministerial Conference on the Protection of Forests in Europe and the role of the EU in the UN Forum on Forestry) and the Forestry Strategy of the Union, we consider the focus of forestry policy to be on *the sustainable use and management of forest resources*.

⁹The main provisions on "closer cooperation" are contained in Articles 11 and 11a of the EC Treaty and in Articles 43 to 45 of the EU Treaty. This option shall remain valid even in the event of the ratification of the Constitutional Treaty, whose Article I-43 provides for "enhanced cooperation".

¹⁰ See Annex 2.

¹¹ See Annex 1.

2. EU forestry policy proper

2.1. The present state as the Zero Option

2.1.1. At present (early 2005), the EU has no competence in forestry policy proper. The lack of a common forestry policy may be explained by the fact that forestry and the forest products industry are organised so differently in the various Member States. Many of them have preferred not to make the forestry sector as heavily regulated and subsidised as agriculture. Yet the EU institutions have been striving to harmonise national forestry policies by means of *informational guidance*. Community legislation concerning the forest sector has moreover been enacted in other policy areas, and is binding on the Member States.

2.1.2. The main informational instrument is the *EU Forestry Strategy* which consists of two documents: the Commission Communication to the Council and the European Parliament of 3 November 1998¹² and the Council Resolution of 15 December 1998¹³. The Forestry Strategy is not legally binding on the Member States, but the Council Resolution (2b) states that

...pursuant to the principle of subsidiarity and the concept of shared responsibility, the Community can contribute positively to the implementation of sustainable forest management and multifunctional role of forests.

2.1.3. The Council Resolution calls for better coordination of forestry issues within the Union. It has not been possible to consider the overall interests of forestry and the forest-based industries adequately, as decisions affecting that sector are being taken in parallel by a number of EU institutions, DGs and units. The Forestry Strategy has not been put into practice and coordination has not been improved either. Forest issues are currently being managed by a number of Commission DGs, including those responsible for the common policies on agriculture, the environment, enterprise, competition, development cooperation, research, energy, transport, and external relations. Policy decisions affecting the forestry sector are prepared notably by the DGs for agriculture and the environment. The former is responsible for forestry measures pursued within the framework of

agricultural and rural development policies and takes part in the implementation of the Forestry Strategy of the Union. The latter, in turn, is concerned with international conventions on the environment, strategies for the sustainable use of natural resources, and issues falling within the scope of the Habitats and Birds Directives¹⁴.

2.1.4. Coordination between the Commission and the Member States has not been streamlined: a large number of committees and working parties are currently active in the fields of forestry and the forest products industry. The main ones are the Standing Forestry Committee; the Council-based Working Party on Forestry; the Agricultural Structures and Rural Development Committee (STAR); the Advisory Committee on Forests and Cork; the Advisory Committee on Community policy regarding forestry and forest-based industries; and the Commission inter-service group on forestry. To improve the situation, it has been suggested that coordination should be concentrated within one EU institution only. Moreover, not all forestry-related issues are currently submitted to the relevant working parties, and they may not even be consulted in those cases. Coordination should therefore be improved, which implies adequate budgetary appropriations.

2.1.5. The need for better coordination in external relations should not be ignored either. Such developments as the increased weight of international forestry policy, action within the framework of the UN Forum on Forestry, together with the conclusion of several international conventions on climate change and biodiversity¹⁵, have a growing influence on EU forestry policy, obliging the Union to implement the measures adopted in multilateral negotiations. Closer informal cooperation between the Member States would strengthen the Union's international negotiating position.

2.1.6. The Council Resolution on a forestry strategy attempts an interpretation of the scope of EU competence: although the EC Treaty makes no provision for a common forestry policy, the principles of shared responsibility and subsidiarity allow for informational guidance, such as the Forestry Strategy. However, legal guidance by the EU (by such regulatory measures as regulations and directives) is not possible in forestry policy

¹² Communication from the Commission on a Forestry Strategy for the European Union, COM (1998) 649.

¹³ Council Resolution of 15 December 1998 on a forestry strategy for the European Union (OJ C 56, 26.2.1999, p. 1-4.)

¹⁴ Council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and Council directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

¹⁵ The UN Framework Agreement on Climate Change and the Convention on Biological Diversity.

without a specific legal basis.¹⁶The lack of an explicit Treaty basis – or, more specifically, of a legal basis – in forestry policy proper means that EU forestry policy is currently being implemented with legal instruments available in other relevant sectors, notably those related to environmental and agricultural policy. In theory, interested Member States may undertake closer cooperation in those sectors, but the opportunities for a closer degree of institutional cooperation must still be viewed with some reserve.

2.2. Following the possible entry into force of the Constitutional Treaty

2.2.1. In the event that the Constitutional Treaty enters into force, EU competence in forestry policy proper could be established in three different ways. The first alternative is to go on implementing forestry policy mainly by means of informational guidance (as with the Forestry Strategy) and by adopting measures in other policy sectors, which is the current practice. The main sectors involved will be discussed in paragraphs 3-5 below.

2.2.2. It would be possible – at least in theory – to enhance EU informational guidance and coordination in forestry policy in other ways than by reinforcing the legal basis of forestry policy proper (Option 1). A good example is provided by the cultural and educational policies where the objective of harmonisation in the field of education and training has been promoted efficiently by means of informational guidance by some Member States (the “Bologna Process”). Effective coordination would, once again, require additional funds.

2.2.3. The second alternative consists of the adoption of the “Proposal on forests and forestry” of May 2004 (hereinafter “the Forestry proposal”) together with the Constitutional Treaty. The draft text suggests that forests and forestry be included in Article I-16(2), which defines the areas (such as industry, education and culture) in which the Union may take *supporting, coordinating or complementary action*. In respect of EU competences, however, it is important to note that the legally-binding acts adopted by the Union under the spe-

¹⁶ It would actually be possible to resort to the implied powers laid down in Article 308 (ex Article 235) of the EC Treaty. However, using that Article as a legal basis for a European legal act is justified only if no other Treaty provision confers on the EU Institutions the competences needed to adopt the measure in question. The competences required in forestry issues can usually be found in other policy sectors.

cific provisions of Title III of the Treaty cannot contain an element of harmonisation of national laws and regulations. Thus the EU would not be able to harmonise national legislation by adopting European laws (currently regulations), European framework laws (currently directives) or European regulations (currently Commission regulations) on grounds of competence under forestry policy proper. It is not quite clear whether adopting European (framework) laws would even be possible on the basis of forestry policy, as suggested in the Proposal. However, the institutions of the Union would be entitled to take European decisions (such as Council decisions) in individual cases and apply soft law like recommendations and opinions in order to guide national forestry policies.

2.2.4. If the Forestry proposal is adopted, a new article on forests and forestry will be inserted into Title III of the Constitutional Treaty (see Annex 2). The following are some of the main objectives put forward in the Proposal:

- Improved EU-level coordination in forestry issues (1) between the institutions of the Union, (2) between the Member States themselves, and (3) in EU actions involving third countries (when concluding international conventions on environmental issues, for example).
- Better and more centralised information mechanisms between the Commission and the Member States during the process of drafting legislation. Whenever the Commission identifies a need for new common legislation on forests, it should ideally have, at the earliest stages, an adequate knowledge of forest issues acquired in liaison with the Member States.
- An opportunity to include all aspects of sustainability in forest-related decision-making. The Proposal seeks a balanced approach to environmental legislation by focusing on the importance of forests as a source of livelihood.
- Increased financial resources for the EU Commission in forestry issues to allow better coordination and a smoother flow of information.

The Proposal seeks to *avoid* the following:

- weakened national legislative powers with respect to the Union, and
- increased support for forestry.

2.2.5. The purpose of the Forestry proposal is to *step up coordination and informational guidance in forestry affairs*. The draft article in Annex 2 stresses the need for

coordination, notably in its point 1 (coordination between the Member States) and point 2 (paragraph 2c – coordination within the Union; and paragraph 3 – coordination with third countries). The need for coordination will become even more apparent with the possible integration of forestry issues into the Constitution (a self-reinforcing process). In that case it might also be easier to find the required funding from within the Commission's budget. The Forestry proposal does not actually affect national decision-making, as the declared goal is *not* to harmonise national laws and regulations. If the Proposal is adopted, the EU would actually only be able to continue the present type of informational guidance, and the Member States would thus promote their own forestry policies with such measures as their national forest programmes. In practice, however, increased EU-level coordination might create a tendency to harmonise national forest programmes even though there is no legal obligation to do so.

2.2.6. Paragraph 3 of the proposed article III-xxx refers to the external competences of the Member States and the EU, and yet does not specify them in greater detail. The Union may presumably take supporting, coordinating or complementary action to encourage the Member States to cooperate with third countries and international organisations in the field of forestry. All in all, the contents of that paragraph remain unclear, as the Union already possesses a certain degree of external competence in forestry issues alongside the Member States in such fields as environmental policy. In practical terms, reinforced external coordination could mean that the EU will act as a Party to international forestry-related negotiations on a par with its Member States more clearly than before.

2.2.7. Paragraph 4 of the proposed article stresses, in particular, that European laws and framework laws can merely be used to implement the provisions of paragraphs 1 and 2 (described above) by undertaking supporting, coordinating or complementary action, excluding action that would imply making amendments to national legislation. This is a controversial provision, since the EU may not exercise legal guidance with European (framework) laws obliging the Member States to harmonise their legislation. Yet a European law as a legislative act is binding in its entirety and directly applicable in all Member States. A European framework law, again, is binding, as to the result to be achieved, on the Member States to which it is addressed, but leaves the national authorities entirely free to choose the form and means of achieving that result.¹⁷ Before

this paradox can be unravelled, we shall have to consider the flexibility clause laid down in Article I-17.

2.2.8. The current interpretation of EU objectives can be derived from the "implied powers" laid down in Article 308 (ex Article 235) of the EC Treaty, aimed at attaining the Community objectives in support of the functioning of the common market. This provision can be seen as a sort of flexibility provision promoting the objectives of the Treaties. The flexibility clause introduced in Article I-17 of the Constitutional Treaty goes a step further:

1. If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.

...

3. Provisions adopted on the basis of this Article may not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.

Paragraph 3 of the said article refers notably to competence to take supporting, coordinating or complementary action. The competence suggested in the Forestry proposal would therefore exclude the application of the flexibility clause for the purpose of harmonising national legislation in this sector.

2.2.9. Competence, as defined in the Forestry proposal, must be construed in such terms that European (framework) laws providing for supporting, coordinating or complementary action may principally concern the EU institutions, funds and various other forestry-related common issues which do not require *de facto* harmonisation of national legislation. If the above laws have the practical effect of guiding national legislation, the EU will have *exceeded its competence*, unless the said laws are mainly based on some other pertinent sector. Even a restricted application of the established categories of EU legal acts as tools for legal guidance is undesirable as such, in that it may obscure the binding nature of those acts and diminish their legitimacy in the Member States.

2.2.10. Paragraph 4(c) of the proposed article contains a reference to Article III-124 of the Constitutional Treaty. What is meant by the formulation providing that the necessary measures or incentive actions established in European laws and framework laws must exclude the

¹⁷ Article I-32(1) of the Constitutional Treaty.

establishment of common market organisations, as referred to in Article III-124? It is stated on page 4 of the Final Report of Working group V of the European Convention that such “supporting measures may take the form of financial support, administrative cooperation, pilot projects, guidelines and many other forms, including the Open Method of Coordination”¹⁸. However, the reference to Article III-124 probably means that it is not permitted to establish common market organisations in the forestry sector similar to the common agricultural policy (CAP) or set up guidance or guarantee funds to that end, at least not to the extent referred to in that article. Finally, forestry, and the aid granted to it in the Member States, would be governed by general considerations relating to public aid, and the limits for financial support would be set by the common internal market policy.

2.2.11. The reference to Article III-124, discussed above, would probably mean that forests and forestry will be left outside the scope of the CAP. However, the EU would not be given effective new tools for legal and financial guidance in the field of forestry. Providing support for forestry would become more difficult in the Union under paragraph 4 of the new article formulated in the Forestry proposal, as forestry subsidies may no longer be contained in European laws adopted under the CAP, such as the Regulation on rural development (1257/1999/EC).

2.2.12. The most serious handicap of the Forestry proposal in relation to other relevant sectors is that the suggested competences would not allow any harmonisation of national legislation through the use of European (framework) laws. So it would still be necessary to resort to competence under EU environmental policy when adopting acts like the “Forest Focus Regulation” (2152/2003/EC), which have a direct bearing on the Member States’ administration in that they take precedence over national legislation. Yet European (framework) laws on supporting, coordinating or complementary action could be adopted in the same issues on the basis of competence under a future forestry policy. *Instead of clarifying the situation, the Forestry proposal might in such a case actually make the division of competences between different Commission DGs increasingly complex and eventually undermine the legal guidance exercised by the Union.*

2.2.13. Bearing in mind the complexity of legislative procedures, European (framework) laws are unlikely to be a popular choice, due to the unclear division of competences between the Member States and the EU. When adopting such laws on issues like forestry subsidies, the Commission will therefore probably give priority to the most effective legal bases available, such as Article III-127 concerning the CAP. What makes this problematic is the restriction imposed by the Forestry proposal, excluding any future application of the CAP for the purposes of forestry support. However, it would be theoretically possible to adopt environmental policy measures to support afforestation designed to minimise the adverse effects of erosion and climate change and to protect groundwater.

2.2.14 Departing from the purpose of Article I-16, it might be theoretically possible to find reasonable justification for supporting, coordinating and complementary action, thus disregarding the conflict between Articles I-16 and I-32 in the case of forests and forestry. For all that, the lack of clarity regarding legal basis and procedure, as set out in the Forestry proposal, is likely to prejudice the use of forestry policy proper as the principal legal basis for European (framework) laws. Taking into account the flexibility clause in Article I-17 of the Constitutional Treaty, and to the extent that competences have been defined in the Forestry proposal, *it may be difficult to resort to competences available in other relevant sectors* when adopting binding European acts in other forest(ry)-related issues than those explicitly identified in the sectors concerned. In other words, an explicit legal basis must exist in a given policy sector before it can be made use of in matters related to forests and forestry. In individual cases, this could mean an even stricter delimitation of EU competences in the forestry sector.

2.2.15. The third alternative (Option 2+) would mean that *more explicit EU competences than those put forward in the Forestry proposal* will be introduced into the Constitutional Treaty. They might take the form of a distinct shared competence as with environmental policy, or forest issues could be integrated into the CAP. This measure would solve some of the problems present in the Forestry proposal, but EU competence would now outweigh national competence. This alternative will be further discussed below when assessing the new role played by the various policy sectors under the Constitutional Treaty.

¹⁸ The open method of coordination (OMC) was first introduced in the Conclusions of the European Council in Lisbon in March 2000 as part of the EU strategy on the enhancement of competitiveness (i.e. the strategy on employment, economic reforms and social cohesion), which was approved at that special summit.

3. EU environmental policy

3.1. The present state

3.1.1. The main principle underpinning EU environmental policy, *sustainable development*, enshrined in Article 2 of the EC Treaty, must be observed when implementing environmental policy under Articles 174 and 175. The objectives have been further specified in the European Union Strategy for Sustainable Development (COM/2001/264).

3.1.2. The main legal basis in environmental policy is Article 175 of the EC Treaty, which sets out the decision-making mechanisms of the common environmental policy for attaining the objectives listed, notably in Article 174. Pursuant to the EU Forestry Strategy (II, 1), the utilisation of forests should be governed by the principles of sustainability and multifunctional use. In particular, the third goal listed in Article 174(1) of the EC Treaty concerns the *sustainable use* of forests. As Union-level environmental policy measures with an effect on forestry are frequently linked to *the protection of biological diversity*¹⁹ or – more generally – to *environmental protection*²⁰, the first goal set out in Article 174(1) on preserving, protecting and improving the quality of the environment is highly relevant for the forestry sector as well. International climate policy also has a bearing on this sector, notably in pursuance of the fourth goal relating to the promotion of international environmental policy.

3.1.3. Article 174 of the EC Treaty contains a *safeguard clause*, which concerns harmonisation in the field of the environment and is addressed to the Member States. There are also other degrees of flexibility in the harmonisation of national environmental legislation on forests, ranging from minimum-level harmonisation to derogations from EU legislation. In addition, it is important to note paragraph 4 of Article 174, which concerns external relations and defines EU competences with respect to the Member States and third countries. Within its competences, the EU has actually already adopted,

together with the Member States, such international instruments as the UN Framework Agreement on Climate Change and the Convention on Biological Diversity, signed at Rio de Janeiro in 1992.

3.1.4. The *unanimity* requirement laid down in Article 175(2) of the EC Treaty has a bearing on the forestry policy of the smaller Member States, since many of the measures laid down in that article could directly or indirectly govern the use of forests too. Due to the requirement of unanimity, however, such guidance measures cannot be adopted very easily.

3.1.5. Article 176 of the EC Treaty moreover provides for the so-called *environmental guarantee* of the Member States. EU directives often only set the minimum level for environmental protection (i.e. minimum-level harmonisation), thus leaving it up to the Member States to introduce more stringent national policies, as long as the safeguard measures are compatible with the EC Treaty and have been notified to the Commission. In practice, however, minimum-level harmonisation might only amount to the *transposition of the EU minimum level* into national legislation. This may be the case whenever it is anticipated that the competitiveness of a Member State might be prejudiced if environmental measures exceeding the EU minimum level were imposed.

3.1.6. The significance of environmental policy is further enhanced by the *integration principle*, as laid down in Article 6 of the EC Treaty, meaning that the environmental protection objective is introduced into forestry policy via other relevant sectors too. Thus agricultural aids applied to forests may be subject to special conditions relating to environmental protection.

3.2. Following the possible entry into force of the Constitutional Treaty

3.2.1. When drafting the Constitutional Treaty, only few modifications were introduced to the articles on the environment. *Sustainable development* remains the main guideline governing the internal and external competences of the EU, and it is one of the basic principles ensuring the consistency of the Union's external and internal action, pinpointed in Article III-193(3) of the Constitutional Treaty. Sustainable development has been declared to be the guiding principle in internal action under Article I-3(3) too. This new formulation shows clearly the different elements of the principle of sustainable development. Environmental aspects must thus be

¹⁹ See, for example, Council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and Council directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

²⁰ See, for example, Regulation (EC) No 2152/2003 of the European Parliament and of the Council of 17 November 2003 concerning monitoring of forests and environmental interactions in the Community (Forest Focus).

closely observed in all EU action in the forestry sector. Sustainable development considerations in foreign policy, referred to in Articles I-3(4) and III-193(2), may become topical as the EU negotiates international agreements relating to forests.

3.2.2. The internal competences of the Union in environmental policy are governed by Articles III-129 to III-131 of the Constitutional Treaty, which correspond closely to Articles 174 to 176 of the EC Treaty. Even the requirement of unanimity, which sets the limits for EU legal guidance in certain measures, has been retained in the new Treaty. As these environmental provisions already feature in the existing Treaties, the new Articles III-129 to III-131 will not have the effect of redirecting EU action. In practice this means that if the Proposal for a proper forestry policy of the Union will *not* be adopted, but the Constitutional Treaty will enter into force (Option 1), the legal bases available under environmental policy will continue to be used in a significant number of cases when adopting European legal acts on forests.

3.2.3. Following the possible entry into force of the Constitutional Treaty, the external competences of the EU in environmental policy relating to forests will be based on Articles III-129(4) and III-225 (Option 1). According to the Forestry proposal (Option 2), forestry competences in external relations do not yet directly allow the conclusion of international conventions. Therefore it is likely that even in the event of the adoption of that Proposal, Articles III-129(4) and III-225 will be used as legal bases for conventions concluded on forestry issues. The predominance of environmental policy as the legal basis for external competences in the forestry sector would be reduced only if a legal basis implying shared competence, similar to Article III-129(4), were integrated into forestry policy proper (Option 2+).

3.2.4. The integration principle, as laid down in Article 6 of the EC Treaty, has been included in the Constitutional Treaty as well. Its Article III-4 states:

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 same principle is expressed in Article II-37 of the Charter of Fundamental Rights of the Union (forming Part II of the Constitutional Treaty):

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.

Differences in the wording of these two articles are unlikely to have a significant effect on the actual implementation of the integration principle: the Commission will probably apply both articles in parallel when presenting propositions for European laws and framework laws. Environment-related issues will be observed in all sectors in pursuance of the integration principle.

3.2.5. It would seem *a priori* that the integration principle, now included in Article II-37 of the Constitutional Treaty, has been given greater prominence. When considering Article II-52(5), however, it is clear that there has been no intention to change the present state of affairs:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

On the contrary, the integration principle is likely to grow in significance in the jurisprudence of the European Court of Justice (ECJ).

3.2.6. If the Forestry proposal is adopted together with the Constitutional Treaty (Option 2), all supporting, coordinating or complementary action must observe the environmental protection requirements (the integration principle). As the competences proposed may not lead to any harmonisation of national legislation, binding European legal acts on forests will probably still be largely adopted on the basis of competences found under environmental policy.

3.2.7. If the EU were granted more explicit competences in forestry policy than suggested (Option 2+), similar to the shared competence applied in fields like environmental policy, the significance of environmental policy would probably diminish and it would be implemented under the integration principle, while the primary legal basis for secondary legislation would be transferred to forestry policy proper. Should forests and forestry be explicitly included in the CAP, its provisions would naturally serve as the legal basis for legal guidance in forestry, with due respect given to the integration principle.

4. The common agricultural policy (CAP)

4.1. The present state

4.1.1. The competences in common agricultural policy for the implementation of Article 33 of the EC Treaty are laid down in Articles 36 and 37. Although European primary law on agriculture makes no specific reference to forests and forestry, the current CAP has been applied as the legal basis for EU secondary legislation relating to forests. The most important of those instruments is the rural development regulation²¹. Its Chapter VIII, Article 29(1), provides that "support for forestry shall contribute to the maintenance and development of the economic, ecological and social functions of forests in rural areas". It is further specified in paragraph 2 of the same article that such support shall promote in particular one or more of the following objectives:

- sustainable forest management and development of forestry,
- maintenance and improvement of forest resources,
- extension of woodland areas.

Compared to the existing agricultural aids, the level of support for forestry is *very low* (only a few per cent), and the obligation to report on the use of the subsidies is presently rather loose, apart from support for the afforestation of agricultural land.

4.1.2. The guidance and guarantee measures adopted in forestry to date have left it up to the Member States to decide whether or not they wish to implement them. The application of those measures has therefore been very varied, leaving ample scope for interpretation. The support-related provisions were last revised on a larger scale in the Agenda 2000 process, during which the scope of forestry support in the new programming period was expanded (making such measures as afforestation in non-agricultural land, as well as afforestation and other measures adopted on environmental grounds eligible for aid). Municipalities and other public bodies, excluding the State, now figure among the beneficiaries along with private landowners. When the acts concerned were revised during the mid-term review of the CAP in the autumn of 2003, even the State as a forest

owner was included among the beneficiaries. Since then, the utilisation of EU support for forestry seems to have increased within EU(15) relative to the previous programming period.

4.1.3. Pursuant to Article 36 of the EC Treaty, aid policy is an exception to the principle of free competition. Article 34 in turn provides that a common organisation of agricultural markets shall be established to attain the objectives of Article 33. As a rule, it overrides Articles 87 to 89, which provide on Member State aids more generally. It is currently possible to apply the subsidiarity principle to agricultural policy for the purpose of coordinating national market organisations, or in the absence of such an arrangement.

4.2. Following the possible entry into force of the Constitutional Treaty

4.2.1. In the event that the Constitutional Treaty enters into force, agricultural policy will become more clearly an area of shared competence (Article I-13). As a result, the subsidiarity principle laid down in Article I-9 and the annexed protocol on subsidiary will be applied in the field of agricultural policy more consistently than before. The transferral of agricultural policy from the sphere of exclusive competence to shared competence reflects more globally the reforms indispensable to making agricultural policy more effective in the enlarged Union, i.e. the tendency is to cut down common agricultural aids and decentralise agricultural policy so that it would again become more clearly a national concern. This apparent change of heart in the CAP is reflected in the legal basis for forestry issues.

4.2.2. The Constitutional Treaty is going to contain an annex similar to Annex I of the EC Treaty, which defines agricultural products. In the light of Article III-122 of the Constitutional Treaty, with the exception of cork, *wood products would thus be left outside the scope of the CAP*. As the contents of Articles III-123 to III-128 are largely similar to the corresponding articles of the present EC Treaty, the more generic articles concerning the internal market would probably be applied to wood products in the future too. The current view within the EU is, however, that support for forestry falls within the scope of agricultural policy.

4.2.3. If the proposal concerning EU forestry policy proper is *not* adopted together with the Constitutional Treaty (Option 1), community competence under the CAP will not automatically give rise to legal changes in

²¹ Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations.

forestry policy. It is a general tendency to stick to the prevailing legal tradition, unless there are obvious reasons to do otherwise. Owing to EU enlargement and the agricultural reform, forest issues might receive less political attention in the future.

4.2.4. With the possible adoption of the Forestry proposal (Option 2), it might be assumed that forestry policy will be more clearly distinguishable from the CAP. This reform may entail legal implications too, as the agricultural policy articles of the Constitutional Treaty do not explicitly refer to wood products or forestry. Ultimately it could well be confirmed in the jurisprudence of the ECJ that the articles of the Forestry proposal – possibly together with the environmental policy articles – constitute the new legal basis for regulatory action on forests and forestry (“specific grounds for reform”). While support for forestry would thus no longer be provided under the CAP, aid for such measures as afforestation (justified by the carbon sink effect) could be provided in the name of environmental policy measures.

4.2.5. If the Community were granted more extensive competences in forestry policy than suggested in the Forestry proposal (Option 2+), forestry policy would, in legal terms, largely remain outside the scope of the CAP, unless wood products, forests and forestry were to be actually included in the articles on agriculture. In this scenario, EU competences would become much more explicit in relation to national competences than in the other options. Option 2+ would thus give the EU an opportunity to guide national forestry policies and harmonise national legislation. If this option is implemented as a distinct area of shared competence under the Constitutional Treaty, forestry-related aid would be removed from the CAP and fall within the scope of this new competence. In the event that forests and forestry are included explicitly in the CAP provisions of the new Treaty, it would reinforce the present policy under which afforestation aids, for example, have been granted under the CAP. It might further mean that common market organisations could be established in the field of forestry, similar to those now existing in the CAP. Should Option 2+ be carried out in this way, more forestry-related aids, including increased follow-up and monitoring activities, are to be expected.

5. Observations on other common policies

5.1. Internal market and Industry

5.1.1. The principal legal basis for the implementation of the internal market is Article 95 of the EC Treaty. Article 14(2) states that “the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.” As for forestry products, it is important to note that Article 95(4) contains an *environmental guarantee*, providing that

If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

The internal market policy moreover involves such issues as the control of plant diseases.

5.1.2. It is fundamental for the functioning of the internal market that quantitative restrictions on imports and exports are prohibited between Member States by virtue of Articles 28 and 29 of the EC Treaty. Article 30 lays down certain derogations from that principle. For example, import restrictions could be imposed exceptionally in order to protect forests. Article 30 further provides that “such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

5.1.3. As forest-based industries and thereby industrial policy are closely linked to forestry policy proper, the competence exclusively concerning industry, laid down in Article 157 of the EC Treaty, could have indirect implications for the field of forestry too. Industrial policy is not very prominent in the EC Treaty. Yet it is possible to use relatively powerful instruments to guide national industrial policies by resorting to the Treaty articles on competition (Art. 81 to 85), public undertakings (Art. 86), aids granted by States (Art. 87 to 89), common regional policy (Art. 158 to 161), and research and technology policy (Art. 163 to 173).

5.1.4. The application of the Constitutional Treaty (Option 1), would not lead to significant changes in the internal market and industrial policies as far as forestry is concerned. Article I-16 of the Treaty identifies industrial policy as an area in which supporting, coordinating or complementary action may be taken at the European level. Article III-180, which provides for industrial policy proper, has clearly not been designed to change the legal status quo. European (framework) laws adopted on the basis of industrial policy may not lead to a harmonisation of national legislation. This paradox undermines the status of forest-based industries, because it will be more difficult to anticipate the form EU legal guidance might take if the Forestry proposal were to be accepted. This effect would be reinforced with the adoption of the proposal.

5.1.5. The possible adoption of the Forestry proposal together with the Constitutional Treaty (Option 2) would not have a significant effect on the internal market policy. However, as wood products are less likely to be treated as agricultural products in the future, the more generic provisions on the free movement of goods would apply to wood products and forestry products more clearly than before. EU-level guidance in forestry, ranging from the use of forests to the processing of wood products, would consist of informational guidance more clearly than before. On the one hand, European (framework) laws, while they may not imply harmonisation of national legislation and should primarily be applied to provide support for national forestry measures, would complicate the operational environment of forestry undertakings. On the other hand, the adoption of the Forestry proposal might make it easier for the EU to harmonise national regulations and recommendations concerning wood products.

5.1.6. The conferral of more explicit forestry competences on the Union than those set out in the Proposal (Option 2+), would have a bearing on the common internal market policy whenever wood products are treated as agricultural products, thus falling within the scope of the CAP. Extensive EU competences in forestry policy could be backed with informational guidance under industrial policy. The drawback is that the interests of national forestry might be overshadowed by a common EU forestry policy.

5.2. Energy

5.2.1. Energy matters are not very prominent in the EC Treaty, which contains only very few provisions on the promotion of renewable energy sources. Due to recent changes in global energy and environmental policies, however, the EU has since 1995 issued policy papers on energy strategy, clearly defining its position and setting guidelines for the Member States to encourage them to develop and enhance an energy production based on renewable energy sources. In the absence of explicit competences in energy policy, environmental policy has commonly served as the legal basis in forestry matters.²² In addition, guidelines on renewable energy sources are provided indirectly under the CAP, governing the production of such species as woody plants²³.

5.2.2. Whether the Forestry proposal will be adopted or not (Options 2 and 1 respectively), the application of the Constitutional Treaty would reinforce the principal legal basis for renewable energy sources, with forestry competence now being transferred from the spheres of agricultural and environmental policies to a sector of its own. Despite the integration principle applied in environmental policy, such a reform may serve to weaken the links between energy policy and the protection and sustainable use of forests, as well as have indirect implications for the supply of wood in forestry. Moreover, the adoption of the Forestry proposal would not give the Union any effective legal tools for promoting the use of renewable energy sources in forests by means of forestry policy. An explicit EU competence in forestry (Option 2+) could expand the scope of legal guidance in forest-related energy matters. For example, reinforcing forestry policy as part of the CAP might serve to promote the cultivation of fuelwood.

5.3. Culture and Education

5.3.1. Under EU competences in the spheres of culture, education and training, as defined in Articles 3(q) and 151(1) of the EC Treaty, the Union may contribute to and enhance cultural diversity in the Member States but cannot exercise actual legal guidance which would be binding on the Member States. In the field of culture,

²² See, for example, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

²³ See, for example, Council Regulation (1782/2003/EC) establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers.

some influence can be exerted on forestry by means of informational guidance on landscape conservation and on the protection of the natural heritage.²⁴

5.3.2. Irrespective of the nature of future EU competences in forestry policy proper, educational policy would still largely be implemented as before. The different options discussed here would basically just mean a redistribution of expertise and know-how within the Member States and the EU respectively. More effective EU competences in forestry would probably increase the need for forestry experts at the Commission, while the Member States would have to release their experts from the administration of purely national forestry policy and assign them to lobby the Commission and participate in policy-making within the EU.

5.4. Rural and regional development

5.4.1. The declared objectives of the common rural and regional policies are to promote economic, social and territorial cohesion, and solidarity, with various structural aids and schemes as the main instruments. In addition, the Union may adopt legislation on specific measures. The Regional Development Fund provides support for projects in the industry and energy sectors involving the use of forests and wood, designed to improve employment rates and economic viability in given regions. The European Social Fund finances, among other things, educational and development action in the field of forestry. Support for forestry-related projects is obtainable from the Cohesion Fund, whose purpose is to bridge the gap between Europe's northernmost and southernmost areas in relation to Central Europe.

5.4.2. Apart from a specific reference to the territorial aspect in Article III-116 of the Treaty, the other articles on rural and regional policy (III-117 to III-120) have not been revised fundamentally. If forestry is not included among EU competences (Option 1), the legal bases for rural and regional policy are unlikely to be modified immediately in such a way that it would directly have a fundamental legal effect on forestry, as compared to the pre-constitutional situation. However, significant *de facto* changes to rural and regional policy may become necessary due to disparities between the levels of development of the regions in the new Member States.

²⁴ See, for example, European Parliament Resolution on the application of the Convention concerning the protection of the world cultural and natural heritage in the Member States of the European Union (2000/2036(INI)).

5.4.3. If forestry were added to Union competences (Options 2 and 2+), it would have to be considered, at least in principle, when drafting European (framework) laws that concern measures outside the Funds, since those laws may not prejudice the application of measures adopted within the framework of the Union's other policies (see Article III-117). This would indeed be the case if forestry policy were governed by a stronger legal basis than has been suggested. If forestry were linked with the CAP, support measures for its promotion could probably be increasingly financed from within the EAGG Section. Accordingly, the obligations to monitor and report on the use of subsidies would become stricter.

5.5. Research and technological development

5.5.1. The EU is strongly committed to promoting research and technological development. In accordance with Article 163 of the EC Treaty, the Union shall improve the competitiveness of industry by means of RTD activities and promote research activities deemed necessary according to the other titles of the Constitutional Treaty. This principle is reflected in the topics of framework programmes; as there is no reference to forests and forest-related economic activity in the other Treaty titles, forest research does not have a significant position in the Union's structures for the promotion of science and technology.

5.5.2. Since research and technological development are defined as an objective under article III-146 of the Constitutional Treaty in similar terms to the present Treaty, no significant changes are to be expected in this respect (Option 1). Forest research in Member States would still be supported under EU programmes if it can be justified on the basis of sectoral policies defined in the Treaty. As research can contribute to better information on forests and thus influence the contents of national and EU guidance on forests, an adequate consideration of forest research in different policy sectors implies the need for firm national research policies and effective networking within the EU.

5.5.3. If the Forestry proposal is adopted (Option 2) and, in particular, if the EU is going to have extensive competences in forestry policy (Option 2+), the necessity of research into sustainable forestry would have to be more carefully considered under research programmes, as research will be increasingly focused on issues identified under the other titles of the Constitutional Treaty (Article III-146). More resources might now be directed towards forestry-related RTD activities complementing environmental policy. In addition, the need for more information on forests and forestry would grow within the EU institutions as they prepare guidance measures in forestry policy.

6. The 4 scenarios viewed through national forestry policies

6.1. Maintaining the status quo (Zero Option)

6.1.1. At present, the actual forestry policy of the Union principally consists of informational guidance, such as the Forestry Strategy. As recommendations and opinions are the main instruments used, EU action in this field has no legally-binding effects on the contents of national forest policies. Yet it may carry political or moral implications for the implementation of those policies. The Union is currently able to exercise intensive legal guidance through the sectoral policies in which it is competent, especially the ones discussed above. Informational guidance exercised with the Forestry Strategy focusing on sustainable forestry will probably be complemented with secondary legislation in different policy areas on the basis of the EC Treaty. In this respect, national forestry policies will have to be adapted to divergent EU acts, a tendency which seems to be growing in the future.

6.1.2. The proposed reinforcement of the legal basis in question has been justified by a need to give forestry issues a more prominent status and improve their coordination within the EU. Forests are currently subject to rather strict legal and financial guidance through other sectoral policies, whereas action on forestry policy proper chiefly consists of providing information. This dichotomy hampers the sustainable management and use of forests in Europe. The fact that forestry issues are scattered across several policy sectors may moreover generate inconsistent and conflicting Union-level legislation on forests. Naturally, the Member States strive to harmonise such legal acts at the implementation stage and in their national legal orders.

6.1.3. The present situation is legally problematic, in that it is difficult to draw the line between the numerous sectoral policies in forestry matters even where an appropriate legal basis exists in the EC Treaty. This dilemma has been touched upon in the jurisprudence of the ECJ. The Court ruled in its judgement of 25 February 1999 (*European Parliament v Council of the European Union*, joined cases C-164/97 and C-165/97) on the problem of determining whether the adequate legal basis for regulations on the protection of forests against atmospheric pollution and fire is to be derived from en-

vironmental policy (the then Article 130s of the EC Treaty) or agricultural policy (the then Article 43 of the EC Treaty). Those two sectors are today the most closely involved in regulatory action on forests. As the legal relation between the various common policy areas and forestry policy proper has already been discussed in greater detail in Chapters 3 to 5 above, we shall now only bring up a few practical aspects concerning forestry policy's relation to the environmental and agricultural policies.

6.1.4. The EU currently conducts its forest-related action primarily under environmental policy. Following the integration principle, this action affects various other sectors too. If the Member States wish to reinforce the legal position of forestry policy proper in relation to environmental policy at the EU level, they will have to share their forestry competences with the EU. That is not exactly possible under the present EC Treaty, and it also seems – for the time being at least – that the Member States do not have the political will to modify the Treaty, and thereby hand over their national competences in forestry matters to the EU.

6.1.5. Particularly in the 1990's and during the present decade, the CAP has had relevance for national forestry policies in terms of afforestation aid, for example. Moreover, it is likely that EU enlargement and the need for agricultural reform were considered when discussing the possibility of reinforcing the Union's forestry policy. Due to the accession of new Member States, the agricultural net expenditure of the Union will rise considerably at first. Yet there is a concurrent tendency to cut the overall agricultural budget (i.e. the funds for agriculture and rural development), although EU commitments will increase along with the enlargement. Because of this dichotomy, the EU might choose to redirect its agricultural and regional policies at the end of the present programming period of CAP subsidy payments and LFA payments in 2006.²⁵ The objectives of the Structural Funds will probably be reviewed too. The criteria for determining the target areas are likely to be tightened, and the bulk of the aid from the Structural Funds will probably be redirected towards the new Member States. As a consequence, the older Member States may not be so interested in stepping up the support and guidance aimed at forestry under agricultural

²⁵ Financed entirely from the EU budget, the CAP subsidy payments are the cornerstone of the CAP and constitute the bulk of the aid granted to farmers in most Member States. Countries like Finland also make ample use of LFA payments (compensatory allowance for permanent natural handicaps) and agri-environmental measures which are currently co-funded by the EU.

and rural development policies. Another result of the reorganisation of agricultural policy is that in the future the implementation of legally-binding acts, currently co-financed by the Union, will probably have to be funded entirely by the Member States.

6.1.6. The 1998 Forestry Strategy was revised in 2004. In the present situation, the leverage of the Member States can be enhanced primarily by further developing that strategy. A new forestry strategy should be adopted by applying "the open method of coordination", and it should make more explicit the objectives of EU informational guidance for forests and forestry. The new strategy should articulate coordination in forestry issues more clearly (1) between the EU institutions, (2) between the EU and the Member States and, (3) in respect of the external competences of the EU and the Member States in relation to third countries and international organisations. In addition, the new strategy should determine the capabilities needed for attaining the forestry policy objectives set by action in the existing EU policy areas, without prejudice to the principles of subsidiarity and proportionality. It should also establish guidelines for the division of costs between the EU and the Member States in the forestry sector.

6.1.7. However, the Forestry Strategy, and the coordination and informational guidance it entails, cannot be improved at Union level unless the Member States consider this to be in their own interests. Taking into account the disparate circumstances of the Member States, it is obvious that not all of them will be equally interested in devising a forestry strategy which would involve intensifying coordination and informational guidance. Countries whose national economy is to a large degree dependent on forestry and forest-based industries will probably have a major interest in this matter.

6.2. Adopting the Constitutional Treaty with no specific legal basis for forestry policy (Option 1)

6.2.1. Since the prospect of the Constitutional Treaty coming into force will not essentially alter the status of actual forestry policy within the EU, the implementation of national forestry policies will not immediately be subject to binding legal changes. In such a scenario, any further progress in forestry issues will be achieved by revising the Forestry Strategy and by resorting to other types of informational guidance. Even if forestry policy remains within national competence, forest(ry)-related

European acts adopted in other sectors are going to have legal effects on this area more often than before. But in the absence of a pro-active forestry policy by the Member States, forestry matters may receive less attention in the EU, although their importance will grow when viewed through other sectoral policies, such as energy and the environment. Yet the effects that guidance exercised in other policy sectors may have on forest use and forestry must be regarded in effect as a by-product and not as a goal in itself.

6.2.2. New EU legislation affecting forests will be adopted under the heading of environmental policy and, when implemented, it will take precedence over national competences in accordance with the principle of primacy. As the integration principle applied in environmental policy is listed among the fundamental rights enshrined in the Constitutional Treaty, environmental policy will probably be given greater prominence in the ECJ jurisprudence even in the other policy sectors. This may have an indirect effect on European acts relating to forests. Yet it is possible that economic considerations will be given priority in the EU, as economic growth – rather than the enhancement of environmental policy – will probably be the chief concern of the most recent Member States in the near future. As for international processes, climate policy may well have an increasing impact on national forest policies.

6.2.3. In the future, new legal and economic guidance on forests – with an indirect effect on forestry – may be exercised through a number of other EU policy sectors as well. As one of the areas to enjoy enhanced status in the new Treaty, energy policy may contribute to the use of renewable energy sources. This may have indirect consequences for environmental policy and affect forestry and the timber market as well.

6.2.4. The CAP will actually constitute an exception to the increasing legal direction by the EU, as guidance measures taken under its remit are undergoing decentralisation. Agricultural subsidies are being cut, and production aids will be replaced by support granted under various programmes. In the Constitutional Treaty, agriculture has been transferred from the sphere of exclusive competence to that of shared competence, which may entail a greater degree of national guidance and a wider scope for action in the field of forestry even for national subsidies.

6.2.5. Although guidance with binding effects will not be stepped up under EU rural development policy, the influence of the Union on the practice of forestry in the

Member States may well increase along with the growing importance of regional policy and aid granted under it. Such measures relating to financial guidance can obviously only be carried out in harmony with the common internal market and competition policies.

6.2.6. Coordination in forest matters now presents greater challenges within the enlarged Union: unless the Member States pro-actively press for changes to the status quo (Zero Option), EU resources will be reduced and the Commission will consequently take a lesser interest in the management of forestry matters. Yet it is possible that EU resources earmarked for forestry policy will remain at their present level or even grow if Option 1 is adopted, i.e. if the new Constitutional Treaty is backed by a new forestry strategy and a level of active cooperation among the Union's leading forestry countries in EU policies across different sectors. This scenario does not imply, and indeed may not even benefit from, the inclusion of forestry policy in the new Treaty.

6.3. Adopting the Constitutional Treaty together with the proposal concerning forestry policy (Option 2)

6.3.1. The Forestry proposal certainly does not clarify the situation in respect of national policy-making and implementation in the field concerned. Under this option, forestry policy would be integrated into the new Treaty, but in practice it would mainly confer competences to exercise informational guidance only. National forestry legislation would still be harmonised through measures adopted in the traditional policy areas, although their scope of application in forestry matters will become less clear.

6.3.2. It would seem that decisions, opinions and recommendations remain the main tools available in forestry policy. Insofar as effective legal bases for forests and forestry policy exist in other policy areas, the Commission is likely to resort to them, instead of the forestry articles of the Constitutional Treaty, when adopting European (framework) laws. However, this practice may become more problematic in the event of the Forestry proposal being adopted, unless forestry competences are also explicitly mentioned in the other sectors in which the EU has more extensive competences. Furthermore, taking into account the reference made to agricultural policy in the Forestry proposal, the present CAP-based competences would probably no longer cover forestry subsidies, and guidance in that field would be based on environmental policy instead. It

must therefore be concluded that the adoption of the Forestry proposal is likely to bring about a more complex and ambiguous situation in the EU's forestry policy.

6.3.3. The significance of environmental policy will not be diminished by the possible adoption of the Forestry proposal. In accordance with the integration principle, reinforced in the Constitutional Treaty, commitments to protect the environment should be based on forestry policy proper. Furthermore, national harmonisation measures concerning forests will still principally have to derive their legal basis from within the sphere of environmental policy.

6.3.4. It is difficult to estimate to what degree the *de facto* leverage of Member States in forestry matters might be affected. As described above, the Forestry proposal would render the distribution of competences across the different sectors more obscure. Yet it would not totally exclude the application of the legal bases available in other sectors to forest(ry)-related matters, notably in situations involving the harmonisation of national legislation. Since the effects of measures taken in the other sectors will remain noticeable, the situation would certainly not become more transparent in respect of the opportunities to exert influence. The Proposal does not specify at what stage the forest-related issues dealt with in the other sectors would be referred to the coordination group for forestry matters. Thus the adoption of the Forestry proposal might actually give rise to conflicts of competence between the different policy sectors. Moreover, it remains to be seen if the proposed coordination would actually make EU forestry policy more transparent, and if the field of forestry would even then receive adequate attention in decision-making in the other policy areas.

6.3.5. If the Forestry proposal is adopted, it is going to be increasingly important to exert leverage in EU forestry policy within the Commission. As the Council and the European Parliament are the main forums for agenda-setting and decision-making, the smaller Member States alone are not in a position to determine the key policy issues regarding forestry when decisions are taken by qualified majority. They may be backed by the Commission, and thus both the larger and the smaller Member States would have more equal opportunities to get their voices heard. In the event of the proposal in question being adopted, the weight of forestry matters would seem to grow slightly within the Commission, notably at the level of informational guidance and coordination. Due to the diminishing weight of nation-

al forestry policy, there may be fewer opportunities to exert influence on the basis of national expertise, and therefore lobbying efforts must be intensified in the Commission, at any rate. Yet lobby activities in forestry policy proper could principally have an influence on Union-level informational guidance only. It should moreover be noted that the Commission might become less motivated to exercise legally-binding guidance in forestry matters, since the ambiguities in the legal bases proposed would complicate the drafting of European (framework) laws. As an indirect consequence, the Commission might redirect its resources to areas with a more clearly defined legal basis.

6.3.6. In comparison with Option 1, the Forestry proposal might moreover make it more difficult for Member States wishing to promote forest issues to engage in enhanced cooperation, as national competences in informational guidance and coordination would actually be transferred to the Commission to a certain degree. If the Commission, for any reason, chose not to promote these issues, enhanced cooperation between the Member States pursuant to the Constitutional Treaty, merely for the sake of informational guidance and Union-level coordination, does not make sense and would not even be possible. Enhanced cooperation might be undertaken primarily in other relevant sectors as before, but considering the contents of the proposal in question, it is not certain whether forestry issues could gain enough weight in those sectors to justify enhanced cooperation even in theory. Along with the Member States' diminished competences in national forestry, informal closer cooperation between interested Member States outside the context of the EU institutions might lose its significance as well.

6.4. Adopting the Constitutional Treaty, reinforced with more extensive EU competences than suggested (Option 2+)

6.4.1. Option 2+ is presented here as a point of reference for the other alternatives. We have therefore not wished to define its contents very closely and have instead departed from a few fundamental conditions deduced from the Constitutional Treaty: (1) this option is about shared competence; (2) the competence in question could be laid down in a separate Treaty article on forestry policy proper, or current agricultural provisions could be redrafted in order to make the status of forests and forestry policy more explicit, and; (3) the compe-

tence in question would cover both the internal and external relations of the Union.

6.4.2. Under this option, in the forestry sector, national policies would be superseded by EU competences. The Union would be able to harmonise national legislation by adopting acts on subsidies (as is the current practice under the CAP). Coordination in forestry matters would inevitably be increased at Union level, and more resources would probably be budgeted for forestry policy. As a result, Union-level coordination would become more intensive, gradually relegating national forest policies, without prejudice to the subsidiarity and proportionality principles.

6.4.3. The Member States would certainly have better defined regulations of leverage than under Option 2, but less real leverage than under the Zero Option and Option 1, in particular. The coordination of a common forestry policy in its internal and external dimensions would now fall within the competence of the Union, without prejudice to the subsidiarity principle. The influence of the larger Member States will grow in decisions taken by qualified majority, making it more difficult for the smaller countries to get their voices heard in the guidance of actual forestry policy than under the Zero Option and Option 1. Any Member State wishing to have its say in EU forestry policy must set aside adequate resource for more intensive lobbying at Union level. The present kind of leverage based on national expertise would then become secondary.

6.4.4. Coordination in forestry matters would become more transparent in relation to the other policy sectors too. Forestry policy as such or, alternatively, an agricultural policy embracing forestry policy more clearly than before, would improve the overall balance of environmental policy. Nevertheless, environmental policy would have to be considered under the new forestry policy in accordance with the integration principle even under Option 2+. Enhanced cooperation between interested Member States would be based on forestry policy proper or agricultural policy more explicitly than under the Zero Option and Options 1 and 2. From the Member States' standpoint, Option 2+ would mean diminished national competences and more extensive EU competences in forestry, coupled with a decline in national leverage in EU policy-making in this area. As in Option 2, it would now become more difficult to estimate the future trends and priorities of forestry policy from the perspective of the next five to ten years, as compared with the Zero Option and Option 1.

Annexes

Annex 1: The four scenarios

Zero Option	Option 1	Option 2	Option 2+
Any further progress will take place through amendments to the existing Treaties.	The Constitutional Treaty will be adopted with no specific provisions on forestry policy.	The Constitutional Treaty will be adopted together with the forestry policy articles proposed.	The Constitutional Treaty will be adopted, providing for more extensive EU competences than suggested.

Annex 2: Drafting proposal on 'Forests and Forestry'

Forests and forestry should be included in the Draft Constitution as follows:

1. Add hyphen "forests and forestry" in

PART I:

TITEL: III: UNION COMPETENCES

Article I-16: Areas for supporting, co-ordinating or complementary action

(2) The areas for supporting, co-ordinating or complementary action shall be, at European level

- Industry
- **forests and forestry**
- protection and improvement of human health
- education, vocational training, youth and sport
- culture
- civil protection

2. Add Section "forests and forestry" in

PART III: THE POLICY AND FUNCTIONING OF THE UNION

TITEL III: INTERNAL POLICIES AND ACTION

CHAPTER V: AREAS WHERE THE UNION MAY TAKE COORDINATING, COMPLEMENTARY OR SUPPORTING ACTION

SECTION 7

FORESTS AND FORESTRY

Article III - XXX

- (1) The Union shall encourage cooperation between the Member States in order to support sustainable forest management and, if necessary, lend its support to their action.
- (2) Action by the Union shall, in particular, aim at:
 - a) fostering sustainable forest management as part of sustainable development;
 - b) preserving and developing the multi-functional character of forests;
 - c) promoting consistency between sustainable forest management and other Union policies
- (3) The Union and the Member States shall encourage cooperation with third countries and the competent international organisations in the sphere of forestry.
- (4) In order to contribute to achievements of the objectives referred to in this Article,
 - a) [c] European laws or framework laws shall establish the necessary measures or incentive actions, excluding any harmonisation of the laws and regulations of the Member States as well as the establishment of common market organisations as referred to in Art. 111-124.
 - b) [d] The Council, on a proposal from the Commission, shall adopt recommendations for the purposes set out in this article.

Tiivistelmä

Abstract in Finnish

Selvityksessä analysoidaan skenaariomallin avulla metsiä ja metsätaloutta koskevaa Euroopan unionin (EU:n) toimivaltaa. Skenaariot on rakennettu neljästä eri vaihtoehdosta: Nykytilasta jatketaan 1) voimassa olevien perustamissopimusten pohjalta (0-vaihtoehto), 2) hyväksymällä perustuslaillinen sopimus ilman ns. metsäpolitiikkaesitystä (1-vaihtoehto), 3) hyväksymällä perustuslaillinen sopimus esityksen kanssa (2-vaihtoehto) tai 4) antamalla unionille esitystä vahvempi toimivalta metsäasioissa (2+-vaihtoehto).

EU:n toimivalta metsäpolitiikassa on nykyisin hajautunut eri politiikan sektoreille. Tämä on vaikeuttanut metsäasioiden koordinoitua unionissa. Keskeinen EU:n informaatio-ohjauksen väline on ollut vuoden 1998 metsästrategia, jonka toimeenpaneminen on koettu ongelmalliseksi muun muassa sen vuoksi, ettei unionilla ole selkeää toimivaltaa varsinaisessa metsäpolitiikassa.

Keväällä 2004 annettiin esitys varsinaisen metsäpolitiikan lisäämisestä EU:n perustuslaillisen sopimuksen mukaisiin tuki-, yhteensovitus- tai täydennystoimia koskeviin aloihin. Näitä aloja koskevaan EU:n toimivaltaan liittyy perustuslaillisessa sopimuksessa paradoksi, sillä oikeudellisesti jäsenvaltioita velvoitettiin euroopalakeihin ja -puitelakeihin, jotka unioni antaa näiden alojen erityismääräysten perusteella, ei voi kuulua jäsenvaltioiden lakien ja asetusten yhdenmukaistamista. Paradoksin aiheuttamat ongelmat heijastuvat myös sanottuun esitykseen. Metsäpolitiikkaesityksellä pyrittiin korjaamaan niitä heikkouksia, joita liittyy nykytilanteessa EU:n metsäasioiden koordinoituihin ja informaatio-ohjaukseen. Esityksen hyväksyminen merkitsisi kuitenkin monia oikeudellisia ristiriitatilanteita koko EU:n perustuslaillisen sopimuksen soveltamisen kannalta. Esimerkiksi maatalouspolitiikan oikeusperustan tulkinnallinen soveltaminen metsiin saattaisi olla nykyistä vaikeammin toteutettavissa.

Kaikkea ei voida saada yhdessä vaihtoehdossa: jos perustuslaillisessa sopimuksessa halutaan lisätä EU-tason metsäasioiden koordinoitua, jäsenvaltioiden on oltava valmiita siirtämään kansallista metsäpolitiikan toimivaltaansa unionille. Samalla on riskinä, että EU:n kasvavan toimivallan myötä pienten jäsenmaiden mahdollisuudet vaikuttaa metsäpolitiikan linjauksiin vähentyvät unionin päätöksentekomenettelyssä. Metsäpolitiikkaesityksen hyväksyminen edellyttäisikin aikaisempaa vahvemmin komission kautta tapahtuvaa vaikuttamista EU:n metsäpolitiikkaan.

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