

EUROPEAN PARLIAMENT

2004



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*Committee on Legal Affairs
The Chairman*

Mr Karl-Heinz Florenz
Chairman
Committee on the Environment, Public Health and Food Safety
BRUSSELS

Subject: Legal basis of the Proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation (EC) {on Persistent Organic Pollutants} (COM(2003)0644 – C6-0530/2003 – 2003/0256(COD))¹

Dear Mr Florenz,

By letter of 2 June 2005 you asked the Committee on Legal Affairs pursuant to Rule 35(2) to consider the legal basis of the above Commission proposal.

Whereas the proposal has Article 95 of the EC Treaty as its sole legal basis, the question is whether Article 175(1) should not be used as an additional legal basis on the ground that Titles VII and VIII of the proposed regulation deal with the authorisation and restriction of chemicals and therefore have the primary objective of protecting the environment.

The Committee considered the above question at its meetings of 13 July and 15 September 2005.

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"², such as the aim and content of the measure in question³. Furthermore, the decisive factor should be the main

¹ Not yet published in the OJ.

² Case 45/86, *Commission v. Council* [1987] ECR 1439, para. 5.

³ Case C-300/89, *Commission v. Council* [1991] ECR I-287, para. 10.

object of a measure.¹

Furthermore, according to the case-law of the Court of Justice, a general Treaty article (such as Article 95) 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 (such as Article 174)².

However, if the view were to be taken that the aims of the establishment and functioning of the internal market and environment protection (and health protection) are indissolubly linked with each other without one being secondary and indirect in respect of the others, it might be considered that the two legal bases would have to be used, given that the same decision-making procedure (codecision) is provided for in both Articles 95 and 175(1)³. However, it would appear from the recitals and from reading the proposed measure as a whole (only Titles VII and VIII of the proposed regulation deal with the authorisation and restriction of the use of chemicals and are hence, arguably, primarily concerned with the environment) that its main objects are the establishment and functioning of the internal market, which fall within Article 95, together with environment protection and the protection of health as ancillary objects.

In any event, there are differences between the two legal bases which suggest that they are incompatible.

First, whereas Article 175 provides for consultation of the Committee of the Regions, Article 95 does not. If Article 175(1) were added as an additional legal basis, failure to consult the Committee of the Regions would constitute a breach of an essential procedural requirement and make it possible for an objection of illegality to be raised before the Court of Justice.

A second reason for considering that the two articles are incompatible is that Article 95 makes it more difficult for Member States to maintain or develop national legislation that includes stricter requirements than in the finalised regulation. Conversely, under Article 175, Member States would have greater scope to adopt stricter measures.

It follows that it would not be possible to add Article 175(1) of the EC Treaty as a legal basis in addition to Article 95.

Consequently, at its meeting of 15 September 2005 and in accordance with the proposal made by its draftsman Mr. Antonio López-Istúriz White, the Committee on Legal Affairs decided, by 18 votes to 3 with 0 abstentions⁴, to recommend that you maintain Article 95 of the EC

¹ Case C-377/98, *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 27, quoting Case C-155/91, *Commission v. Council*, *supra* n. 23, pars 19-21.

² 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.

³ Case C-165/87 *Commission v. Council* [1988] ECR 5545, para. 11.

⁴ The following were present for the vote : Giuseppe Gargani (Chairman), Rainer Wieland (Vice-Chairman), Antonio López-Istúriz White (Draftsman), Maria Berger, Marek Aleksander Czarnecki, Bert Doorn, Nicole Fontaine (for Syed Kamall), Janelly Fourtou (for Diana Wallis), Monica Frassoni, Adeline Hazan (for Katalin Lévai), Kurt Lechner, Klaus-Heiner Lehne, Eva Lichtenberger (for Alain Lipietz), Toine Manders (for Viktória Mohácsi), Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega (for Andrzej Jan Szejna), Alexander Radwan (for Piia-Noora Kauppi), Aloyzas Sakalas, Francesco Enrico Speroni, Nicola Zingaretti, Andrzej Tomasz Zapałowski, Jaroslav Zvěřina, Tadeusz Zwiefka .

Treaty as the legal basis without the addition of Article 175(1).

Yours sincerely,

Giuseppe Gargani