

Legal Briefing: The possible integration of financial and fiscal provisions in the Directive 2002/91/EC on the Energy Performance of Buildings

EXECUTIVE SUMMARY

The purpose of this legal briefing is to advise on issues related to fiscal and financial measures proposed by the European Parliament to be included into Article 9.a. and Annex III b of the Directive 2002/91/EC on the Energy Performance of Buildings (the EPBD).

The European Parliament's proposal to include into the EPBD the fiscal and financial provisions, as proposed in Articles 9.a.1, 9.a.3 and Annex III b, is acceptable from the legal point of view although it can be also expected that it can meet strong political opposition.

The proposal for the national fiscal and financial measures (proposed Article 9.a.1 and Annex III b of the EPBD) does not contradict the principles of subsidiarity and proportionality, complies with the State aid rules and the principle of the Community implied competences. It has the character which can be compared to EC implementing measures. In spite of the proposed detailed solutions for the EU Member States, the EPBD, by comparison with other Community post-Amsterdam directives, can be considered to be corresponding not only to the principle of proportionality but also to the character of the directive as described in Article 249 of the EC Treaty. There is no problem of the legal basis: the fact that EPBD is based on Article 175 of the EC Treaty does not put into question the possibility to impose national fiscal and financial measures (proposed fiscal and financial measures are only accessory to the main objective of the Directive, which is environmental protection. In addition, being the result of the Community implied powers, Article 9.a.1 and Annex III b of the EPBD result indirectly from the same legal basis on which is based the whole EPBD (Article 175 of the EC Treaty)). There is also no problem of the unanimity voting in relation to the issue of taxation as the provisions of Article 9.a.1 and Annex III b do not aim at the harmonization of the EC legislation or establishment of common Community rules.

The main difficulty in relation to these provisions is that they touch very sensitive issue of areas considered traditionally to be the national competence. Attempts to enter into this area often raise arguments of state sovereignty. Therefore, it can be expected that the proposal raises political concerns and opposition from the Member States.

The possible solution to that could be to change the proposed text slightly. In this case, the Directive should impose on Member States a strong obligation to establish and implement fiscal and financial measures of their choice but compliant with conditions established in the Directive. That would give the Commission power to pursue Member States if they do not implement these provisions correctly (under the drafting currently proposed by the European Parliament, the Commission has enforcement powers in relation to the content of the national action plans but not in relation to the actual implementation of this content). If the first part of the proposed Article 9.a.1 imposes such a strong obligation, the second part, more difficult for Member States to accept, could be softened so that the list included in Annex III b is a proposal of measures leaving Member States also the choice of using other measures (i.e. make the list of measures non-exhaustive). This could be done by using the term 'may' or 'shall consider' when proposing particular solutions to be used by the Member States. However, this is just a proposal of a possible solution which, depending on further discussions, is likely to be developed or modified.



At the same time this Directive is the best place to propose measures as the ones of Articles 9.a.1 and Annex III b.

The proposal for the European Commission's general obligation to bring legislative proposals on Community financial instruments to support the implementation of the EPBD (proposed Article 9.a.3 of the EPBD) is appropriate to be included in the EPBD. Not being an amendment to other legislative acts but only a general request for potential new legislative activities, it is in principle legally acceptable.

While the first general part of Article 9.a.3 of the EPBD does not raise problems, the second part, very detailed and requiring that legislative proposals consider certain Community acts, can provoke some discussions (as to the necessity to create a separate legislative act on the EPBD financing, possibility to include in the legal act based on Article 175.1 of the EC Treaty provisions resulting from other Articles of the Treaty, unanimity or qualified majority vote on the proposed fiscal and financial provisions). However, further analysis shows that arguments challenging the legality of provisions proposed under Article 9.a.3 of the EPBD are not relevant.

In spite of the above the text in the proposed form may not be accepted for political reasons. Therefore, it could be suggested to, in certain ways, soften the requirements of Article 9.a.3 of the EPBD. In that respect it could be suggested for example to replace *'These proposals shall consider the following measures...'* by *'The following measures shall be considered by the Commission in the process of preparing legislative proposals...'* or *'... developing new legislative proposals...'*. Such a wording would leave the Commission the open choice of legislative acts to be considered and would also clarify the text (the present wording is quite confusing). The first sub-paragraph of Article 9.a.3 does not need and should not be amended.

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Brussels, 10.10.2009

Legal Briefing: The possible integration of financial and fiscal provisions in the Directive 2002/91/EC on the Energy Performance of Buildings (OJ L 1, 4.1.2003, p.65), as amended

I. INTRODUCTION

ClientEarth is a non-profit environmental law and policy organisation based in London and Brussels. The charitable objectives of the organisation include promoting and encouraging the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit. We provide dedicated public interest legal capacity, working with environmental NGOs and others and acting as legal advocates for the environment.

The purpose of this legal briefing is to advise on issues related to fiscal and financial measures proposed by the European Parliament to be included into the Directive 2002/91/EC on the Energy Performance of Buildings (the EPBD).

Within the ongoing recast of the Directive 2002/91/EC on the Energy Performance of Buildings, the European Parliament proposed to include the following Article 9.a and Annex III b:

Art. 9.a: Financial Incentives and Market Barriers

*1. Member States shall, by 30 June 2011, **draw up national action plans**¹, including proposed measures, for meeting the requirements laid down in this Directive through reducing existing legal and market barriers and developing existing and new financial and fiscal instruments to increase the energy efficiency of new and existing buildings.*

These proposed measures shall be sufficient, effective, transparent and non-discriminatory, shall support the execution of the recommendations included in the energy performance certificate, strive to encourage substantial improvements in the energy performance of buildings where an improvement would not otherwise be economically feasible and include measures to support households at risk of energy poverty.

***Member States shall compare their financial and fiscal instruments with the instruments listed in Annex III b and, without prejudice to national legislation, implement at least two measures from that Annex.**²*

2. Member States shall communicate these national action plans to the Commission by including them in the Energy Efficiency Action Plans referred to in Article 14(2) of Directive 2006/32/EC and shall update them every three years.

3. The Commission shall, by 30 June 2010 at the latest, following an impact assessment, bring forward appropriate legislative proposals to strengthen existing and propose additional Community financial instruments to support the implementation of this Directive.

These proposals shall consider the following measures:

(a) in the context of the revision of the ERDF Regulation for the next programming period, a significant increase of the maximum amount of the European Regional Development Fund allocation that may be used to support energy efficiency including district heating and cooling and renewable energy investments in housing and an extension of the eligibility of those projects;

(b) the use of other Community funds to support research and development, information campaigns or training related to energy efficiency;

(c) the establishment of an Energy Efficiency Fund, based on contributions from the Community budget, the European Investment Bank and Member States to act as a leverage for increasing private and public investments for projects increasing energy efficiency of buildings, including renewable energy in buildings or building components, related to energy efficiency by 2020. This Energy Efficiency Fund shall be integrated into the programming of other Community structural assistance. The criteria for its allocation shall be defined according to Council Regulation (EC) No 1083/2006 and it shall be implemented by 2014, at the latest;

(d) reduced VAT for services and products, including renewable energy in buildings or building components, related to energy efficiency.

¹ Emphasis added

² Emphasis added

Annex III b: Financial instruments for improving the energy performance of buildings
Without prejudice to national legislation, Member States shall implement at least two financial instruments from the following list:³

- (a) VAT reductions for energy saving, high energy performance and renewable energy goods and services;*
- (b) other tax reductions for energy saving goods and services or energy efficient buildings, including fiscal rebates on income or property taxes;*
- (c) direct subsidies;*
- (d) subsidised loan schemes or low interest loans;*
- (e) grant schemes;*
- (f) loan guarantee schemes;*
- (g) requirements on or agreements with energy suppliers to offer financial assistance to all categories of consumers;*

The European Commission has rejected these amendments on the basis that, although the objective of fiscal and financial incentives for energy savings and use of the energy from renewable sources is supported in principle, this proposal goes beyond what is possible under the applicable articles of the Treaty⁴ and contradicts the subsidiarity principle. In relation to Article 9.a.3 it also added that the EPBD is not an appropriate place to request and announce potential new legislative measures under other specific legislation.

The purpose of this paper is to assess whether the European Parliament's proposals for fiscal and financial measures are legally acceptable. This assessment will be divided into two parts concerning interpretation of:

- the proposed Article 9.a.1 and Annex III b of the EPBD: Member States' obligation to reduce existing legal and market barriers and develop existing and new financial and fiscal instruments to increase the energy efficiency of new and existing buildings and, in that respect, the proposed obligation to implement national fiscal and financial incentives selected from among the measures listed in Annex III b and
- the proposed Article 9.a.3 of the EPBD: the European Commission's obligation to bring legislative proposals to strengthen existing and propose additional Community financial instruments to support the implementation of the EPBD and, in that respect, consider measures listed in Article 9.a.3 of the Directive, consisting, in principle, of revision of the existing Community legislation in areas such as Structural Funds, VAT, research and development (in the case of Structural Funds the proposed revision would be a part of the revision requested under Article 106 of the Structural Funds Regulation⁵ and Article 24 of the ERDF Regulation⁶ to be adopted by the Council by 31 December 2013)

The first part (Article 9.a.1 and Annex III b) will be discussed in section II of this legal briefing and the second part (Article 9.a.3) in its section III.

³ Emphasis added

⁴ Although the Commission hasn't indicated which these 'applicable articles of the Treaty' are, it can be presumed that these are Articles 175(1) and 249 of the EC Treaty.

⁵ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31.7.2006, p. 25, as amended

⁶ Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, OJ L 310, 31.07.2006, p. 1, as amended

II. ARTICLE 9.a.1 AND ANNEX III b OF THE EPBD: THE EU MEMBER STATES` OBLIGATION TO IMPLEMENT AT LEAST TWO OF NATIONAL FISCAL AND FINANCIAL MEASURES FROM ANNEX III b

The new Article 9.a.1 imposes on Member States the requirement to draw up a national action plan including measures aiming at increasing the energy efficiency of buildings through reducing legal and market barriers and developing existing and new financial and fiscal instruments. It also requests that EU Member States propose financial and fiscal instruments to increase the energy efficiency of buildings. At least two of them must be chosen from the list included in Annex III b. These are: VAT and other tax reductions, direct subsidies and subsidized loan schemes or low interest loans, grant schemes and loan guarantee schemes, requirements on or agreements with energy suppliers to offer financial assistance to all categories of consumers.

The two first sub-paragraphs of Article 9.a.1 do not pose problems as they include general requirements concerning the Member States` measures aiming at increasing the energy efficiency of buildings. Even if one could argue that some of these requirements might not comply with the EC rules on State aid⁷, this argument cannot be accepted for the reasons explained below in section II.3 of this legal briefing (it discusses the State aid in relation to the whole Article 9.a.1 and Annex III b of the EPBD).

On the other hand, the third sub-paragraph of Article 9.a.1 imposes on Member States an obligation that requires further analysis. This obligation is to implement two of the measures listed in the proposed Annex III b of the EPBD. Its assessment will concern in particular the following elements:

- subsidiarity and proportionality
- Community competence/powers,
- State aid,
- whether the proposed text goes beyond what is possible under the applicable articles of the Treaty (Articles 175.1 and 249 of the EC Treaty)⁸.

These will be assessed one by one to determine whether the amendment proposed by the European Parliament is legally acceptable and whether the rejection of this proposal by the Commission is justified.

Although the compliance with the principle of proportionality and the Community competence are not objected to by the European Commission, they must be addressed as they are strongly linked to the principle of subsidiarity and necessary for its assessment.

⁷ This applies especially to the following: measures *supporting the execution of the recommendations included in the energy performance certificate, striving to encourage substantial improvements in the energy performance of buildings where an improvement would not otherwise be economically feasible and including measures to support households at risk of energy poverty* and measures listed in Annex III b

⁸ See footnote 4.

1. Subsidiarity and proportionality

The **principle of subsidiarity** is expressed in Article 5.2 of the EC Treaty and reads as follows:

'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

Principle of subsidiarity is also further described in the 'Protocol on the application of the principles of subsidiarity and proportionality' attached to the Treaty of Amsterdam.

The principle of subsidiarity allows assessing whether an action (in this context the term 'action' should be understood as an adoption of a legislative act) should be taken at the Community level or at national level. Once it is established that the objectives of the action can be better achieved by the Community and therefore it is justified to take a Community action (adopt the Community legal act), the principle of subsidiarity would not apply any further and could not be used for the assessment of particular detailed elements of this action (legislative act). This can be done through an assessment under the principle of proportionality and the Community competencies/powers.

In the case discussed in this paper, the principle of subsidiarity can be used for assessing whether it is appropriate for the Community to adopt the legislation on the energy efficiency of buildings but not for assessing whether it is appropriate to include in this Community document the financial and fiscal measures as proposed under Article 9.a.1. and Annex III b of the EPBD.

The EPBD was already voted in 2002 and now is only revised. At the moment the first version of the Directive was adopted all actors involved in the legal process agreed that there is a need for the Community legislation on energy efficiency of buildings and therefore, that the Directive complies with the principle of subsidiarity, as described in Article 5.2 of the EC Treaty. One can only agree with that as the adoption of the EPBD is not only important for the overall aim of the environmental protection but also in particular for the EU compliance with the Kyoto Protocol. Separate actions at the national level would in that respect bring only very limited results.

As stated in recital 3 of the Preamble to the EPBD: *Increased energy efficiency constitutes an important part of the package of policies and measures needed to comply with the Kyoto Protocol and should appear in any policy package to meet further commitments.*

In the view of that, one must revoke that the *building sector is the largest user of energy and CO₂ emitter in the EU and is responsible for about 40% of the EU's total final energy consumption and CO₂ emissions*⁹. Moreover, *it is also responsible for about half of the CO₂ emissions not covered by the Emission Trading Scheme and has significant CO₂ reduction potential at negative or low abatement costs.*¹⁰

Recital 4 of the preamble to the EPBD mentions also another reasons for which the adoption of the EPBD at the EC level is crucial: *'Demand management of energy is an important tool enabling Community to influence the global energy supply in the medium and long term.'*

⁹ COM(2008) 780 final 2, Explanatory Memorandum.

¹⁰ COM(2008) 780 final 2, Explanatory Memorandum.

The principle of proportionality, strongly linked to subsidiarity and included in Article 5.3 of the EC Treaty, reads as follows:

'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

Further interpretation of this principle is provided by the 'Protocol on the application of the principles of subsidiarity and proportionality' attached to the Treaty of Amsterdam. Recitals 7 and 8 of the Protocol provide:

(7) The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.

*(8) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organization and working of Member States' legal systems. **Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.**¹¹*

The first assessment of the measure under the principle of proportionality should consider the following questions:

- is the measure suitable to achieve the desired end?
- is the measure necessary to achieve the desired end?
- does the measure impose a burden on the individual that is excessive in relation to the objective sought to be achieved?¹²

In the present case, the reply to the two first questions is positive and to the last one, negative. The amendment proposed by the European Parliament is suitable to achieve the desired end of the EPBD, it is necessary to achieve this end as without efficient fiscal and financial measures the implementation of the Directive will be compromised; and it does not impose any excessive burden on the individual.

The amendment proposed by the European Parliament is suitable and necessary to achieve the desired end of the EPBD. As the EPBD is based on Article 175.1 of the EC Treaty, its wider aim is the environment protection. The objective of the Directive is further defined more precisely in Article 1 of the EPBD. It consists of promoting the improvement of the energy performance of buildings within the Community, taking into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness. Providing fiscal and financial incentives shall help in implementing the EPBD and achieving its aims. The costs of implementing the EPBD's requirements can be difficult to bear by certain building owners. Without some financial help an effective implementation of the EPBD and in consequence its contribution to environmental protection,

¹¹ Emphasis added

¹² Paul Craig, Grainne de Burca 'EU law Text, Cases and Materials', third edition, Oxford University Press, 2003, page 372.

compliance with the Kyoto Protocol and increasing the Community ability to influence the global energy supply¹³ can be compromised.

The amendment proposed by the European Parliament does not impose any excessive burden on the individual. On the contrary, it aims at helping individuals to face any financial needs resulting from the EPBD's implementation.

Therefore, potentially on this basis it could be concluded that the measure is compliant with the principle of proportionality.

However, one must also take into account the above quoted 'Protocol on the application of the principles of subsidiarity and proportionality'. It could be considered that it marks a new approach in drafting of Community legislation by using minimum rather than total harmonization. In the light of the Protocol, it could be argued that the financial and fiscal requirements proposed by the European Parliament might be judged to be too detailed, leaving too little scope for the national decision. On the other hand, only general types of measures are listed in the discussed proposals for the EPBD, while all further details on their implementation are left for the Member States' decision. Also the choice of measure from among the measures listed in the Annex III b is left to Member States, which complies with the Protocol's requirement to provide Member States with alternative ways to achieve the objectives of the measure.

Therefore, taking into account the above arguments, the amendment proposed by the European Parliament does comply with the Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam and its rejection by the European Commission is not justified. Above arguments provide also justification that the measure is appropriate and subject to the need for proper enforcement (other requirements under recital 8 of the Protocol).

It is also worth to compare the proposed new provisions of the EPBD with similar provisions in other Directives listed in Annex II of this legal briefing.

Examples quoted in Annex II to this legal briefing can be divided into three groups:

- **The first group**¹⁴ consists of provisions containing details of how the Community rules are to be implemented by the Member States (in some cases going into detail on matters related to national competencies), giving the choice between two or more options. Only one of them, Article 5.1 sub-paragraph 2 of the Energy End-Use and Energy Services Directive is drafted in a way very similar to the EPBD proposal (however, it does not concern the fiscal and financial measures).
- **The second group**¹⁵ also leaves Member States the choice of implementation measures but does it by using the term 'may' and therefore opens the Member States' choice more than in the first group.
- **The third group**¹⁶ is in some aspects the closest to the situation of Article 9.a.1 and Annex III b of the EPBD:

¹³ See also above arguments concerning subsidiarity.

¹⁴ Art. 5.2 of the Directive 2002/96/EC, as amended, Art. 8.2 sub-paragraph 1 of the Directive 2002/96/EC, as amended, Art. 5.1 sub-paragraph 2 of the Directive 2006/32/EC, as amended

¹⁵ Art. 8.2 sub-paragraph 2 of the Directive 2002/96/EC, as amended, Art. 14.2 of the Directive 92/43/EEC, as amended, Art. 4.2 of the Directive 94/62/EC, as amended

- it provides a wide list of implementation measures from which Member States shall select at least one (the wording which is the closest to the one of EPBD proposal),
- it refers to the way in which Member States choose to spend their national revenues (similarly to the EPBD proposal, going into detail on matters considered as Member States' internal affairs) and
- it lists fiscal and financial support policies and domestic regulatory policies as the possible way of the implementation by Member States (fiscal and financial measures are discussed further).

All the three groups contain provisions quite similar to the European Parliament's proposal for the EPBD as they also propose to Member States the way of implementing the Directive but, at the same time, leave them certain choices (to a greater or lesser degree) between the proposed ways of implementation. The drafting of some of them is even very close to the proposed drafting of Article 9.a.1 and Annex III b of the EPBD.¹⁷

The main difference between the majority of the above quoted provisions (except from the one included in Article 10.3 of the Emissions Trading Directive) and the European Parliament's proposal to the EPBD lies in the fact that the financial and fiscal measures proposed under the EPBD are traditionally considered by Member States to belong to their national competence. Their sensitivity on this issue might cause the rejection of this provision.

The Emissions Trading Directive (the ETS Directive) is the only one which contains (in its Art. 10.3 quoted above) a reference to the Member States' fiscal or financial support policies and domestic regulatory policies, and therefore, the areas traditionally considered to be part of the national competence. As such a reference was already accepted in the past by the legislator, it could be accepted also in the case of the EPBD. However, the difference is that according to the proposals in the EPBD Member States must choose two of the measures (which are all politically sensitive and considered to be Member States' national competence), while in the ETS Directive a recourse to the use of national measures is only one of the possible options. Moreover, the ETS Directive refers only to fiscal and financial support policies or domestic regulatory policies which leverage financial support, while the EPBD contains a much wider and more detailed list of national fiscal and financial measures to be implemented by the Member States.

This shows that, in spite of important similarities between the proposed Article 9.a.1 and Annex III b of the EPBD and Article 10.3 of the ETS Directive, there are also some differences between them. These differences relate to issues that are politically sensitive.

Therefore, the comparison of the level of detail between Article 9.a.1 and Annex III b and similar provisions in other EC legal acts shows that in the legal terms the provisions proposed under the EPBD can be argued to be acceptable while in political terms they can be challenged on the basis that they do not correspond exactly to previous similar legislation.

The possible solution to that could be to change the proposed text slightly. In this case, the Directive should impose on Member States a strong obligation to establish and implement fiscal and financial measures of their choice but compliant with conditions established in the Directive. That would give the Commission power to pursue Member States if they do not implement these provisions correctly (under the drafting currently proposed by the European

¹⁶ Art. 10.3 of the Directive 2003/87/EC, as amended

¹⁷ Art. 5.1 sub-paragraph 2 of the Directive 2006/32/EC, as amended

Parliament, the Commission has enforcement powers in relation to the content of the national action plans but not in relation to the actual implementation of this content). If the first part of the proposed Article 9.a.1 imposes such a strong obligation, the second part, more difficult for Member States to accept, could be softened so that the list included in Annex III b is a proposal of measures leaving Member States also the choice of using other measures (i.e. make the list of measures non-exhaustive). This could be done by using the term ‘may’ or ‘shall consider’ when proposing particular solutions to be used by the Member States. However, this is just a proposal of a possible solution which, depending on further discussions, is likely to be developed or modified.

2. Competence/Powers

Article 5.1 of the EC Treaty provides that

‘the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.’

The Community competence arises from the relevant EC Treaty provisions (the particular Treaty provisions allow to adopt Community legislation in particular areas). For different areas of policy, the Community competence arises from different Treaty provisions.

In the area of VAT and other taxes mentioned in Annex III b of the EPBD¹⁸, the main aim of the Community legislation is the harmonization necessary for proper functioning of the internal market, the elimination of any distortions to the internal market (Article 93 of the EC Treaty) or protection of the environment (Article 175.2 of the EC Treaty). In all these cases the aim of the Community is to set common rules at Community level.

The fiscal and financial measures proposed under Article 9.a.1 and Annex III b of the EPBD also have the aim of protecting the environment but they do not aim at creating one set of Community rules. Instead, they ask Member States to establish national legislation in particular areas supporting the relevant Community law. On the other hand, taking into account the way Article 175.2 of the EC Treaty is drafted, the environmental fiscal measures can also have the aim different than establishing one set of common rules at the Community level. One should not forget that it depends on the political will how detailed the Community legislation is and should think of details of some Community implementing measures.

In spite of this last argument I would conclude that, the Community has a certain competence in this area but there are also grounds for arguing that this competence does not correspond to what is proposed under Article 9.a.1 and Annex III b of the EPBD (these provisions do not aim at establishing one set of common rules at the Community level).

The other measures proposed under the above mentioned EPBD provisions, e.g. direct subsidies, grant schemes etc., clearly do not fall under the Community competence (although some Community rules are applicable to them, e.g. State aid rules applicable to low interest loans, subsidized loan schemes and grant schemes).

¹⁸ As stated already above, Annex III b lists the following national measures: VAT and other tax reductions, direct subsidies and subsidized loan schemes or low interest loans, grant schemes, loan guarantee schemes, requirements on or agreements with energy suppliers to offer financial assistance to all categories of consumers

This discussion could suggest that the European Parliament's proposal is not acceptable (except from fiscal measures in relation to which the contrary arguments can also be raised) as it is interfering in an area which does not belong to the competence of the European Community but is purely the one of the Member States.

However, although the EC Treaty requires that the Community acts within the limits of the Treaty, it is established that it can also act in certain areas which are not the Community competence but result from the implied powers under the particular Treaty articles. As argued by T.C.Hartley in 'The Foundations of European Community Law'¹⁹, the principle of implied powers can be formulated in wide or narrow terms:

'According to the narrow formulation, the existence of a given power implies also the existence of any other power which is reasonably necessary for the existence of the former; according to the wide formulation, the existence of a given objective or function implies the existence of any power reasonably necessary to attain it.'

Although an argument that the existence of financial and fiscal measures is reasonably necessary for the existence of the Directive on the energy performance of buildings, might be difficult to defend (narrow formulation) it is quite clear that the financial and fiscal measures are necessary for attaining the objective laying behind the EPBD (wide formulation)²⁰.

Moreover, the provisions of the proposed Article 9.a.1 and Annex III b have the character similar to many implementing measures adopted at the Community level requiring Member States to, e.g. appoint specific authorities or carry out regular inspections etc.

Therefore, in the light of this wide formulation of the Community implied powers and comparison with other implementing provisions in EC legal acts, integration within the EPBD of the financial and fiscal measures proposed by the European Parliament is possible.

Justification that the measures proposed by the European Parliament are indeed necessary is provided in this legal briefing in the section on subsidiarity and proportionality.

On the other hand, what can be difficult to overcome is the Member States' conviction that financial and fiscal measures as proposed under the EPBD belong to their national competence and should not be covered in any way by the Community law.²¹

3. State Aid

According to Article 87.1 of the EC Treaty which provides the State aid definition:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be compatible with the common market.'

¹⁹ T.C.Hartley, 'The Foundations of European Community Law', Oxford University Press, 4th edition, 1998, page 102.

²⁰ For more information see also the section on subsidiarity and proportionality.

²¹ Issue discussed also in the section on proportionality and in the section entitled: 'Whether the proposed text goes beyond what is possible under the applicable Articles of the Treaty – Character of the Directive – compliance with Article 249 of the EC Treaty'

One of the necessary elements for State aid to be considered incompatible with the common market is that it affects trade between Member States. Measures requested under the proposed Article 9.a.1 of the EPBD in principle should not affect trade between Member States as they apply to buildings, leaving their owners the choice of materials and undertakings. That means that owners can choose between national and foreign service or product providers and there are no grounds for considering that the competition between different Member States could be distorted.

Another necessary element for State aid to be considered incompatible with the common market is that State aid favours certain undertakings or the production of certain goods. This is not the case for measures requested under Article 9.a.1 and Annex III b. To comply with the State aid principles, fiscal and financial incentives should not be granted to enterprises providing building services or producing the building materials. They should be granted to the buildings' owners, who have a free choice between national and foreign service or product provider. In case a building belongs to an enterprise, it is necessary to assess whether the financial incentive could favour this undertaking in comparison to others and, in consequence, affect trade between Member States. It is difficult to imagine situations when incentives aiming at improving energy efficiency of buildings, having very specific aim of energy savings, could significantly improve the situation of the company on the market in comparison to others and affect internal EU trade.

In consequence there are no grounds for arguing that the proposed Article 9.a.1 is not compatible with the EC rules on State aid. State aid rules are simply not applicable to this case.

4. Whether the proposed text goes beyond what is possible under the applicable Articles of the Treaty

Two issues need to be considered to assess whether the proposed text goes beyond what is possible under the applicable Articles of the Treaty:

- whether it is appropriate to include the obligations such as of Article 9.a.1 and Annex III b of the EPBD into the Community directive (compliance with Article 249 of the EC Treaty)

and

- whether the fact that the EPBD is based on Article 175(1) of the EC Treaty could be the reason not to introduce into its scope fiscal and financial provisions as proposed in Article 9.a.1 and Annex III b of the EPBD.

a. Character of the directive – compliance with Article 249 of the EC Treaty

Article 249 of the EC Treaty provides that:

'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method.'

The comparison of this Article and the proposal for Article 9.a.1 and Annex III b of the EPBD shows that the formulation of the proposal for the EPBD does not give Member States complete flexibility as to the implementation of the Directive. On the other hand, it does not restrict such flexibility completely as it leaves them a choice of measures from the wider list as well as decision on details of

implementation of these chosen measures, which corresponds to the requirements of Article 249 of the EC Treaty that the Directive shall leave to the national authorities the choice of form and method.

Further arguments useful for assessing compliance with Article 249 of the EC Treaty are discussed in detail in the section on the proportionality principle (as they are common for both issues).

In the view of all arguments discussed in this section as well as in section on the proportionality principle: in the legal terms, it can be argued that it is acceptable to include in the EPBD the proposed fiscal and financial provisions because they respect the flexibility required by the nature of the directive and because similar provisions were already used in the past. However, in political terms this argument can be challenged as the previous legislation does not correspond exactly to the proposed Article 9.a.1 and Annex III b. It is also likely that such a proposal will meet strong political opposition.

There is one more argument which might arise in relation to the proposed provisions of the EPBD and the character of the Directive. This element was also already mentioned before and concerns the compliance with the 'Protocol on the application of the principles of subsidiarity and proportionality' attached to the Treaty of Amsterdam.²²

It could be argued by the opponents that the level of detail of any post-Amsterdam legislation should be less than that of the earlier legislation. However, this argument can be rejected on the basis of the EC post-Amsterdam legislation²³ quoted in Annex II to this legal briefing, which contains quite detailed provisions.

Therefore, there is no conflict between the above mentioned Protocol and Article 249 of the EC Treaty. However, the proposal could well meet strong political opposition.

b. Legal basis

The fact that the EPBD is based on Article 175.1 of the EC Treaty could be argued to be the reason not to include into its scope fiscal and financial provisions as going beyond what is possible under Article 175.1 (Article 175.1 constitutes the legal basis for the EPBD).

Such an argument would not be correct. As stated already above, the measures proposed by the European Parliament in Article 9.a.1 and Annex III b are not resulting directly from the particular Treaty provision but from the EC implied powers. Therefore, the legal basis for Article 9.a.1 and Annex III b is the same as for the whole Directive - it arises indirectly from Article 175.1 of the EC Treaty.

Moreover, it has been confirmed by the European Court of Justice that a single legal basis is sufficient even if the measure has also incidental effects on other policies. That means that the legal act based on Article 175.1, as this is the case for the EPBD, can also contain elements not falling under this legal basis if these elements have only incidental effect on other policies.²⁴

²² Discussed also above in the section on the proportionality principle

²³ Treaty of Amsterdam was signed in 1997 and entered into force in 1999

²⁴ The case: *European Parliament v Council* (C-164 & 165/97): (1999) E.C.R. I – 1139, para. 14.



In case C-155/91 concerning the legal basis for Directive 91/156, the ECJ stated that even though the waste is a product, the Directive's primary objective was the protection of the environment and it only dealt in an accessory way with aspects of the internal market.²⁵ The same reasoning applies to the case discussed in this paper: the primary objective of the EPBD is the protection of the environment and the fiscal and financial measures proposed to be included in its scope have the same objective.

For the reasons stated above, the unanimity voting applicable to taxation issues according to Articles 93 and 175.2 of the EC Treaty does not apply in case of the proposed Article 9.a.1 and Annex III b.

In the view of these arguments, the fact that the EPBD is based on Article 175.1 of the EC Treaty cannot be the reason for not introducing into its scope fiscal and financial provisions. In consequence, the proposed Article 9.a.1 and Annex III b of the EPBD do not go beyond what is possible under Article 175.1 of the EC Treaty (legal basis of the EPBD).

However, expecting the political opposition to these provisions, the possible alternative drafting is discussed in the section on the proportionality principle of this legal briefing.

III. ARTICLE 9.a.3 OF THE EPBD: THE EUROPEAN COMMISSION'S OBLIGATION TO BRING LEGISLATIVE PROPOSALS ON COMMUNITY FINANCIAL INSTRUMENTS TO SUPPORT THE IMPLEMENTATION OF THE EPBD

In this section of the briefing it will be discussed whether the proposed Article 9.a.3 of the EPBD requesting the European Commission to bring legislative proposals on Community financial instruments to support the implementation of the EPBD is acceptable from the legal point of view. The following main issues will be discussed in this chapter:

- 1: whether it is legally acceptable to invoke in the EPBD potential new legislative activities under other specific legislation
- 2: whether it is possible to include in the EPBD (based on Article 175.1 of the EC Treaty) provisions falling under other legal bases and whether including in the EPBD provisions of Article 9.a.3 would imply unanimity vote on the Directive (instead of the qualified majority)

1. Legality to invoke in the Directive potential new legislative activities under other specific legislation

The proposal for the new Article 9.a.3 of the EPBD imposes on the Commission an obligation not only to bring forward appropriate legislative proposals for the Community financial instruments to support the implementation of the EPBD but also that these legislative proposals consider the listed measures, such as the ERDF Regulation, the new Energy Efficiency Fund (to be integrated into the programming of other Community structural assistance), Community funds to support research and development and reduced VAT for services and products.

²⁵ The other case confirming the above judgement is the case: *European Parliament v. Council* (C-187/93): (1994) E.C.R. I – 1139.

The first part of Article 9.a.3, containing general obligations to bring forward appropriate legislative proposals for the Community financial instruments to support the implementation of the EPBD, drafted in general terms, should not cause contestations. However, the second part, requiring that the Commission's proposals considers indicated measures, could raise some concerns.

First of all it is important to stress that Article 9.a.3 does not make any amendments to these Community legal acts. It establishes a requirement on the Commission to find solutions for financing the EPBD through revision (sometimes compulsory and already foreseen²⁶) or adoption of new legislative acts into which might possibly be included provisions on the financing of the EPBD. As it does not amend these acts but only considers their revision, subject to a previous impact assessment, there should be no legal obstacle to it.

However, the drafting of Article 9.a.3 of the EPBD is not very clear. On one hand it can be considered, as stated by the European Commission, to be a request or an announcement of the potential new legislative activities under other specific legislation (Article 9.a.3 states that *the legislative proposals shall consider* and not that *the Commission shall consider the legislative proposals*). On the other, the use of the word 'consider' and indication of the necessity to carry out an impact assessment, allows assuming that the Commission has some flexibility as to whether the requested amendments should be included in the indicated legal acts. In that case, the Commission would only have to show that it took proposed amendments into account but be free to include into legislation only the ones that it considers justified and which successfully pass impact assessment.

There is already at least one example of a similar proposal for further legislation, which is Article 8.4 of the Habitats Directive.²⁷ This Article foresees that

(...) the Commission shall adopt, having regard to the available sources of funding under the relevant Community instruments (...), a prioritized action framework of measures involving co-financing to be taken when the site has been designated as a special area of conservation.

There are two main differences between Article 8.4 of the Habitats Directive and Article 9.a.3 of the EPBD.

The first main difference is the context under which the provisions were adopted. Co-financing under the Habitats Directive is foreseen in order not to impose an excessive financial burden on certain Member States given the uneven distribution of priority habitats and species throughout the Community and the fact that the 'polluter pays' principle can have only limited application in the special case of nature conservation. In the context of the EPBD, inequality of Member States is not an issue and is not considered to be the reason for adopting additional Community financial instruments. On the contrary, the character of the financial assistance (on one hand, Structural Funds, on the other research and development) makes one think that it should be made available for all the EU Member States. However, the limited application (or even non application) of the 'polluter pays' principle appears in this case too.

The second main (and the most important) difference is that the measures mentioned in the EPBD are more detailed and they indicate to the Commission legal instruments which could be possibly amended to provide Community financing and support the implementation of the Directive. They

²⁶ See above: Chapter I Introduction and footnotes 5 and 6.

²⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7, as amended



contain also some details of particular amendments to be considered. However, as indicated above, the language of this provision is rather unclear.

It must be noted that including such a precise provision on amendments to other Community legal acts belonging to different policy area is not a frequent practice. On the other hand, it is common that the Community directives or regulations ask the Commission for new legislative proposals implementing legal acts. One of such examples is Article 16 of the Water Framework Directive²⁸, quoted in the Annex I to this legal briefing. In that respect it must be stressed that this Article refers to creation of new implementing legislation based on the basic legal act.

The reason for not including in the Directive detailed provisions concerning the revision of the other Community act may be in this case legislators' will not to pre-determine the solutions in advance at the moment when it does not yet have all elements allowing full assessment of whether a proposed solution is indeed possible (decisions concerning financing might require assessment of existing financial assets and of the EU budget as a whole and therefore, might need extensive negotiations between EU Member States). However, this is a political argument, not justified from the legal perspective. Moreover, some Community acts define even the financial envelope for the particular policy for the whole programming period.²⁹ The proposal by the European Parliament (although not completely clear) does not go that far.

The arguments that the provisions proposed in Article 9.a.3 should be included in a separate act, dealing only with the financial aspects of the Directive, are not convincing. Firstly, the provision proposed by the European Parliament is only general and leaves details to be defined by other Community policies. Its aim is to ensure the EPBD's implementation through its integration into other relevant Community policies³⁰. Establishing a separate legal act on EPBD financing does not seem realistic (would the Commission include EPBD implementation into its priorities and create a separate service dealing with the EPBD projects? would the financing be high enough for the Commission to envisage such a possibility?). Secondly, it is not possible to compare the implementation of the EPBD with other Community sectors such as, for example, TEN-T (Trans-European Transport Networks). It is true that in the TEN-T sector there is separate legislation establishing the general guidelines for the TEN-T policy³¹ and a separate act on financial aspects of the policy.³² The second one regulates issues such as e.g. forms and methods of financial aid, eligibility of projects, selection of projects etc. However, the TEN-T constitutes a Community policy largely implemented through Community project funding (project funding constitutes a major part of this policy implementation). This cannot be compared with the EPBD unless the Commission plans to make EPBD a separate policy that financing is managed independently from Structural Funds, research and development funding etc.

²⁸ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1, as amended.

²⁹ e.g. Regulation (EC) 680/2007 of the European Parliament and the of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks, OJ L 162, 22.06.2007, p. 1; Regulation (EC) No 1638/2006 of the European Parliament and the of the Council of 24 October 2006 laying down general provisions establishing a European Neighborhood and Partnership Instrument, OJ L 310, 9.11.2006, p. 1.

³⁰ This is compliant with Article 6 of the EC Treaty that states that 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

³¹ Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network, OJ L 228, 9.9.1996, p. 1-104

³² Regulation (EC) 680/2007 of the European Parliament and the of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks, OJ L 162, 22.06.2007, p. 1

2. Legal basis and voting majority

As the proposed Article 9.a.3 does not amend any Community acts, the question on legal basis does not need to be assessed (there is no need to discuss any further whether the legal basis for the proposed measures would be the same as for the rest of the Directive and whether for the Directive adopted by the qualified majority under Article 175.1 EC Treaty, it is possible to adopt measures falling under other legal basis requiring unanimity vote). The same goes for a question of choice between unanimity and qualified majority (Community measures on VAT require unanimity while the environmental legislation is, except few exceptional cases, adopted by the qualified majority).

In any case, these issues are discussed in the section of this legal briefing concerning legal basis for Article 9.a.1 and Annex III b of the EPBD³³.

3. Conclusion

As presented above, from the legal point of view there are no legal obstacles to include a general provision requiring the Commission to bring forward appropriate proposals for the Community financial instruments supporting the implementation of the EPBD. On the other hand, including detailed provisions is likely to raise political objections.

At the same time, this Directive is the best place to include a requirement for the Commission to make proposals on Community financial instruments to support the implementation of the EPBD, although the wording of the provision proposed by the European Parliament could be suggested to be reconsidered. In that respect it could be suggested for example to replace *‘These proposals shall consider the following measures...’* by *‘The following measures shall be considered by the Commission in the process of preparing legislative proposals...’* Such a wording would leave the Commission the open choice of legislative acts to be considered and would also clarify the text (the present wording is quite confusing). The first sub-paragraph of Article 9.a.3 does not need and should not be amended.

IV. CONCLUSION

Following the above reasoning, it appears that the European Parliament’s proposal to include into the EPBP the fiscal and financial provisions as proposed in Articles 9.a.1, 9.a.3 and Annex III b is acceptable from the legal point of view although it can be also expected that it might be opposed by political arguments.

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³³ section: II.4.b of this legal briefing.

ANNEX I

Article 16 of the Directive 2000/60/EC (Water Framework Directive)³⁴:

Strategies against pollution of water

1. *The European Parliament and the Council shall adopt specific measures against pollution of water by individual pollutants or groups of pollutants presenting a significant risk to or via the aquatic environment, including such risks to waters used for the abstraction of drinking water. For those pollutants measures shall be aimed at the progressive reduction and, for priority hazardous substances, as defined in Article 2(30), at the cessation or phasing-out of discharges, emissions and losses. Such measures shall be adopted acting on the proposals presented by the Commission in accordance with the procedures laid down in the Treaty.*

2. *The Commission shall submit a proposal setting out a list of priority substances selected amongst those which present a significant risk to or via the aquatic environment. Substances shall be prioritised for action on the basis of risk to or via the aquatic environment, identified by:*

(a) risk assessment carried out under Council Regulation (EEC) No 793/93 (1), Council Directive 91/414/EEC (2), and Directive 98/8/EC of the European Parliament and of the Council (3), or

(b) targeted risk-based assessment (following the methodology of Regulation (EEC) No 793/93) focusing solely on aquatic ecotoxicity and on human toxicity via the aquatic environment.

When necessary in order to meet the timetable laid down in paragraph 4, substances shall be prioritised for action on the basis of risk to, or via the aquatic environment, identified by a simplified risk-based assessment procedure based on scientific principles taking particular account of:

- evidence regarding the intrinsic hazard of the substance concerned, and in particular its aquatic ecotoxicity and human toxicity via aquatic exposure routes, and*
- evidence from monitoring of widespread environmental contamination, and*
- other proven factors which may indicate the possibility of widespread environmental contamination, such as production or use volume of the substance concerned, and use patterns.*

3. *The Commission's proposal shall also identify the priority hazardous substances. In doing so, the Commission shall take into account the selection of substances of concern undertaken in the relevant Community legislation regarding hazardous substances or relevant international agreements.*

4. *The Commission shall review the adopted list of priority substances at the latest four years after the date of entry into force of this Directive and at least every four years thereafter, and come forward with proposals as appropriate.*

5. *In preparing its proposal, the Commission shall take account of recommendations from the Scientific Committee on Toxicity, Ecotoxicity and the Environment, Member States, the European Parliament, the European Environment Agency, Community research programmes, international organisations to which the Community is a party, European business organisations including those representing small and medium-sized enterprises, European environmental organisations, and of other relevant information which comes to its attention.*

6. *For the priority substances, the Commission shall submit proposals of controls for:*

- the progressive reduction of discharges, emissions and losses of the substances concerned, and, in particular*
- the cessation or phasing-out of discharges, emissions and losses of the substances as identified in accordance with paragraph 3, including an appropriate timetable for doing so. The timetable shall not exceed 20 years after the adoption of these proposals by the European Parliament and the Council in accordance with the provisions of this Article.*

In doing so it shall identify the appropriate cost-effective and proportionate level and combination of product and process controls for both point and diffuse sources and take account of Community-wide uniform emission limit values for process controls. Where appropriate, action at Community level for process controls may be established on a sector-by-sector basis. Where product controls include a review of the relevant authorisations issued under Directive 91/414/EEC and Directive

³⁴ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1, as amended

98/8/EC, such reviews shall be carried out in accordance with the provisions of those Directives. Each proposal for controls shall specify arrangements for their review, updating and for assessment of their effectiveness.

7. The Commission shall submit proposals for quality standards applicable to the concentrations of the priority substances in surface water, sediments or biota.

8. The Commission shall submit proposals, in accordance with paragraphs 6 and 7, and at least for emission controls for point sources and environmental quality standards within two years of the inclusion of the substance concerned on the list of priority substances. For substances included in the first list of priority substances, in the absence of agreement at Community level six years after the date of entry into force of this Directive, Member States shall establish environmental quality standards for these substances for all surface waters affected by discharges of those substances, and controls on the principal sources of such discharges, based, inter alia, on consideration of all technical reduction options. For substances subsequently included in the list of priority substances, in the absence of agreement at Community level, Member States shall take such action five years after the date of inclusion in the list.

9. The Commission may prepare strategies against pollution of water by any other pollutants or groups of pollutants, including any pollution which occurs as a result of accidents.

10. In preparing its proposals under paragraphs 6 and 7, the Commission shall also review all the Directives listed in Annex IX. It shall propose, by the deadline in paragraph 8, a revision of the controls in Annex IX for all those substances which are included in the list of priority substances and shall propose the appropriate measures including the possible repeal of the controls under Annex IX for all other substances.

All the controls in Annex IX for which revisions are proposed shall be repealed by the date of entry into force of those revisions.

11. The list of priority substances of substances mentioned in paragraphs 2 and 3 proposed by the Commission shall, on its adoption by the European Parliament and the Council, become Annex X to this Directive. Its revision mentioned in paragraph 4 shall follow the same procedure.

ANNEX II

Article 5.2(b) of the Directive 2002/96/EC (WEEE)³⁵:

2. For WEEE from private households, Member States shall ensure that by the 13 August 2005:

(...)

(b) when supplying a new product, distributors shall be responsible for ensuring that such waste can be returned to the distributor at least free of charge on a one-to-one basis as long as the equipment is of equivalent type and has fulfilled the same functions as the supplied equipment. **Member States may depart from this provision provided they ensure that returning the WEEE is not thereby made more difficult for the final holder and provided that these systems remain free of charge for the final holder. Member States making use of this provision shall inform the Commission thereof;**³⁶

Article 8.2 of the Directive 2002/96/EC (WEEE)³⁷:

2. For products put on the market later than 13 August 2005, each producer shall be responsible for financing the operations referred to in paragraph 1 relating to the waste from his own products. **The producer can choose to fulfill this obligation either individually or by joining a collective scheme.**³⁸

Member States shall ensure that each producer provides a guarantee when placing a product on the market showing that the management of all WEEE will be financed and that producers clearly mark their products in accordance with Article 11(2). This guarantee shall ensure that the operations referred to in paragraph 1 relating to this product will be financed. **The guarantee may take the form of participation by the producer in appropriate schemes for the financing of the management of WEEE, a recycling insurance or a blocked bank account.**³⁹

The costs of collection, treatment and environmentally sound disposal shall not be shown separately to purchasers at the time of sale of new products.

Article 14 of the Directive 92/43/EEC (Habitats Directive)⁴⁰:

1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. **Such measures may also include in particular**⁴¹:

- regulations regarding access to certain property,
- temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,
- regulation of the periods and/or methods of taking specimens,
- application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,
- establishment of a system of licences for taking specimens or of quotas,
- regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,

³⁵ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE); OJ L 37, 13.2.2003, p.24

³⁶ Emphasis added

³⁷ Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE); OJ L 37, 13.2.2003, p.24

³⁸ Emphasis added

³⁹ Emphasis added

⁴⁰ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206, 22.7.1992, p.7, as amended.

⁴¹ Emphasis added

- breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens of the wild,
- assessment of the effect of the measures adopted.

Article 4.1 of the Directive 94/62/EC (Directive on Packaging and packaging waste)⁴²:

1. Member States shall ensure that, in addition to the measures to prevent the formation of packaging waste taken in accordance with Article 9, other preventive measures are implemented.

Such other measures may consist of⁴³ national programmes, projects to introduce producer responsibility to minimise the environmental impact of packaging or similar actions adopted, if appropriate in consultation with economic operators, and designed to bring together and take advantage of the many initiatives taken within Member States as regards prevention. They shall comply with the objectives of this Directive as defined in Article 1(1).

Article 10.3 of the Directive 2003/87/EC (Emissions Trading Directive):

3. Member States shall determine the use of revenues generated from the auctioning of allowances. At least 50 % of the revenues generated from the auctioning of allowances referred to in paragraph 2, including all revenues from the auctioning referred to in paragraph 2, points (b) and (c), or the equivalent in financial value of these revenues, should be used for one or more of the following⁴⁴:

(a) to reduce greenhouse gas emissions, including by contributing to the Global Energy Efficiency and Renewable Energy Fund and to the Adaptation Fund as made operational by the Poznan Conference on Climate Change (COP 14 and COP/MOP 4), to adapt to the impacts of climate change and to fund research and development as well as demonstration projects for reducing emissions and for adaptation to climate change, including participation in initiatives within the framework of the European Strategic Energy Technology Plan and the European Technology Platforms;

(b) to develop renewable energies to meet the commitment of the Community to using 20 % renewable energies by 2020, as well as to develop other technologies contributing to the transition to a safe and sustainable low-carbon economy and to help meet the commitment of the Community to increase energy efficiency by 20 % by 2020;

(c) measures to avoid deforestation and increase afforestation and reforestation in developing countries that have ratified the international agreement on climate change, to transfer technologies and to facilitate adaptation to the adverse effects of climate change in these countries;

(d) forestry sequestration in the Community;

(e) the environmentally safe capture and geological storage of CO₂, in particular from solid fossil fuel power stations and a range of industrial sectors and subsectors, including in third countries;

(f) to encourage a shift to low-emission and public forms of transport;

(g) to finance research and development in energy efficiency and clean technologies in the sectors covered by this Directive;

(h) measures intended to increase energy efficiency and insulation or to provide financial support in order to address social aspects in lower and middle income households;

(i) to cover administrative expenses of the management of the Community scheme.

⁴² European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365, 31.12.1994, p.10, as amended

⁴³ Emphasis added

⁴⁴ Emphasis added

Member States shall be deemed to have fulfilled the provisions of this paragraph if they have in place and implement fiscal or financial support policies, including in particular in developing countries, or domestic regulatory policies, which leverage financial support, established for the purposes set out in the first subparagraph and which have a value

equivalent to at least 50 % of the revenues generated from the auctioning of allowances referred to in paragraph 2, including all revenues from the auctioning referred to in paragraph 2, points (b) and (c).⁴⁵

(...)

Article 5.1 sub-paragraph 2 of the Directive 2006/32/EC (Energy End-Use and Energy Services Directive)⁴⁶:

1. (...)

Member States shall ensure that energy efficiency improvement measures are taken by the public sector, focussing on cost-effective measures which generate the largest energy savings in the shortest span of time. Such measures shall be taken at the appropriate national, regional and/or local level, and may consist of legislative initiatives and/or voluntary agreements, as referred to in Article 6(2) (b), or other schemes with an equivalent effect. **Without prejudice to national and Community public procurement legislation:**

— **at least two measures shall be used from the list set out in Annex VI;⁴⁷**

— Member States shall facilitate this process by publishing guidelines on energy efficiency and energy savings as a possible assessment criterion in competitive tendering for public contracts.

(...)

Annex VI of the Directive 2006/32/EC (Energy End-Use and Energy Services Directive):

Without prejudice to national and Community public procurement legislation, **Member States shall ensure that the public sector applies at least two requirements from the following list⁴⁸** in the context of the exemplary role of the public sector as referred to in Article 5:

(a) requirements concerning the use of financial instruments for energy savings, including energy performance contracting, that stipulate the delivery of measurable and pre-determined energy savings (including whenever public administrations have outsourced responsibilities);

(b) requirements to purchase equipment and vehicles based on lists of energy-efficient product specifications of different categories of equipment and vehicles to be drawn up by the authorities or agencies referred to in Article 4(4), using, where applicable, minimised life-cycle cost analysis or comparable methods to ensure cost-effectiveness;

(c) requirements to purchase equipment that has efficient energy consumption in all modes, including in standby mode, using, where applicable, minimised life-cycle cost analysis or comparable methods to ensure cost-effectiveness;

(d) requirements to replace or retrofit existing equipment and vehicles with the equipment listed in points (b) and (c);

(e) requirements to use energy audits and implement the resulting cost-effective recommendations;

(f) requirements to purchase or rent energy-efficient buildings or parts thereof, or requirements to replace or retrofit purchased or rented buildings or parts thereof in order to render them more energy-efficient.

⁴⁵ Emphasis added

⁴⁶ Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, OJ L 114, 27.4.2006, p.64, as amended

⁴⁷ Emphasis added

⁴⁸ Emphasis added