

COMMISSION OF THE EUROPEAN COMMUNITIES

SEC(93) 331 final - COD 436

Brussels, 10.03.1994

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189b(2) of the EC Treaty

**COMMON POSITION OF THE COUNCIL ON THE PROPOSAL FOR A
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
ON PACKAGING AND PACKAGING WASTE**

1. PROCEDURAL ASPECTS

- The proposal (COM (92) 278 final-SYN 436 of 15 July 1992) was presented to the Council and European Parliament (cooperation procedure under Article 100A of the Treaty) on 24 August 1992 and published in the Official Journal on 12 October 1992 (O.J.C. 263).
- The European Parliament voted in its first reading during the plenary session of 21-25 June 1993. The opinion was published in the Minutes of the sitting of 23 June 1993 (Document PE 173.750, PV 17).
- The Commission formally adopted the amended proposal (COM (93) 416 final-SYN 436 of 9 September 1993) which was transmitted to the Council on 10 September 1993 and published in the Official Journal on 21 October 1993 (O.J.C. 285).
- The common position of the Council was formally adopted on 4.3.1994.

2. SUBJECT OF THE DIRECTIVE

This Directive covers all packaging placed on the market in the Community and all packaging waste, and aims to harmonise national measures concerning the management of packaging and packaging waste, in order to

- provide a high level of environmental protection
- to ensure the functioning of the internal market.

The Directive includes specific articles on preventive measures and re-use systems and sets quantitative targets for recovery and recycling of packaging waste.

Member States shall take the necessary measures to establish specific return, collection and recovery systems in order to reach the objectives of the Directive. In compliance with the principle of subsidiarity Member States are free to develop their own management schemes which have to be in conformity with Treaty provisions.

The proposal, in line with the "new approach" of Council Resolution 85/C 136/01 of 7 May 1985, lays out an important number of areas for standardisation, regarding the essential requirements on the composition of re-usable and recoverable, including recyclable, packaging.

The conditions for a marking and identification system are to be decided by the Council at a later stage.

As a monitoring mechanism for the implementation of the objectives set out in this Directive, harmonised national databases have to be established.

3. THE COMMISSION'S OBSERVATIONS ON THE COMMON POSITION

3.1 GENERAL REMARKS (1)

Amendments No.s 1, 2, 4, 11, 12, 14, 17, 18, 30, 32, 33, 35, 37, 38, 41, 44, 47, 48, 52, 57, 62, 64, 73, 79, 84, 87 and 88, included in the amended proposal (COM (93) 416 final-SYN 436), have been incorporated totally or in part into the common position.

Amendments No.s 8, 12, 13, 16, 20, 21, 22, 23, 24, 29, 34, 35 (part), 45, 46, 50, 56, 60, 65, 75, 76, 80 and 106, which had been included totally in part in the amended proposal, have not been incorporated into the common position.

The common position introduces a number of new elements, some of which take into account, directly or indirectly, some amendments of the Parliament (No.s 27, 28, 39, 42, 46, 55, 60, 68 and 77) which had not been incorporated in the amended proposal.

The Commission has endeavoured to reach as much consensus as possible, while keeping the essential objectives of the proposal, that is, to provide a high level of environmental protection, and to ensure the functioning of the internal market, and this through a long term harmonisation process in which the present targets are a first stage towards increasing convergence.

In view of the different starting situations and capacities in Member States, the Commission is convinced that the present text is an important approximation towards attaining a feasible optimal solution.

The Commission considers that the present text includes, in its basic principles, the Parliament standpoint and expects that it is a good basis for further contribution by Parliament.

The Commission shares with the Parliament the conviction on the urgent need for a harmonised Community framework which would help to solve the present situation due to disruptions resulting from unilateral actions. This situation evidences the need to act together in order to develop a balanced network of collection, recovery and recycling systems and capacities in the Community, as well as developing appropriate market outlets for the recycled materials. The proposal takes into account the need to avoid actions in some Member States which could disrupt the attainment of objectives by other Member States or third countries.

(1) The references to the articles of the proposal correspond to the text on the common position. The references to the Parliament amendments correspond to document PE 173.750.PV 17 with the minutes of the sitting of 23 June 1993. The modified proposal (COM (93) 416 final-SYN 436) incorporated directly or partially a number of these amendments.

The proposal is based on article 100A, and at the same time also provides for an exception clause to pursue higher targets in the case of compliance with a number of conditions. At the same time, in order to consider present special circumstances some countries are allowed additional time to attain the first stage targets.

The Parliament had asked for a hierarchy of management options in which prevention was the first priority and re-use the second one. The Commission when adopting the amended proposal stressed the need to keep the flexibility on packaging materials and management systems but an effort has been made to approach the basic Parliament line, and now prevention is mentioned explicitly as a first priority. While keeping the principle of equivalence between re-use, recovery and recycling a new article has been introduced on re-use systems which can be encouraged, as long as they are in conformity with the Treaty.

The Commission looks forward to close co-operation with the Parliament in order to achieve a coherent and solid piece of legislation, the need for which is felt by all actors concerned: public authorities, industry and consumers.

3.2 Specific Remarks

(A) Parliamentary amendments accepted by the Commission in the amended proposal and which have been incorporated, totally or partially, in the common position.

Due to the process of redrafting, in some cases it is the spirit of the amendment and not its exact wording which has been retained in the common position.

- Recital on prevention (Rec 7 - Am. 1)
- Recital on the function of packaging (Rec 4 - Am. 2)
- Recital on ecobalances with the indication that they should be further encouraged. (Rec. 6 - Am. 4)
- Recital on economic incentives (Rec 28 - Am. 12)
- Recital on noxious substances and heavy metals (Rec 18 - Am. 14)
- Recital on development of markets for recycled packaging materials (Rec 22 - Am. 17)
- Recital on requirements for recycled materials (Rec 23 - Am. 18)
- Amendment on the definition of prevention (Art 3.4 - Am. 30)
- Introduction of the definition on biomethanisation (Art 3.10 - Am. 32)
- Introduction of the definition on composting (Art 3.9 - Am. 33)
- Incorporation of the reference to "importers" in the definition of economic operators. (Art 3.12 - Am. 35)

- Introduction of five years recovery and recycling targets. (Art 6.1 - Am. 87 and 37)
- Promotion of the re-use of recycled packaging (Art 6.2 - Am. 38)
- Publication of measures and targets and information campaign (Art 6.4 - Am. 41).
- Mention of "waste stream" in the provision for the return, adding of "including recycling" after recovery and an explicit mention of tariffs in the non-discriminatory procedures to be established (Art 7.1 - Am. 84 and 44).
- Addition of "including recycling" after recovery (recital 19 and Art 8.2 - Am. 47 and Am. 11)
- Specific provision on marking as "lasting" when the packaging is opened (Art 8.3 - Am. 48)
- Specific mention of the directive and not only Annex II in relation to essential requirements (Art 9.1 - Am. 52)
- Indication that measures for information should be taken within two years of the entry into force of the Directive (Art 13 - Am. 57)
- Elaboration of standards for minimum content of recycled materials and for compostability (Art 10 - Am. 37 and Am. 62)
- Communication of existing provisions (Art 22.3 - Am. 64)
- New title for Annex II on essential requirements (Am. 73)
- Indication in relation to requirements for material recycling on the compliance with current standards in the European Community and of the possibility of variation depending on the type of material which the packaging is composed of (Annex II para 3(a) - Am. 79)
- Introduction of requirements for biodegradable packaging (Annex II, para 3(d) - Am. 88).

(B) Parliamentary amendments accepted, in total or in part, by the Commission in the amended proposal but not incorporated in the common position.

- Recital on protection of employment and competitiveness (Am. 8)

The Commission would have preferred to keep it but it was not retained since it was not in direct relation to the articles.

- Recital on economic instruments avoiding protectionism (Am. 12)

Only the first part of this amendment has been retained to be more in line with the final succinct version of article 15 on economic instruments.

- Recital indicating that systems should guarantee maximum possible return (Am. 13)

The first part of this amendment, that is, mention of recovery, is retained. However, due to the new formulation of Art 7, so that systems are in direct relation to the objectives of the Directive, this part of the amendment is out of context.

- Recital precisising conditions for markings (Am. 16)

The recital retained for marking is very schematic as the decisions on markings are to be taken at a later stage.

- Recital on the special nature of islands (Am. 80)

The Commission had included this element but it has not been retained as the geographical conditions are already taken into account explicitly in Art 6.5 on derogations for lower targets and implicitly in recital no. 15.

- Recital on the positive impact of economic instruments (Am. 20)

This amendment overlaps with the first part of Am. 12, which has been retained as it is more in line with the final drafting of Art 15 on economic instruments.

- Recital on Research and Development (Am. 21)

The Commission would have preferred to keep it, but it was not retained since it is not in direct relation to the articles.

- Recital on measures as part of a Community general strategy (Am. 22)

It has not been retained as it does not relate directly to the articles and some of its elements, such as the relation to a Community strategy, are already included in recital 5.

- Recital on correspondence with other legislation (Am. 23)

It was considered finally as being unnecessary from a legal point of view.

- Recital on the principle of subsidiarity (Am. 24)

It was not retained as this principle is included in the Treaty of the Union and thus is implicit in the whole Directive.

- Definition of small packaging (Art 3 - Am. 29).

It has not been retained so as to allow more flexibility for the provisions to be developed in accordance with the Committee procedure.

- Amendment to the definition of reusable packaging to indicate a "minimum" of trips and to mention explicitly the support of auxiliary products (Art 3 - Am. 34).

It has been decided to establish the definition of "re-use", instead of "re-usable", to be more in line with the definitions of recovery and recycling. The word "minimum" has been replaced by "certain" which is more neutral. The mention of auxiliary products has been deleted in order not to put too much emphasis on relatively particular cases which may be considered as being implicitly included in the general definition.

- Adding of authorities and statutory organisations to the definition of economic operators. (Art 3 - Am. 35).

This has been made in order to distinguish (in particular on Art 7.1) between private operators and public authorities.

- Indication of the particular problems relating to small and medium sized enterprises in relation to the systems to be set up (Art 7 - Am. 106 and 45).

This provision was finally deleted due to the difficulties of its practical interpretation and that the particular problems of these enterprises are already considered in Art 12 (information systems).

- Indication on the durability of markings and harmonisation of any future EC Eco-label for packaging. (Art 8 - Am. 46).

It has been decided to defer some details for further study. Relating to Eco-label, this provision has been judged as unnecessary from a legal point of view.

- Provision for the markings to enter into force simultaneously (Art 8 - Am. 50).

As it has been decided that the Council will adopt the markings at a later stage this provision is kept for a further decision.

- Member States require economic operators to provide data on their sector. (Art 12 - Am. 56).

The Commission indicated that this was a useful provision but Member States agreed that they did not need this provision to obtain the data.

A complete new draft of the article 15 on economic instruments (Am. 60).

The Commission insisted on the importance of this amendment and on the need for economic instruments to promote the objectives of the Directive. It was not possible to obtain a consensus along the lines indicated by the Parliament. Finally it was possible at least to keep the article in its original form.

The general criterion established throughout the directive has been not to repeat elements already included in the Treaty and to concentrate all notification procedures in Articles 16 and 22.

- Indication not to impede use of recovery procedures (Art 18 - Am. 65)

It was decided to keep the original formulation which is traditional in all the new-approach Directives on standardisation. At the same time it was deemed that this amendment was difficult to interpret in practice and might originate in legal disputes.

- Deletion in Annex II of the reasons to minimize the presence of hazardous substances. (Am. 75)

It was requested to reincorporate these elements in order to better justify the opportunity of the corresponding measures.

- Establishment in Annex II of individual concentration levels of heavy metals instead of the sum of concentration levels. (Am. 76).

This question was subject to an intense debate. The Commission encountered great difficulties in defending the individual limits as they were judged unrealistic. On the other hand, according to the information obtained, they correspond to strict composting standards which are not easy to justify for packaging in general. Finally it was agreed to keep for the time being in the original context which corresponds to the CONEG (Coalition of Northeastern Governors) legislation in the United States and as such is a good reference.

(C) CHANGES, (ADDITIONS, MODIFICATIONS AND DELETIONS) IN THE COMMON POSITION INTRODUCED BY THE COUNCIL WITH RESPECT TO THE AMENDED PROPOSAL

- New recital on the objectives (recital 1)

This recital is directly in line with the new formulation of Art 1.1.

- New recital mentioning that measures taken in one Member State to protect the environment should not adversely affect the ability of other Member States to achieve the objectives of the Directive (recital 2)

- Deletion of recital on packaging waste (old recital 2)

Considered unnecessary and not in direct relation to the articles.

- Amended recital on scope (recital 3)

This recital adjusts elements from old recitals 3, 4 and 22.

- Amended recital on management options (recital 5)

The new version follows directly the new formulation of Art 1.2

- New recital on re-use systems (recital 8)

This recital takes directly the elements of the new Article 5 on re-use.

- Amendment to recital on recycling (recital 9)

Old recital no. 6 has been redrafted to simplify it.

- New recital on energy recovery (recital 10)

This recital recognises the importance of energy recovery, together with recycling in order to attain the recovery targets.

- Deletion of recital on current different national provisions (old recital 7)

This recital has been considered superfluous in the general context and implicit in recital 1.

- Deletion of recital on approximation of measures (old recital 8)

This element is already taken up by recital 1.

- Deletion of recital on harmonisation of national provisions (old recital 9)

The elements are already taken up in recitals 1 and 16.

- New amended recitals on targets (recitals 11 and 12)

These recitals are in line with Art 6.1 and take the essential elements of old recitals 10 and 13 into account.

- New recital on reporting on the first phase (recital 13)
This recital incorporates elements of Art 6.3
- New recital on the exception clause for higher targets (recital 14)
This is a major new element in line with Art 6.6
- New recital on derogation for lower targets (recital 15)
This recital is in line with Art 6.5
- Deletion of recital on improving present levels of re-use, recycling and recovery (old recital 14)
This recital is no longer needed, account taken of new Art 5 and Art 6, and might be the subject of difficult legal interpretation.
- Amended recital on internal market objectives (recital 16)
This recital amends old recital 12 to be in line with new text for Art 7.1.
- Amended recital on marking (recital 17)
This recital amends old recital 17 to be in line with new text for Art 8.
- New recital on transition period (recital 19)
This takes into account the provisions on transitional periods in Art 22.
- New recital on essential requirements (recital 20)
This recital completes recital 18 to take into account the modification introduced in Art 9 on essential requirements.
- New recital on standards (recital 21)
In line with new Art 10 (replaces old art 12) on standardisation.
- New formulation of the recital on data (recital 24)
This recital replaces old recital 18 to be in line with Art 12.
- Amended recitals on responsibility (recital 25 and 26)
These recitals amend old recital 19 and in particular recital 25 introduces the polluter-pays principle. This principle was requested by Parliament in Am. 60 on economic instruments.
- New recital on specific management plans (recital no. 27)
This recital justifies the need for a specific chapter on waste management plans.

- Amended recital on notification (recital 29)

This recital adjusts elements of old rec 24 and 25

- Amended recitals on Committee (recitals 30 and 31)

These recitals replace old recital 23 to be in line with articles 19 and 20.

- Explicit mention of the impact on the environment of all Member States as well as third countries. (Art 1.1)

This element is useful to reinforce a spirit of cooperation among states and to avoid present disruptive consequences of unilateral actions.

- Establishment an order of priority between the different measures to be adopted. (Art 1.2)

The Commission has always tried to avoid the introduction of a rigid hierarchy regarding waste management options which could go against the need for flexibility and for non-discrimination between packaging materials, systems and management alternatives. This was the reason why the corresponding Parliament amendment in this sense was not incorporated. However the Commission agrees on the need to clarify priorities. The new formulation approaches the Parliament position, as reflected in Am. 27, and in particular stresses prevention as the first priority.

- Mention of a number of relevant requirements to be considered in addition to the provisions in Council Directive 91/689/EEC on hazardous waste (Art 2.2)

This is a technical element to draw attention to other important provisions in this field.

- Deletion of the the reference to disposables in the definition of packaging (Art 3.1)

It was agreed that this reference was superfluous and somewhat confusing.

- Explicit mention of some exceptions in relation to tertiary packaging (Art 3.1 (c)).

This is an element to complete the definition of packaging excluding elements which are clearly not packaging but might fall within the general definition.

- Exclusion of regeneration and biomethanisation in the definition of recycling (Art 3.7)

The present definition is the last result of the discussion but it might be worked out further.

- Incorporation of an energy recovery definition (Art 3.8).

An ad-hoc definition was deemed necessary since the definition of recycling indicates the exclusion of energy recovery.

- Incorporation of a new article on prevention (Art 4).

This is a major new element to the proposal. It reinforces the importance of prevention in the text which was already considered either directly (essential requirements, standards) or indirectly by the effects induced by the recovery and recycling targets. It was decided to ensure that other preventive measures are implemented by Member States and a flexible framework is established. This new element is in line with the priority assigned to prevention by the Parliament as it is reflected in Am. no. 27.

- Incorporation of a new article on re-use (Art 5).

This basic new element of the proposal, was subject to a deep political discussion at Council level. The Commission which acknowledges the importance that these systems may have to the protection of the environment was worried about the repercussions on the internal market and the non-discriminatory conditions between re-usable and one-way packaging. The text agreed upon is a good compromise as it is established that Member States may encourage re-use systems of packaging which can be re-used in an environmentally sound manner which is in line with Am. 39 of the Parliament, while adding the explicit safeguard of being in conformity with the Treaty.

- New recovery and recycling targets for the medium term (5 years) (Art 6.1 (a) and (b)).

A new and more flexible approach, with the introduction of target ranges instead of fixed values, has been adopted. There has also been a change of approach as the targets refer to the totality of packaging materials and not to each material separately of the packaging waste flow.

With article 100A being the legal basis for the Directive, the remaining problem was the different starting points and capacities in Member States which were to be matched with the high level of environmental protection requested by this legal basis. A first element for a solution was to establish target ranges which could take the different situations into account, but these should not be too wide in order to remain compatible with an Article 100A approach. The upper limits of these ranges are slightly higher - 65% versus 60% (recovery) and 45% versus 40% (recycling) - than those in the amended proposal, while the lower limits 50% and 25% respectively allow for added flexibility at this first stage.

The adoption of global targets for all materials together allows for more flexibility at this first stage. There is however a provision that each material has to obtain a minimum 15% recycling.

- Targets for the 10 year deadline to be set up later. (Art 6.1 and 3)

A compromise has been obtained not to establish the specific limits at this stage, but to allow for some time to set them up on the basis of practical experience and scientific evidence, and with a view to increasing them substantially, so that the operators and public authorities have a clear signal for planning a long term

strategy.

The four years delay for the Council to examine the situation, from the date by which this Directive is implemented in national law corresponds in part to the four years proposed by Parliament in Am. 42. The text contains measures to revise targets, which are to be fixed now by a qualified majority no later than six months before the end of the first five year phase.

- Derogation for lower targets: Greece, Ireland and Portugal (Art 6.5) are allowed a later deadline, (which shall not exceed 31 December 2005) to attain the targets while reaching at least 25% for recovery in the first five years.

The special difficulties of the aforementioned countries called for a supplementary delay at this first stage, keeping the idea that this is a long term process in which convergence is to be reinforced gradually. The present problems facing these countries are geographical ones as well as low levels of packaging consumption. In particular the problem of islands is indicated and this relates to Am. 28 in which it is said to take account of special problems affecting islands.

- Clause for higher targets (Art 6.6)

This new element was introduced in order to try to reach an agreement by unanimity although finally this was not possible. This clause intends to give some political recognition to the actions of some Member States which at this stage are in a more advanced situation than the Community average.

This clause, without prejudice to the possibility of having recourse to Article 100 A §4, allows for the pursuance of higher targets in the interest of a high level of environmental protection and on the condition that they do not prevent the achievement of the internal market and do not hinder compliance by other Member States with the Directive. In particular, and in order to avoid present problems, Member States using this clause have to provide for the appropriate recycling and recovery capacities.

- Explicit mention that systems are set up in order to meet the objectives laid down in the Directive (Art 7.1)

This is more coherent as the requirement for the return of all used packaging waste and for all packaging waste was unrealistic.

- Decision on marking is postponed (Art 8.1)

It was not possible, as it was the intention of the Commission, to reach an agreement on markings due to the political discussion on whether there should be a single marking for all recoverable packaging or if a specific marking for recycling should be introduced. At the same time the availability of markings, and in particular the three arrows symbols remains uncertain. This postponement is in line with the corresponding part of Parliament Am. 46.

- Transition delay for compliance with essential requirements (Art 9.1)

This article is essential for both internal market and environment protection purposes. This compromise formula was attained in order to provide for a fixed additional time to set European standards and thus ensure the application of the Directive within a more coherent framework.

- New formulation of the standardisation actions (Art 10).

This article replaces the old Art 12 while keeping its basic elements and adding a reference to those standards relating to the essential requirements. The list of actions has been somewhat changed, in particular by including methods for measuring presence of heavy metals and other dangerous substances and also their release into the environment. This last element follows Am. 77 in part, which presents test methods based on the risk of displacement.

- New article on concentration levels of heavy metals (Art 11)

This provision has been taken out of Annex II and incorporated as a new article, due to its special characteristics (explicit setting of limits) in relation to other elements of the Annex). The formulation retained on the sum of concentration levels is the original one. An exception is granted to crystal glass as well as a description of cases, such as recycled materials, in which special conditions might be applied.

- New formulation of the Information Systems (Art 12 and Annex III)

The emphasis is set on the implementation of the objectives of the Directive. Annex III has been considerably simplified so as to keep just the elements relevant for that purpose. Databases are to be established on formats to be developed in line with this Annex which being simpler would be less costly for operators while allowing to monitor compliance with the Directive. The Commission deems that this new formulation somehow takes into account Parliament's reservations on databases, which in Am. 55 were left to further decision.

- Redrafting of Art 13 (information)

New text keeps all previous elements.

- Redrafting of Art 14 (Management Plans)

New text retains main elements but deletes mention of justification for target modifications which could be subject to controversial interpretation. An explicit mention of measures under Art 4 (prevention) and Art 5 (re-use) is included.

- Revision on Notification (Art 16)

The Commission defended the communication of all relevant measures and not only those in the context of Directive 83/189/EEC. This was finally accepted with just the exclusion of some measures of a fiscal nature, in line with the common position on the amendment of Directive 83/189/EEC.

- Obligation to report (Art 17)

This article has been redrafted to be in line with the Directive 91/692/EEC on standardizing and rationalizing reports on the implementation of certain Directives relating to the environment.

- New formulation for the adaptation to scientific and technical progress (Art 19 and 20).

The old article 16 has been split up into new Art 19 and 20. Art 19 deals with the adaptation questions while Art 20 deals with measures which might be needed to solve any difficulties encountered in applying the provisions of the Directive (mention of luxury packaging has been added).

- New Committee procedure (Art 21)

The Committee finally retained by Council is a regulatory one (type IIIA). The Commission preferred a consultative one to allow for more flexible discussion, but finally agreed on this one which is also the same as the one requested by Parliament in Am. 68.

- New provisions on implementation in national law (Art 22)

The need to communicate all existing laws, regulations and administrative provisions, formerly in Art 14 (Am. 64), has been transferred to this article. A new provision has been incorporated in order not to impede the marketing of packaging manufactured before the date of adoption of the Directive.