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R E P O R T

of the Committee on the Environment, Public Health and
Consumer Protection

on the legal basis of the proposal from the Commission to
the Council for a directive amending Directive 75/442/EEC on
waste

(COM (88) 391 final - SYN 145)

(Council: 7461/90/150 - C3-0219/90)

Rapporteur: Mr John IVERSEN

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PE 145.152/fin.

Or. FR

A Series: Reports - B Series: Motions for Resolutions, Oral Questions - C Series: Documents received from other Institutions (e.g. Consultations)

* = Consultation procedure requiring a single reading

**II = Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment

**I = Cooperation procedure (first reading)

*** = Parliamentary assent which requires the votes of a majority of the current Members of Parliament

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By letter of 9 July 1990, the Council forwarded a common orientation and asked the European Parliament for its opinion on the appropriateness of Article 130s of the EEC Treaty as the legal basis for the proposal from the Commission to the Council for a directive amending Directive 75/442/EEC on waste.

At the sitting of 13 July 1990, the President of the European Parliament announced that he had referred this common orientation to the Committee on the Environment, Public Health and Consumer Protection as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights for its opinion.

At its meeting of 18 September 1990, the committee appointed Mr Iversen rapporteur.

At its meeting of 29 October 1990, it considered the validity and appropriateness of the legal basis pursuant to Rule 36(3) of the Rules of Procedure and unanimously adopted the motion for a resolution.

The following took part in the vote: Schleicher, acting chairman; Scott-Hopkins, vice-chairman; Iversen, vice-chairman and rapporteur; Amendola, Avgerinos, Bowe, de la Camara Martinez, Ceci, Duarte Cendan (for Bombard), Hadjigeorgiou (for Alber), K.P. Köhler, Lannoye (for Monnier-Besombes), Llorca Vilaplana, Muntingh, Partsch, Pollack, Seligman, Valverde Lopez, Vernier and Vittinghoff.

The opinion of the Committee on Legal Affairs and Citizens' Rights is attached.

The report was tabled on 14 November 1990.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.

A

MOTION FOR A RESOLUTION

on the legal basis of the proposal from the Commission to the Council for a directive amending Directive 75/442/EEC on waste

The European Parliament,

- having regard to the proposal from the Commission to the Council (COM(88) 391 final - SYN 145)¹,
 - having regard to the common orientation of the Council (C3-219/90 - Doc. 7461/90/ENV.150),
 - having been consulted by the Council on the appropriateness of the choice of Article 130s of the EEC Treaty as the legal basis,
 - having regard to the opinion of the European Parliament on the Commission's proposal at first reading²,
 - having regard to Rule 36(3) of its Rules of Procedure,
 - having regard to the report of the Committee on the Environment, Public Health and Consumer Protection and the opinion of the Committee on Legal Affairs and Citizens' Rights (A3-0307/90),
1. Disputes the appropriateness of the legal basis proposed by the Council;
 2. Considers that the Commission proposal should be based on Article 100a of the EEC Treaty;
 3. Instructs its President to forward this resolution to the Council and, for information, to the Commission.

¹ OJ No. C 295, 19.11.1988, p.3

² OJ No. C 158, 26.6.1989, p. 232

B

EXPLANATORY STATEMENT

During its meeting of 7 June 1990 the Council indicated its agreement on the substance of the draft directive amending Directive 75/442/EEC on waste.

It decided to forward this 'common orientation' to Parliament and consult the latter on the appropriateness of the legal basis. The Council had been of the opinion that the legal basis should be Article 130s of the Treaty and no longer 100a as in the Commission's proposal. According to the Council, the main aim of the measures being proposed is to protect the environment rather than to complete the internal market. While acknowledging that this change affects the very substance of the proposal, the Council has confined itself to consulting Parliament on the change to the legal basis.

1. Appropriateness of Article 100a as the legal basis

(a) The background to the 'common orientation'

The Council's agreement on the 'common orientation' comes after the adoption of its resolution of 7 May 1990³ on a policy towards waste, in which it recognized the size of the problem created in the European Community by the uncontrolled generation of waste and its disastrous effect on the environment. It therefore recognizes the need for a comprehensive waste policy (but not a Community strategy) 'which deals with all waste, regardless of whether it is to be recycled, reused or disposed of'.

On the basis of that resolution, the Council fundamentally amended the proposal for a directive (COM(88) 391) which had restricted itself to amending the basic Directive 75/442/EEC so as to eliminate the distortions of competition arising from the disparities between the laws on waste disposal in the Member States, account being taken of the experience acquired when the Member States applied Directive 75/442/EEC.

The Council draft is now considerably wider and seeks:

- to give priority to protecting the environment, hence the choice of Article 130s rather than 100a as the legal basis,
- to reduce the overall amount of waste by the development of clean technology and of less-polluting products,
- to encourage the recovery of waste, including recycling and re-use,
- Community, or better still national, self-sufficiency in waste disposal.

From the outset, Parliament cannot but welcome the Council's good intentions but, as they emerge from the 'common orientation', it would appear that the facts do not precisely match the intentions.

³ OJ No. C 122, 18.05.1990

(b) The Council's arguments

The Council invokes protection of the environment as its grounds for preferring Article 130s to Article 100a as the legal basis.

The argument is three-pronged. The first involves changing the content of the recitals and removing all reference to the internal market and distortions of competition apart from the final part of the fifth recital. Secondly, there is now no reference to the transport of waste in the definitions. The third is a thread running right through the Council's 'common orientation' and is a rejection of any Community waste policy. Member States should seek to become self sufficient and should cooperate with other Member States on waste disposal only when needed. Moreover this applies only to waste for disposal.

(c) The arguments of the Legal Affairs Committee and the Commission

The Legal Affairs Committee, which was asked for its opinion, feels that Article 100a should apply to the proposal for a directive as amended by the Council and that the Commission should withdraw its proposal if the Council does not agree to Article 100a (see attached opinion).

Similarly, in the statements to be recorded in the Council minutes, the Commission upheld the view against the Council that Article 100a was the sole correct legal basis and that 'the Commission reserved the right to exploit all the legal means available at the appropriate moment'.

(d) The position adopted by the Committee on the Environment

After careful consideration of the various views expressed, the Committee on the Environment feels that the appropriate legal basis is indeed 100a. The proposal for a directive is intended to harmonize the laws of the Member States in this field, especially by improving the definitions. This would eliminate obstacles and disparities in national legislation not only as regards waste disposal but also as regards services (management, transport, etc.) and thus operations on and concerning waste.

The question is whether we are first thinking of the effect of waste on the environment or the nature of waste, i.e. as goods subject to commercial rules under the internal market and which also have an impact on the environment. The prime goal is to control the production, placing on the market, movement and disposal of waste, which falls within the scope of Article 8a of the Treaty.

The Committee on the Environment therefore believes that Article 100a applies in this case and hence that the 'common orientation' should become a 'common position' on which the European Parliament would be able to deliver an opinion at second reading. Should the Council persist and convert the common orientation into a directive, Parliament reserves the right either to support the Commission if, as it said in the statements for the Council minutes, it initiates proceedings before the Court of Justice, or itself to bring the matter before the Court insofar as, pursuant to the judgment of 22 May 1990 (Judgment C 70/88) on the 'capacity of the European Parliament to bring an action for annulment', Parliament can ask the Court to annul acts of the Council or the Commission provided that in doing so it is only seeking to safeguard its prerogatives, as is the case here.

2. Need for a second reading by the European Parliament

The substance of the Council's common orientation would appear to be a substantial modification both of the original Directive (75/442) and the proposal for a directive (COM(88) 391 final) on which Parliament delivered its opinion at first reading on 25 May 1989⁴.

(a) the recitals

While the European Parliament cannot but welcome the Council's insistence on providing a high level of environmental protection, Article 100a would logically require it to reinstate the first recital in the Commission's initial proposal as amended by Parliament at first reading and reinserted by the Commission in its amended proposal⁵ concerning the disparity between the laws of the Member States and the need to remove distortions of competition directly affecting the establishment and functioning of the internal market.

All reference to exemptions from permit requirements for certain establishments must be removed.

In the twelfth recital, the idea of recovery should be added to that of disposal. The monitoring of waste should also apply to the production and recovery cycle so that waste is not lost track of en route.

(b) the substance

Article 1 of the common orientation replaces Articles 1 to 12 of Directive 75/442/EEC. Incidentally, we welcome the fact that the Council rewrites a full text where the Commission's text simply referred to the text of the basic directive, which did not simplify matters for the reader.

*The definitions

One of the main problems with this directive lies in the definitions. The Commission's aim, with the support of Parliament, was to clarify the definitions so as to reduce the scope for differing interpretations by the Member States of the basic Directive 75/442/EEC.

The Council is proposing completely different definitions, adding definitions of 'producer', 'holder', and 'management'. It removes the definition of 'transport' and, most importantly, makes a clear distinction between 'disposal' and 'recovery', which could simply be interpreted as 'recycling'. The whole Council 'proposal' rests on this distinction.

⁴ OJ No. C 158, 26.06.1989, p. 232

⁵ OJ No. C 326, 30.12.1989, p. 6

Parliament has to decide its own position on this matter, with the help of the Commission. The question is:

1. whether Parliament accepts these definitions, i.e. referral to Annex IIA for 'disposal' and IIB for 'recovery',
2. whether the distinction between disposal and recovery does not allow waste to escape monitoring from production to the final stage, whether it is disposal or recovery.

*Self-sufficiency in waste disposal (Article 5)

Parliament cannot but endorse this idea. Clearly it is for those producing waste to provide for its disposal. We have to keep the transfer of waste within a country or from one country to another to the minimum, so as to avoid accidents which can always happen, to reduce the chances of losing track of waste and thus being unable to monitor it and to ensure that waste is disposed of in ways which are most beneficial to the environment.

This article does however raise a number of questions. Without binding Community measures, without Community standards and checks, self-sufficiency is likely to allow Member States to dispose of waste as they can or as they please. Besides, the Council and the Commission have seen fit to record a statement in the minutes in which they 'agree that the reference to the aim of individual self-sufficiency shall not form an obstacle to cooperation between Member States'⁶. This statement highlights the weakness of the Council's position in that it acknowledges the risk inherent in the concept of self-sufficiency. Further evidence is provided by another Council statement on Article 12 to the effect that it undertakes 'to establish by the end of 1992 harmonized rules relating to the conditions of and controls on the transport of waste'.

*Permits and exemptions (Articles 9-12)

The arrangements laid down by the Council in this respect are a complete departure from the basic Directive 75/442/EEC and from the Commission proposal (COM(88) 391).

First of all, the Council repeats its distinction between waste for disposal and waste for recovery. In Articles 9 and 10 it states that establishments or undertakings disposing of or recovering waste 'must obtain a permit' from the competent authority in the Member State. The matters covered by such permits are set out in Article 9 but not in Article 10 relating to recovery.

Article 11 provides for exemptions from permit requirements for establishments or undertakings carrying out their own waste disposal at the place of production or carrying out waste recovery. Such undertakings or establishments do have to be registered and the Member States have to adopt general rules of which the Commission shall be informed.

Article 12 goes even further in also allowing exemptions from permit requirements to establishments or undertakings collecting or transferring

⁶ Doc. C3-219/90, Annex II, p. 16

waste on a professional basis, or which arrange for the disposal or recovery of waste on behalf of others.

These two articles give rise to several questions. Firstly, who then is subject to the permit requirement? The others arise from Article 12 in particular. What is meant by 'on a professional basis'? What are the requirements? Is simply registering with the competent authorities enough to forestall the risk of the disappearance or chance 'changes' in the nature of waste, 'waste for recovery' becoming 'waste for disposal' for obvious commercial and financial reasons, based on considerations other than a high level of protection of the environment.

The Council and Commission have provided absolutely no explanation on this matter.

*Other considerations

- Dates: The directive is to come into force two years after the date of adoption; the Commission had proposed 1 January 1990, which, thanks to the Council, is impossible. The Council also states that the reports the Member States have to send to the Commission on the measures taken to implement the directive are to begin two years after the two years for the directive to come into force, i.e. four years after its adoption.
- Commitology: In Article 18 the Council lays down the regulatory procedure (IIIa) rather than the consultation procedure (procedure I).
- The annexes: The Council has rightly amended the headings of Parts A and B in Annex II to take into account the distinction between waste for disposal and waste for recovery.

Leaving aside the question of definitions (see above), Parliament cannot accept the retention in Part A of Annex II of disposal procedures which are incompatible with environmental protection, such as dumping at sea.

CONCLUSION

After thus analysing the Council's common orientation, the European Parliament considers that, in view of its substance, it is essential that there should be a second reading pursuant to Article 100a. It therefore confirms its support for any legal proceedings taken by the Commission should the Council persist in its intention to change the legal basis from Article 100a to Article 130s of the EEC Treaty.

Opinion of the Committee on Legal Affairs and Citizens' Rights

Letter from the chairman to Mr COLLINS, chairman of the Committee on the Environment, Public Health and Consumer Protection

Brussels, 16 October 1990

Dear Mr Collins,

At its meeting of 15 and 16 October 1990, the Committee on Legal Affairs and Citizens' Rights considered the appropriateness of the legal basis for the Council orientation on the draft Council directive amending Directive 75/442/EEC on waste (SEC 7461/90).

After hearing Mr GARCIA AMIGO, the member responsible for matters relating to legal bases, the Committee on Legal Affairs and Citizens' Rights adopted the following conclusions:

- A. The main object of the proposal for a directive in question is the harmonization of the national laws of the Member States so as to remove existing obstacles and disparities in the national laws relating to the management and disposal of waste.
- B. This measure would thus help complete the internal market and improve conditions for competition between the Member States.
- C. Although this proposal for a directive contains provisions on the protection of the environment, as laid down in Article 100a, that does not remove the object of the directive from the scope of Article 100a(3); the latter is therefore the appropriate legal basis.
- D. The change to the legal basis proposed by the Council constitutes a substantial modification which requires that Parliament be consulted again.
- E. The Commission should be called upon to withdraw its proposal should the Council not agree that Article 100a is the appropriate legal basis in this case.

(sgd) STAUFFENBERG

The following were present during the vote: Stauffenberg, chairman; Vayssade and Rothley, vice-chairmen; Garcia Amigo, draftsman; Alber, Amendola, Anastassopoulos, Bandres Molet, Casini, Fontaine, Grund, Inglewood, Janssen van Raay, Malangré, Medina Ortega, Merz, Price, Reymann and Stamoulis.