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*Committee on Legal Affairs
The Chair*

28.4.2010

Mr Herbert Reul
Chair
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 indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (COM(2008)0778 – C7-0412/2008 – 2008/0222(COD))

Dear Mr Chair,

By letter of 23 March 2010 you asked the Committee on Legal Affairs pursuant to Rule 37(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 28 April 2010.

By letter of 23/03/10 you informed the Legal Affairs Committee of a change of legal basis suggested by the Council for the proposed re-cast of the Energy Labelling Directive¹. The Council has indicated its intention to use this new legal basis in its imminent Common Position and it would seem that your committee has indicated its own pre-disposition towards approving the change. Leaving aside the seemingly undisputed consensus in favour of this action, it is considered that it is necessary, under to Rule 37 of Rules of Procedure², that the

¹ Council Directive 92/75/EEC of 22/09/1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ L 297, 13.10.1992, p. 16.

² Rule 37(5): Amendments tabled in Parliament to change the legal basis of a proposal for a legislative act without the committee responsible for the subject-matter or the committee responsible for legal affairs having disputed the validity or appropriateness of the legal basis shall be inadmissible.

Legal Affairs Committee should give its opinion on this change in legal basis as compared with the original Commission proposal.

The aim of this note will therefore be to determine the appropriate legal basis for the Commission's proposal for a directive on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products¹ (hereinafter "the proposal"), which seeks to recast Council Directive 92/75/ECC (hereinafter "the Energy Labelling Directive" or "ELD"). The Commission has proposed Article 114 TFEU as the legal basis, while the Council proposes a switch to Article 194 TFEU.

General considerations

The choice of legal basis is important because the Union is constitutionally founded upon the principle of conferral of competences; Community institutions can only act in a manner consistent with the mandate provided them by the Treaty².

The case law of the Court establishes that the choice of legal basis is not subjective. A consistent set of criteria have been developed which are applicable in the determination of correct legal bases. The ultimate choice must be based on objective factors which are amenable to judicial review, such as the aim, object and content of the legislative act in question³. The fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are all irrelevant.⁴

Legal bases under consideration:

Article 95 EC, which replaced the old Article 100a TEC, constituted the legal basis for the ELD. The Commission intimated in December 2009 that the corresponding Article 114 TFEU should be retained for the present proposal. As against this, the Council proposes Article 194 TFEU, a provision dealing specifically with energy policy, introduced for the first time under Lisbon. The provisions in question are set out as follows:

Article 114

(ex Article 95 TEC)

- 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure 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.*

¹ COM (2008) 778 final.

² Opinion 2/00 of 6/12/2001 on the *Cartagena Protocol* [2001] ECR I-9713, at para. 3.

³ See, for instance, Case C-300/89 *Commission v. Council* [1991] ECR I-2867; Case C-269/97 *Commission v. Council* [2000] ECR I-2257 and Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

⁴ Case C-269/97 *Commission v. Council*, cited above, at para. 44.

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 of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, 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 of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, 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 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 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union 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 36, provisional measures subject to a Union control procedure.*

TITLE XXI

ENERGY

Article 194

1. *In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*
 - (a) *ensure the functioning of the energy market;*
 - (b) *ensure security of energy supply in the Union;*
 - (c) *promote energy efficiency and energy saving and the development of new and renewable forms of energy; and*
 - (d) *promote the interconnection of energy networks.*
2. *Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.*

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).
3. *By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.*

It should be noted that the proposed legal bases do not run contrary to each other and are better regarded as complementary provisions; both are expressly concerned with enhancing internal market integration. But in governing a province of Article 114's wider scheme Article 194 introduces a second policy goal, namely the protection of the environment through energy efficiency. This undoubtedly alters the manner in which it functions. Article 114 is exclusively concerned with economics, specifically the removal of arbitrary barriers which distort the market. As against this it is unavoidable that the pursuit of environmental goals, in the short term at least, can lead to actions running contrary to what value-free economics would prescribe. In short, the provisions have similarities but they are by no means identical.

However, it is necessary to enter the caveat that merely because a proposed measure is concerned with the energy sector, it does not automatically mean that that measure must be based on Article 194 TFEU. That article must be considered as being confined to energy-policy measures aimed at ensuring the functioning of the energy market, ensuring security of energy supply in the Union, promoting energy efficiency and energy saving and the development of new and renewable forms of energy or promoting the interconnection of energy networks. *Energy-policy measures having as their object the establishment and functioning of the internal market must still be based on Article 114 TFEU.*

In determining which of the proposed articles is the appropriate one, the evolution of energy policy as an area of Community competence will be examined as will, hence, the aim and content of the proposal.

The regulation of energy within the EU before and after the entry into force of the Lisbon Treaty

Traditionally, the national energy markets have been fragmented and the EC Treaty conferred no specific legislative competence in the area of energy policy. The Community, however, influenced this important policy area by legislating through Treaty provisions dealing with the single market and environmental policy¹.

The Treaty of Lisbon gives the Union a clearer and more explicit competence in energy policy, with Article 4 TFEU declaring it an area of shared competence². Article 194 TFEU envisages a Community energy policy which coheres with the internal market while promoting the protection and improvement of the environment³.

With regard to legal coherence and security, it can be generally stated that the espousal of a specifically-directed legal basis promotes transparency and constitutional legitimacy in Community action. It is especially important to respect these principles in such a strategically significant and politically sensitive area. The Court has held that where a sector-specific legal regime has been adopted, it should be used in preference to residual and general provisions⁴.

The aim and content of the proposed Directive

Adopted in 1992, the current ELD is a framework in the context of which the Commission can, through implementing measures, prescribe energy-labelling requirements for a relatively concise list of household appliances. Consumers presented with accessible information regarding the efficiency of appliances are thus encouraged to factor energy-cost savings into their choices while manufacturers are given an incentive to develop greener goods and market them accordingly. This dynamic manifestly precipitates concurrent economic and

¹ An example is Directive 2005/32/EC of the European Parliament and the Council of 6/7/2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and the Council, OJ L 191, 22.7.2005, p. 29.

² Article 4 (2) (i).

³ B. Delvaux, A. Guimaraes-Purokoski: EU Energy Law and policy issues, ELRF Collection, 1st edition (editors B. Delvaux, M. Hunt, K. Talus) pp. 13-16, 27-28.

⁴ Case C 376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419.

environmental benefits and is consistent with a number of Community policy initiatives¹.

Impact assessment of the ELD revealed that, in addition to the comprehensive implementation of its present regime, the extension of its scope so as to encompass all energy related products² could facilitate huge savings in energy resources³. As a result, the Commission, in choosing between four policy options presented under the review procedure, went ahead with the current proposal.

Further analysis will be facilitated by reference at this point to the 'Legal Basis' section included in the Commission's proposal. In selecting Article 95 EC (114 TFEU) as legal basis the Commission stated:

The ELD ensures the completion of a well-functioning internal market with a level playing field excluding technical barriers to trade[and] the free movement of products falling within its scope that satisfy the labelling requirements laid down in the implementing measures adopted under the Directive⁴.

The Commission couch their justification of Article 95 EC as the appropriate legal basis in terms exclusively referential of the internal market. This is noteworthy given that the vast bulk of the explanatory memorandum deals with the energy-savings and consequential environmental benefits achievable by way of the proposal.

Recital 3 of the proposal itself is illustrative to the extent that it is probably worth quoting it in full:

The provision of accurate, relevant and comparable information on the specific energy consumption of energy related products may influence the end-user's choice in favour of consuming less energy and other essential resources during use, thus prompting manufacturers to take steps to reduce the consumption of energy and other essential resources of the products which they manufacture; it should also, indirectly, encourage the efficient use of these products. In the absence of this information, the operation of market forces alone will fail to promote the rational use of energy and other essential resources for these products.

Recital 8 states that only energy-related products which have a significant impact on the consumption of energy or the consumption of resources should be subject to implementing legislation, while Recital 12 specifies that energy-efficiency should not be promoted to an extent that produces detrimental environmental consequences overall. None of the proposal's recitals expressly deal with its potential benefits for the internal market. It is significant, for the purposes of the present exercise, that Recital 8 is substantially implemented by Article 1 of the proposed Directive (entitled 'Scope') which limits its ambit to: "*energy-related products which have a significant impact on the consumption of energy and, where relevant, on other essential resources during use*".

¹ Sixth Community Environment Action Programme, Decision No. 1600/2002/EC; Integrated Product Policy Building on Environmental Life-Cycle Thinking, IPP (COM (2003) 302 final) and the Better Regulation: Simplification Strategy, COM (2005) 535 final of 25.10.2000.

² Windows and insulating products, for example.

³ 27 mega tonne oil equivalent (a unit of energy).

⁴ SEC (2008) 2862, at p.6.

The purpose evidenced by the foregoing provisions, in conjunction with the policy backdrop against which impact assessment was carried out on the ELD and the general tenor of the explanatory memorandum attending the proposal, make it clear that Article 194 is by far the more appropriate legal basis as between the available alternatives. Any additional coherence granted the internal market by way of the proposal is a benefit incidental to its primary aim, namely the promotion of energy-efficiency and its attendant economic and environmental gains. That all of these effects can result from the proposal is entirely in line with the analysis of the relationship between Articles 114 and 194 TFEU provided above. The determinative factor in our present inquiry is the direct manner in which the purpose of the proposal matches that of Article 194.

Consequently, this particular measure can be regarded as being primarily directed towards promoting energy efficiency and saving within the meaning of Article 194(1)(c) TFEU. If the proposal, albeit concerned with energy policy, had had as its principal objective the establishment and functioning of the internal market, it would have had to have been based on Article 114. The fact that a new specific legal basis for energy now exists does not mean that all measures concerned with energy must be based on that article.

Conclusion

The Court has held that where a sector-specific legal regime has been adopted, it should be used in preference to residual and general provisions¹ and that in principle a measure is to be founded on only one legal basis². In light of these principles and of the foregoing analysis, it is considered that Article 194 TFEU is the appropriate legal basis for this proposal.

At its meeting of 28 April 2010 the Committee on Legal Affairs accordingly decided, unanimously³, to recommend that to you that the appropriate legal basis is Article 194 of the Treaty on the functioning of the European Union.

Yours sincerely,

Klaus-Heiner Lehne

¹ See footnote 8

² Case C-91/05 *Commission v. Council* [2008] ECR I-3651.

³ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Kurt Lechner (rapporteur), Piotr Borys, Sergio Gaetano Cofferati, Christian Engström, Eva Lichtenberger, Antonio López-Istúriz White, Antonio Masip Hidalgo, Bernhard Rapkay, Francesco Enrico Speroni, József Szájer, Alexandra Thein, Diana Wallis, Cecilia Wikström, Tadeusz Zwiefka