



Towards a European Energy Community: A Policy Proposal

Seminar organised by *Notre Europe* on the occasion of the publication of its report on the feasibility of a European Energy Community -

Brussels, 4th May 2010

Questionnaire to prepare the Seminar

The following questionnaire raises a certain number of issues (legal above all) to be discussed at the meeting of 4th of May in Brussels. We are aware of the fact that numerous obstacles and legal difficulties may occur on the way towards a real European Energy Community. However, the primary purpose of the meeting is to have a constructive discussion and identify potential solutions and ways forward a common energy policy for Europe.

The list of questions attached below is indicative and non-exhaustive. Its object is mainly to fuel the debate. The list is divided into four main sections which correspond to the successive sessions of the debate. We recommend you to read the relevant chapters of our report in order to prepare the meeting. The most relevant part is Part 2, with the following sections:

- The Need for Common Action (p.75)
- Ways and Means for Achieving a Common European Energy Policy (p. 95)
- What to do now? (p.107)

Please note that the relevant Treaty articles mentioned in this questionnaire can be found at the end of the document.

Session I : General comments and issues

1. Do participants agree with the conclusion that the EU does not have a real energy policy, assuming that accessibility, sustainability and reliability are the three objectives of an energy policy?
2. The report offers various options for all or some Member States to make progress in the energy field. The report favours a specific Energy Treaty under the Union structure, allowing the inner group of Member States to rely on the Union institutions. Does Art. 20 TEU lay down an exclusive route for enhanced cooperation, in particular having regard to Article 329(1) TFEU?
3. Should there be a minimum number of Member States willing to opt for the new Treaty and should there be also qualitative requirements, such as the Member States in question being adjacent?
4. Could some Member States opt for the new Treaty and others rely on Article 20 TFEU?

5. If the above options cannot work – what other possibilities might there be? Reform of the Euratom Treaty? A new intergovernmental/international approach such as the Energy Charter Treaty (i.e. different from EU supranational structure, which we assume is optional)?
6. Can we envisage informal arrangements outside TEU constraints, at least in the beginning of the process?

Session II: Compatibility of the project with existing structures

Two points of discussion: A) Energy Specific Treaty under Union Structure and B) The interim projects (Compatibility issues relating to the external dimension will be addressed under Part III below).

A) Compatibility of energy specific treaty

1. Is it correct to assume that the conclusion of the Energy Treaty would require a modification of both the TEU and the TFEU pursuant to the ordinary revision procedure of Article 48 TEU?
2. Assuming that the new Treaty would confer the Commission supranational powers comparable to those of the High Authority under the ECSC, could such powers co-exist with the powers which, under the present Union rules, still rest with the Member States or with powers which are exercised according to the ordinary legislative procedure (Art. 294)?
3. Assuming that the Meroni case law is an obstacle to the creation of one integrated European regulator under the present rules and that the new Treaty can set this case law aside, how would the European regulator be held accountable under the existing institutional rules?
4. The project foresees in fiscal powers. Do the Union's budgetary rules allow for separate funding by and dedicated spending in favour of certain Member States? Would the Commission be accountable to the EP and Council for the implementation of a (part of the) budget that only applies to a limited group of Member States?
5. Should the group of participating Member States grant some kind of financial compensation to the general budget for the use of the Union institutions (compare Art. 332)?
6. Could alternative funding arrangements – i.e. other than via Member States - be envisaged (e.g. a special levy on cross-border infrastructure congestion rents? - or earmarking of some of the revenue from the auctioning of ETS permits?).
7. Following the proposition that the Treaty should be democratic, the Commission should find its legitimacy in the European Parliament. Are the existing rules sufficient to guarantee that legitimacy or should there be additional specific rules under the new Treaty? Does Article 14 TEU allow this? Could an additional Energy Treaty specific Commissioner be envisaged for whom special rules would apply?
8. Can it be envisaged that the European Parliament and the Council would meet in restricted formation limited to representatives of the Member States that have opted in? Could the EP designate a specialised committee?

9. Participation in the new project implies additional rights and duties. Can additional rights be justified under the TFEU's non-discrimination rules (e.g. limited recognition and free circulation of renewable energy certificates of origin)?
10. Also, can the fruits of R&D projects conducted under the new Treaty be reserved for the participating Member State? Or in the form of a TEN-E type arrangement with priority for participating Member States as an alternative?

B) The interim projects

1. The specific agreements touch upon issues in which the Union is exclusively or jointly competent, in particular where network regulation and investments are concerned.
 - a. Does this imply that procedure laid down by Articles 216 e.s. of the TFEU applies to these agreements? Or, are Member States still free to proceed without Union participation?
 - b. Could one find a support for this latter alternative in Articles 170 and 171 TFEU, in so far as a network community treaty is concerned?
 - c. Conversely, treaties on gas purchasing entities and an energy fund do not seem to affect Union rules. Does this imply that the Member States are free to conclude those treaties without Union involvement?
 - d. Does the so-called South Eastern Energy community Treaty (SEECT) offer any useful precedent?
2. Do the answers to the previous questions differ, if the specific project Treaties want to rely on the Union institutions?
3. A gas purchasing entity can be envisaged in various forms. Since it implies cooperation for economic activities, some kind of antitrust immunity should be granted. How could this be organized? Are the precedents from CAP of any relevance?
4. Pre-emption rights interfere with the freedom of trade and could therefore conflict with the Treaty's free circulation rules? How could this possible conflict be solved?
5. Is it correct to assume that the creation of a European Energy Fund would not require the Union's participation (see also question 1 c above)? Would the answer to this question change, if the participating states requested the EIB to manage the fund?
6. Does participation in a specific Treaty imply participation in the general Energy Treaty?

Session III: External dimension

1. The report suggests that the EU (represented by the Commission) should participate in international organizations. How would this form of exclusive representation interact with the general procedures laid down by Article 216 and 220 TFEU?

2. Is it possible to envisage that the participating Member States appoint one representative that will assist the Commission in the ordinary proceedings, with the proviso that this one representative will have as many rights as those conferred to the participating states? Should the EP have any rights vis-à-vis appointments?
3. Could Third States oppose the participation of the Union in various capacities (i.e. as Union representative under normal procedures and as sole representatives for the participating Member States)?
4. Is it possible under Article 8 TEU that Third States participate in the new Treaty (or parts thereof) without participating in the Union?
5. Energy policy is often and rightly qualified as strategic. What should prevail if the Commission sets out a policy line for the inner group of participating states, which is not (entirely) consistent with the policy pursued by non-participating states? Can the European Council call the Commission back on the basis of Article 22 TEU?
6. Are WTO members allowed to impose duties on the marketing of environmentally unfriendly products?
7. Is a Gas Supply Agency compatible with WTO rules?

Session IV: Treaty structure and elements

1. Should the Treaty be a new instrument attached to the Union Treaties by means of Protocol or should it be integrated in the Treaties themselves?
2. The competence in the energy field should be exclusive. Does this entail the need for a *Traité Loi*? Is there any relevant precedent (e.g. proposed Patent Treaty)?
3. How could the scope of the new Treaty be defined? Preferably the scope should be able to vary in time, allowing to refer matters back to the EU if there is no need for further action by the inner group.
4. One of the key criticisms of the report is that Member States fail to respect the rules to which they commit. It proposes to improve commitment to rules by increasing stake holder involvement (comparable to the ECSC's consultative committee). A need for sanctions nevertheless remains. What other sanctions than those foreseen by Art. 260 TFEU could be considered (tort, expedite damage proceedings)?
5. How could members of the representative stakeholders be designated?
6. One of the ideas underlying the new Treaty would be to have non-discriminatory access to resources, as guaranteed by the old ECSC Treaty for coal? How would be the practical consequences of this non-discrimination provision as regards strategic stocks and natural resources under the new Treaty system?
7. Another key element of the report is the coordination of R&D programmes. Does this coordination imply that participating Member States could no longer carry out energy related R&D on their own?

8. Would there be a need for new legal acts under the Treaty (e.g. concessions - Right to assume ownership/control of strategic infrastructure such as crucial cross-border networks) ?
9. Do we need new general principles (such as commitment to technological neutrality? Reciprocity? etc.)?.

Relevant Treaty articles in order of apparition

Article 20 TEU

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union.

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.

Article 329 (1) TFEU

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so. Authorisation to proceed with the

enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information. Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

Article 48 TEU (ex Article 48 TEU)

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

Article 294 TFEU
(ex Article 251 TEC)

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.

2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.

4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.

5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.

6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:

- (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
- (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
- (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:

- (a) approves all those amendments, the act in question shall be deemed to have been adopted;
- (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.

11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the

European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

Article 332 TEU

(ex Articles 27*a* to 27*e*, 40 to 40*b* and 43 to 45 TEU and ex Articles 11 and 11*a* TEC)

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Article 14 TEU

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be progressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

Article 216 TFEU

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Article 170 TFEU

(ex Article 154 TEC)

1. To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

Article 171 TFEU

(ex Article 155 TEC)

1. In order to achieve the objectives referred to in Article 170, the Union:

- shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,
- shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,
- may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure.

The Union's activities shall take into account the potential economic viability of the projects.

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 170. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

3. The Union may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

Article 220 TFEU

(ex Articles 302 to 304 TEC)

1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations.

2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall be instructed to implement this Article.

Article 8 TEU

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

Article 22 TEU

1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be

thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

Article 260 TFEU
(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.