



EUROPEAN PARLIAMENT

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*Committee on Legal Affairs
The Chair*

25.6.2013

Mr Matthias Groote

Chair

Committee on the Environment, Public Health and Food Safety
BRUSSELS

Subject: Opinion on the legal basis of the proposal amending Directive 2006/66/EC on batteries and accumulators as regards the placing on the market of portable batteries and accumulators containing cadmium intended for use in cordless power tools (COM(2012)0136 – C7-0087/2012 – 2012/0066(COD))

Dear Mr Chair,

By letter of 14 May 2013, you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to consider a proposed change of the dual legal basis of the proposal to a single legal basis.

I - Background

The legal basis originally proposed by the Commission was Article 192(1) of the Treaty on the Functioning of the European Union (TFEU), which is the general legal basis in the Treaty for action to be taken by the Union in order to achieve the objectives of Union policy on the environment.

The legal basis of Directive 2006/66/EC was however Article 175(1) TEC, which was the predecessor to Article 192(1) TFEU, with the exception of Articles 4, 6 and 21 of the Directive, which had Article 95(1) TEC (now Article 114(1) TFEU) as their legal basis. This is the legal basis for the adoption of measures for the approximation of Member State rules which have as their objective the establishment and functioning of the internal market.

The Commission therefore presented a corrigendum to its proposal, whereby Article 114(1) TFEU was added to Article 192(1) TFEU to form the dual legal basis for the proposal.

Directive 2006/66/EC was, however, also amended in 2008, in order to update it to the regulatory procedure with scrutiny, which in the meantime had been introduced. This amending directive had Article 175(1) TEC as its single legal basis.

Following negotiations with the Council and the Commission, ENVI reached an agreement for a compromise text on 3 June 2013, according to which Article 192(1) TFEU would be the sole legal basis of the current amending act, notably by reference to the fact that protection of the environment was the prevalent aim of the Directive.

The Council Presidency took the position that Article 192(1) TFEU should be chosen as the single legal basis in order to ensure consistency with respect to other waste legislation, and bearing in mind that protection of the environment was the prevalent aim of the directive. The Commission originally maintained the position that a dual legal basis should be used, including also the internal market, on the ground that this was justified by reference to the previous amendments to the directive. The ENVI report does not seek to change the proposed dual legal basis, but during negotiations this point was referred to a technical meeting for further examination.

The single legal basis of Articles 192(1) TFEU in the compromise text is therefore a result of discussions at technical level.

II - Relevant Treaty Articles

The following Article of the TFEU was presented as the legal basis in the Commission's original proposal of 26 March 2012:

Article 192 (ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred too in Article 191.

[...]

The following Article of the TFEU was added to the legal basis in the Commission's corrigendum to the proposal of 26 July 2012:

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.

[...]

III - Case-law on legal basis

It is the settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

In this case, it therefore has to be established whether the proposal either:

1. pursues a twofold purpose or has a twofold component, and one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental; or
2. simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other.

According to the case law of the Court of Justice, in the first case the act must be based on a single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act will have to be founded on the various corresponding legal bases.²

IV. Aim and content of the proposed regulation

The aim of the proposal, according to its Recital 3, is to extend the existing prohibition of the use of cadmium to portable batteries and accumulators intended for use in cordless power tools, in order gradually to diminish the amount of cadmium released into the environment. This followed from Article 4 of Directive 2006/66/EC, with the title "Prohibitions", which provided for a review by the Commission on whether such an extension should take place. The legal basis for Article 4 of the Directive, it should be recalled, was Article 95(1) TEC.

The agreed first reading compromise text also includes, in Recital 4a, the addition of a prohibition of the marketing of button cells with a specified mercury content, which was

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

² See the Case C-411/06, cited above, paras 46-47.

exempt under Article 4 of Directive 2006/66/EC, but not subject to any review.

According to Recital 5, the proposal also aims at aligning the Directive with Articles 290 and 291 TFEU. This is, however, a primarily technical exercise which results from the entry into force of the Lisbon Treaty and does not directly affect the choice of legal basis, in particular against the background of the general aim and content of the proposal.

The main purpose of the proposal is therefore to extend the existing prohibitions to place environmentally harmful substances in batteries and accumulators on the internal market.

V - Determination of the appropriate legal basis

It should first be noted that, in 2005, JURI gave two opinions to ENVI on the legal basis of the proposal for Directive 2006/66/EC, in first and second reading, and each time recommended the dual legal basis above.

The amendments introduced to the Directive in 2008, however, had Article 175(1) TEC as their sole legal basis. Those amendments included changes to Article 21 of the Directive, with the title "Labelling", which had Article 95(1) as a legal basis in Directive 2006/66/EC.

It should be recalled that, in addition to Article 21 of the Directive, only Article 4 discussed above and Article 6, with the title "Placing on the market" also had Article 95(1) as a legal basis.

Against the background of the current case law on legal basis discussed above, it must therefore be considered that, while the proposal pursues both an environmental objective and objectives relating to the placing of products on the internal market, the proposal highlights the aim of "gradually diminish[ing] the amount of cadmium released to the environment" and the compromise text also adds additional prohibitions concerning the mercury content in batteries and accumulators. The environmental objective is therefore the predominant purpose of the text, and the internal market aspects are merely incidental. The act must therefore be based on a single legal basis, namely Article 192(1) TFEU.

VI - Conclusion and recommendation

In light of the foregoing analysis, Article 192(1) TFEU alone constitutes the proper legal basis for the compromise text.

At its meeting of 20 June 2013, the Committee on Legal Affairs accordingly unanimously decided¹ to recommend the following: Article 192(1) TFEU is the proper legal basis for the

¹ The following were present for the final vote: Raffaele Baldassarre (Vice-Chair), Luigi Berlinguer, Sebastian Valentin Bodu (Vice-Chair), Françoise Castex (Vice-Chair), Sergio Gaetano Cofferati, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Klaus-Heiner Lehne (Chair), Eva Lichtenberger, Antonio Masip Hidalgo, Jiří Maštálka, Alajos Mészáros, Angelika Niebler, Bernhard Rapkay, Evelyn Regner (Vice-Chair), Dimitar Stoyanov, Rebecca Taylor, Alexandra Thein, Axel Voss, Tadeusz Zwielfka.

compromise text on a Directive amending Directive 2006/66/EC on batteries and accumulators as regards the placing on the market of portable batteries and accumulators containing cadmium intended for use in cordless power tools and of button cells with low mercury content.

Yours sincerely,

Klaus-Heiner Lehne