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*Committee on Legal Affairs
The Chairman*

27.6.2008

Mrs Angelika Niebler
Chairwoman
Committee on Industry, Research and Energy
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (COM(2008)0019 – C6-0046/2008 – 2008/0016(COD))

Dear Mr Chairman,

By letter of 29 May 2008 you asked the Committee on Legal Affairs pursuant to Rule 35(2), to consider whether the legal basis of the above Commission proposal was valid.

The committee considered the above question at its meeting of 26 June 2008.

According to your letter, an amendment tabled by the your committee's Rapporteur seeks to delete Article 95, leaving Article 175(1) of the EC Treaty as the sole legal basis. The justification given by the author of the amendment is that a dual basis is reserved for extreme cases where several goals are equally important; the main aim of the proposed directive is environmental protection and the current Directive on Energy from Renewable Sources and the Biofuels Directive have both been adopted under Article 175. Besides, according to the Rapporteur, biofuels provisions do not principally aim at facilitating trade - as the prescribed standards are far from harmonised - but at defining sustainability criteria.

Legal basis

All Community acts must be founded upon a legal basis laid down in the Treaty (or in another legal act which they are intended to implement). The legal basis defines the Community's competence *ratione materiae* and specifies how that competence is to be exercised, namely

the legislative instrument(s) which may be used and the decision-making procedure.

According to the Court of Justice the choice of legal basis is not a subjective one, but "must be based on objective factors which are amenable to judicial review"¹, such as the aim and content of the measure in question². Furthermore, the decisive factor should be the main object of a measure.³

According to the case-law of the Court of Justice, a general Treaty article constitutes a sufficient legal basis even though the measure in question also seeks, in a subordinate manner, to attain an aim sought by a specific Treaty article⁴.

As far as recourse to multiple legal bases is concerned, it is only where a measure has several contemporaneous objectives which are indissolubly linked with each other without one being secondary and indirect in respect of the others that multiple legal bases must be used⁵.

The legal basis proposed by the Commission

The Commission proposes to use two legal bases, namely Article 175(1)⁶ and Article 95⁷. Its

¹ Case 45/86, *Commission v. Council* [1987] ECR 1439, para. 5.

² Case C-300/89, *Commission v. Council* [1991] ECR I-287, para. 10.

³ Case C-377/98, *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 27.

⁴ Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, paras 27-28; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 93-94.

⁵ See, for instance, Case C-165/87 *Commission v. Council* [1988] ECR 5545, para. 11. See also Lenaerts and Van Nuffel (ed. Bray), *Constitutional Law of the European Union*, 2005, Sweet & Maxwell, London, 5-013.

⁶ Article 175

1. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 95, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

— town and country planning,

— quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

— land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council may, under the conditions laid down in the first subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

3. In other areas, general action programmes setting out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.

The Council, acting under the terms of paragraph 1 or paragraph 2 according to the case, shall adopt the measures necessary for the implementation of these programmes.

4. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:

— temporary derogations, and/or

— financial support from the Cohesion Fund set up pursuant to Article 161.

Article 174

1. Community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems.

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure.

3. In preparing its policy on the environment, the Community shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Community,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Community as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

⁷ Article 95

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. 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.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission

unusually lengthy justification for the use of this dual legal basis is as follows:

"The Proposal will be made on the basis of Article 175(1) of the Treaty in combination with Article 95. While a single legal base is preferred, it is recognised that a dual legal base is appropriate where a measure contains provisions based on different parts of the Treaty. Both these legal bases imply the use of the co-decision procedure.

The majority of the Proposal falls under Article 175(1) (environment). This Article gives the Community power to act to preserve, protect and improve the quality of the environment, protect human health and make prudent and rational use of natural resources. These objectives are pursued by this Directive.

However, Articles 15, 16 and 17 of the Proposal impose binding obligations on Member States regarding the sustainability of biofuels and other bioliquids. While the sustainability criteria themselves obviously pursue an aim of environmental protection, the Directive also prevents Member States from adopting certain measures which would obstruct trade in biofuels or raw materials. The Directive thus aims for a complete harmonisation of biofuel sustainability criteria in order to ensure that no criteria adopted individually by Member States may constitute an obstacle to trade between Member States. For this element of the Directive, the internal market is therefore considered to be the primary objective. This assessment is not altered by the fact that environmental protection is also an important goal, since Article 95(3) EC expressly provides for a high level of protection of the environment to be aimed for in measures to complete the internal market. The Commission therefore considers that the provisions of harmonised standards for biofuel sustainability fall under Article 95 (internal market).

In general, renewable energy is a close substitute for conventional energy and is supplied through the same infrastructure and logistic systems. All Member States already use renewable energy and all have already decided to increase renewable energy's share. For these reasons, the proposal will not significantly affect Member States' choice between different energy sources or the general structure of their energy supply and does not fall under Article 175(2) of the Treaty."

Aim and content of the proposal for a regulation

The proposed directive seeks to establish a common framework for the promotion of energy

may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure. 8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

from renewable sources. It sets mandatory targets for the overall share of energy from renewable sources in energy consumption and for the share of energy from renewable sources in transport. It lays down rules relating to guarantees of origin, administrative procedures and electricity grid connections in relation to energy from renewable sources. It establishes environmental sustainability criteria for bio fuels and other bio liquids

The future directive aims to establish an overall binding target of a 20% share of renewable energy sources in energy consumption and a 10% binding minimum target for bio fuels in transport to be achieved by each Member State, as well as binding national targets by 2020 in line with the overall EU target of 20%.

Of the 57 recitals, only one, recital (53), refers specifically to the internal market: it states that Articles 15 to 17 should be considered as being based on Article 95 EC because they ensure the proper functioning of internal market by harmonising the conditions of sustainability that biofuels and other bioliquids must meet for certain purposes and thus facilitating trade between Member States in compliant biofuels and bioliquids.

The remainder of the recitals and the enacting terms (apart from the final provisions on reporting, monitoring, amendments and repeal, comitology and entry into force) are all concerned with preserving, protecting and improving the quality of the environment and the prudent and rational utilisation of natural resources within the meaning of Article 174 of the EC Treaty. Even Articles 15 to 17, which the Commission claims should be based on Article 95, are concerned with environment protection.

In view of the strictures of the Court of Justice to the effect (a) that a general Treaty article constitutes a sufficient legal basis even though the measure in question also seeks, in a subordinate manner, to attain an aim sought by a specific Treaty article and (b) that it is only where a measure has several contemporaneous objectives which are indissolubly linked with each other without one being secondary and indirect in respect of the others that multiple legal bases must be used, it is considered that Article 175(1) EC can be used as the sole legal basis.

At its meeting of 27 June 2008 the Committee on Legal Affairs accordingly decided, unanimously¹, to recommend that you that the most appropriate legal basis is Article 175(1) of the EC Treaty and that there is no need to add any reference to Article 95.

¹ The following were present for the final vote: Giuseppe Gargani (chairman), Titus Corlăţean (vice-chairman), Diana Wallis (draftswoman), Sharon Bowles, Carlo Casini, Monica Frassoni, Neena Gill, Piia-Noora Kauppi, Klaus-Heiner Lehne, Eva Lichtenberger, Hans-Peter Mayer, Manuel Medina Ortega, Aloyzas Sakalas, József Szájer and Ieke van den Burg.

Yours sincerely,

Giuseppe Gargani