

## Climate-energy package adopted by unanimity: Legal or illegal?

By Daniel Guéguen and Stevi Iosif (\*) | 14 November 2008

The decision of French President Nicolas Sarkozy, current president of the European Council, to adopt the climate and energy package by unanimity, has not been widely analysed by observers of the EU. However, a number of jurists in the EU institutions have started to question the legal basis of this decision. This note provides a clear response to the issue in question.

### COUNCIL OF MINISTERS BYPASSED

Mr Sarkozy's engagement to transfer the negotiations on the climate and energy package from the Environment Council, which votes by qualified majority, to the European Council composed of the heads of state or government, is being challenged. At this point, we have to remind that the European Council is not a European institution, does not have any decision-making powers and can only give recommendations. It is only able to take orientations, which are generally adopted by consensus, meaning unanimity between the 27 participants of the European Council.

Mr Sarkozy's idea is that a unanimous agreement at the European Council will be imposed on the Environment Council and that it will not be discussed amongst environment ministers but only be adopted as an 'A item' on the agenda. An 'A item' means automatic adoption without any discussion by the Council of Ministers when it is unanimously agreed upon by Coreper beforehand (and not by the European Council!).

Therefore, the real problem is not a question of adoption by unanimity but that the Council of Ministers is being bypassed by the European Council, which is not an institution and does not enact legislation.

### EUROPEAN PARLIAMENT SIDESTEPED

The European Parliament will vote sooner than expected, on 3 December 2008, before the next EU summit, on 11-12 December. The Parliament has decided to advance its voting schedule in order to combat the decision taken by Mr. Sarkozy by pressuring the European Council into considering its position and thus preventing a possible watering down of the text by the European Council.

Despite the Parliament hurrying into vote, Mr Sarkozy clearly downplays the Parliament's co-decision role. This disregard is stressed by several MEPs and most notably by Green MEPs Satu Hassi (rapporteur on the CO<sub>2</sub> effort-sharing proposal of the climate and energy package) and Caroline Lucas.

### LEGAL ASPECTS OF THE TREATIES

- In accordance with **Article 175, 2(c)**, the Council of Ministers shall decide unanimously about measures which significantly affect a member state's choice between different energy sources and the general structure of its energy supply. However, only the Renewables Directive falls under this heading and not the other three directives of the climate and energy package. Therefore, changing the legal basis of the whole package on the basis of A175, 2c, is not justifiable. Furthermore, such legal derogations to the EU decision-making process always have to be interpreted very strictly, but Mr Sarkozy would like to have a wide interpretation of the A175, 2c. This could only be justified if the overall aim of the climate and energy package was focused on energy. But it is not. The overall aim of the package is focused on the environment;



- According to **Article 250(1)**, the Council of Ministers can act unanimously only in order to impose an amendment to a Commission legislative proposal, which will not be the case in occurrence;
- According to **Article 137(2)**, which defines circumstances where the Council of Ministers uses unanimity and **Article 251**, which defines co-decision procedure rules, unanimity exists only in three cases under co-decision: social security for migrant workers; mutual recognition of diplomas if an amendment to national legislation is required; and incentive measures in the field of culture;
- The Constitutional Treaty, which is not ratified, envisaged an ‘emergency break’ procedure, where a state may refer contentious legislation from the Council of Ministers to the European Council. Even if this provision was in force, the climate and energy package does not constitute contentious legislation;
- The Lisbon Treaty contains a provision that would make the European Council a European institution with real decision-making powers. However, the Lisbon Treaty has not yet been ratified and this provision is not in force.

## CONCLUSIONS

1. The real problem is not the unanimous adoption of the climate and energy package but that both the Council of Ministers and the Parliament are being bypassed by the European Council, which is not an institution and does not enact legislation;
2. There is no legal basis for justifying Mr Sarkozy’s engagement to transfer the negotiations on the climate and energy package from the Environment Council to the European Council. It is now up to his legal advisers to find an appropriate one.

(\*) *Clan Public Affairs*

Copyright © 2008 Europolitics. All rights reserved.