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The European Community’s Amended Waste Directive

INTRODUCTION

In March 1991, the Council of the European Communities (Council) adopted an amendment¹ to the Community’s framework waste directive, Council Directive 75/442.² The amendment is designed to increase the effectiveness of Directive 75/442, which requires member states to take appropriate steps to encourage the prevention, recycling, and proper processing of waste in order to conserve natural resources.³ The amendment reflects growing European Community (EC or Community) impatience with the failure of member states to comply with environmental directives in general.⁴

While the amendment expands those provisions of Directive 75/442 that were designed to encourage waste prevention and recycling,⁵ its primary emphasis is waste

³ Amendment, supra note 1, at art. 1(1)(arts. 3, 4). Directive 75/442 describes waste as “any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force.” Directive 75/442, supra note 2, at art. 1. The amendment provides a far more specific definition. An annex to the amendment provides an extensive listing of wastes covered by Directive 75/442, including expired products, household wastes, and various industrial wastes. See Amendment, supra note 1, at Annex I. The amendment does not cover gaseous effluents emitted into the atmosphere, nor other wastes that are covered by specific legislation such as radioactive waste, waste resulting from mining and extracting and related activities, animal carcasses and livestock waste, waste waters (except waste in liquid form), and decommissioned explosives. Id. at art. 2.
⁵ See Amendment, supra note 1, at art. 1(1)(art. 3). While earlier drafts of the amendment stated that member states must take measures to prevent the creation of waste, the amendment now only requires member states to “encourage” the prevention of waste. Compare Amended proposal for a Council Directive amending Directive 75/442 on waste, COM(89) 560 final–SYN 145, O.J. C326/6, at art. 3 (1989), with Amendment, supra note
disposal. In an effort to ensure member state compliance, the amendment requires each member state to submit a more specific and coordinated waste disposal plan than that required under Directive 75/442. The amendment’s reporting requirements would enable the Commission of the European Communities (Commission) to more closely monitor member state compliance.

This Note represents a critical analysis of the amended directive. Part I addresses the Community’s waste policy objectives and reviews the historic problem of non-compliance with these objectives by the member states. Part II details the provisions of the amendment and its potential impact on Directive 75/442. Part III then examines current Community strategies for ensuring compliance with environmental directives, and proposes new enforcement measures for waste directives generally, and amended Directive 75/442 in particular. This Note concludes that the achievement of full compliance with waste directives requires timely adoption of Community sanctioning and funding powers.

I. COMMUNITY WASTE POLICY AND PROBLEMS WITH COMPLIANCE

A. Policy Objectives and Provisions

Enacted in 1975, Directive 75/442 was designed to reduce the quantity of waste produced, increase recycling and reuse of waste to the maximum extent possible, and provide for the safe disposal of any remaining non-recoverable wastes. To achieve these goals, Directive 75/442 requires member states to formulate waste disposal plans, establish permitting systems for waste disposal, treatment, and storage installations, and prevent the uncontrolled disposal of wastes. Directive 75/442 incorporates the polluter-pays principle for cost allocation.
Directive 75/442 also requires member states to submit to the Commission, every three years, a situation report on the texts of the main provisions of national laws adopted in accordance with the directive.\textsuperscript{14} Finally, Directive 75/442 requires member states to encourage the prevention of waste generation and the reuse of waste.\textsuperscript{15}

B. \textit{Historic Non-compliance by Member States}

Member state non-compliance has hampered the effectiveness of Directive 75/442.\textsuperscript{16} Initially, the Commission did not rigidly insist upon adherence to the two-year implementation deadline.\textsuperscript{17} In 1981, however, continued non-compliance with the directive prompted the Commission to bring suit against Belgium and Italy in the Court of Justice of the European Communities (Court of Justice).\textsuperscript{18} In \textit{Commission v. Belgium}, the Commission alleged that Belgium failed to implement Directive 75/442. The Belgian Government argued that it had already partially implemented the directive but that constitutional difficulties impeded its full implementation.\textsuperscript{19} The Court of Justice held for the Commission, holding that a member state could not plead provisions, practices, or customs in its legislative or legal system to justify its failure to comply with a directive.

An action against a member state before the Court of Justice is essentially the only course of action that the Commission can take to remedy member state non-compliance with directives.\textsuperscript{20} Nevertheless, Court of Justice judgments have had little effect on

\begin{itemize}
\item \textsuperscript{14} Id. at art. 12.
\item \textsuperscript{15} Id. at art. 3.
\item \textsuperscript{17} See \textit{EEC Members Face Deadlines for Implementing Environmental Directives}, 1 Int'l Env't Rep. (BNA) No. 1, at 5–6 (Jan. 10, 1978) [hereinafter \textit{EEC Members Face Deadlines}].
\item \textsuperscript{18} See Case 69/81, [1982] E.C.R. at 166.
\item \textsuperscript{19} See id. at 167. Belgium argued that implementation was hampered by institutional reforms "concerning the redistribution of powers and responsibilities between the national and regional institutions." Id.
\item \textsuperscript{20} See \textit{L. Brown & F. Jacobs, The Court of Justice of the European Communities} 76–78 (1989). The Commission may bring proceedings against a member state that has failed to meet its obligations under article 169 of the EEC Treaty. Such action involves three phases; the final and most serious is the rendering of a judgment by the Court of Justice. Under Article 171, however, the judgment is only declaratory. There are no provisions for sanctions in cases of non-compliance. Member states are simply expected to take the measures needed to comply with the judgment.
\end{itemize}
the behavior of some member states because the Court of Justice can not impose fines or sanctions. This lack of enforcement power has contributed to the growing frustration with non-compliance. Consequently, there are increased demands for reduced member state interpretive latitude, increased surveillance of member state compliance, and tougher methods of enforcement. The amendment to Directive 75/442 reflects these concerns.

II. THE AMENDMENT

The amendment's primary emphasis is the creation of a coordinated Community approach to waste disposal. Like Directive...
75/442, the amendment emphasizes the need for member states to encourage the adoption of waste prevention and recycling measures, yet member states still have significant latitude to determine what measures they will take. The waste disposal provisions, however, allow far less interpretive latitude.

The focus of the waste disposal program centers on the need for member states to establish an "integrated and adequate network" of disposal installations, both independently and in cooperation with one another where necessary. This harmonization effort is designed to make the Community self-sufficient with regard to waste disposal. Another goal is to require member states to move individually toward self-sufficiency by requiring disposal of waste at appropriate sites nearest the point of production. Those member states whose current programs are the least developed will bear the highest costs of such harmonization measures.

The amendment requires member states to appoint a "competent authority" to draw up one or more waste management plans as soon as possible. The amendment provides guidelines for disposal plans and an extensive list of the waste disposal operations that must obtain permits from the designated competent authority. The amendment covers extensively the requirements and scope of these permits.

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28 See supra note 5 and accompanying text.
29 See supra notes 36–39 and accompanying text.
30 See Amendment, supra note 1, at art 1(1)(art. 5(1)).
31 See id. at Preamble, art. 1(1)(art. 5(1)).
32 See id. at art. 1(1)(art. 5(1)–(2)).
33 See Communication from the Commission to the Council and to Parliament: A Community strategy for waste management, SEC(89) 934 final, at 20–21 (Sept. 18, 1989). “The cost of waste disposal is directly dependant on standards and regulations governing the construction and operation of the facility . . . . [H]armonization of technical standards for waste disposal plants is a basic priority for environmental protection; and it is harmonization based on a high level of protection.” Because the extent and effectiveness of waste management in member states is uneven and varies widely, it is logical to assume that the member states with less stringent programs will bear the heaviest costs in meeting the Community’s standards. See id. at 21.
34 Amendment, supra note 1, at art 1(1)(arts. 6, 7).
35 Id. at art. 1(1)(arts. 7, 8).
36 Id. at art. 1(1)(arts. 10, 11, Annex IIA). Unlike Directive 75/442, the amendment contains an annex listing all waste disposal operations that must obtain a permit, including landfill operations, incineration on land or at sea, permanent storage, and numerous other operations.
37 Id. at art. 1(1)(art. 9). Each permit must cover the types and quantities of waste, the technical requirements, the precautions to be taken, the disposal site, and the treatment method.
The amendment also revises member state reporting requirements. Under Directive 75/442, member states were required to submit status reports every three years, but were not required to follow any particular guidelines. Member states must now base their status reports on a particular questionnaire provided by the Commission. Moreover, whereas Directive 75/442 required only that member states report the "main provisions" of national laws that were adopted in compliance with the directive, the amendment now requires member states to report all pertinent texts of national laws.

Like Directive 75/442, the amendment does not specify enforcement actions to be taken in the event of non-compliance. The amendment’s increased specificity and stricter reporting requirements, however, appear to limit the ability of member states to circumvent its provisions, and have provided the Community with more efficient methods of monitoring compliance. This seems to reflect the Community’s intentions to act more quickly to enforce compliance with the amended directive than it did to enforce Directive 75/442. Increased pressure on the Community from environmental groups and others to act against member state non-compliance supports this proposition.

III. PROSPECTS FOR COMPLIANCE AND SUCCESS

Over the past two decades, the Community has adopted two strategies to ensure compliance with anti-pollution directives. First, the Community has attempted to persuade member states that they have an economic interest in compliance. Second,

38 Directive 75/442, supra note 2, at art. 12.
39 Amendment, supra note 1, at art. 1(1)(art. 16(1)). "Member states shall send the Commission a report on the measures taken to implement this Directive. This report shall be based on a questionnaire . . . which the Commission shall send to the member states . . . ." Id.
41 Amendment, supra note 1, at art. 2(2).
42 See Implementing Environmental Standards, supra note 21, at 43; Parliament to Establish Committee, supra note 24, at 320.
43 EC Seen as Bringing Increased Pressure on Spain to Comply with Community Directives, 13 Int’l Env't Rep. (BNA) No. 7, at 284–85 (July 11, 1990). Complaints to Brussels alleging non-compliance with environmental directives throughout the Community increased from five in 1986 to 500 in 1989.
where persuasion fails, the Community has resorted to enforcement action through the Court of Justice.\textsuperscript{45}

\textbf{A. Persuading Member States to Comply}

The Community’s "persuasion" tactics stress two main themes. First, the Community urges that a strong waste management policy will provide jobs and save natural resources.\textsuperscript{46} Second, the Community argues that if compliance is not achieved, "the completion of the internal market may . . . be jeopardized as a result of distortions of competition, unwarranted switching of investment or market compartmentalization."\textsuperscript{47} It is unlikely, however, that merely repeating these themes—without proof of the benefits that compliance can bring to individual member states—will guarantee their cooperation.\textsuperscript{48}

The Community believes that the need for member states to comply with its waste disposal program is virtually self-evident.\textsuperscript{49} The Community generates 2.2 billion tons of waste per year, the sheer volume of which appears to reinforce the need for a coordinated, Community-wide plan.\textsuperscript{50} Nevertheless, member states that are less developed and relatively clean may regard such measures as unnecessarily costly and burdensome.\textsuperscript{51} Moreover, because it is probable that the less effective waste disposal programs exist in the less developed member states, the highest costs of compliance may befall those who can least afford them.\textsuperscript{52} As

\textsuperscript{45} See Implementing Environmental Standards, supra note 21, at 42.

\textsuperscript{46} See Info. Memo P--52, supra note 44, at 1--2.

\textsuperscript{47} Id. at 1.

\textsuperscript{48} Statistical evidence highlights the failures of the current strategy. By early 1990, 62 infringement procedures had been initiated for member state non-compliance with waste directives. See Info. Memo P--5, supra note 22, at 4.

\textsuperscript{49} See Info. Memo P--52, supra note 44, at 2. While the Community recognizes that waste disposal problems in the past were solved at the local level, it believes the current volume and diversity of waste has outpaced the ability of local governments to handle it safely.

\textsuperscript{50} Id. at 1.

\textsuperscript{51} See E. Rehbinder, supra note 22, at 263. Although generalizations are difficult, [m]ember states located at the margins of the Community, which have large underdeveloped, relatively clean regions for which expensive environmental controls are too costly in relation to the benefits derived from them, are often more reluctant to agree to a [costly] environmental policy than the richer, more densely populated states in the center of the Community.

\textsuperscript{52} Haigh, The Environmental Policy of the European Community and 1992, 12 Int'l Env't Rep. (BNA) No. 12, at 619 (Dec. 13, 1989). Member state implementation of Community legislation is inevitably intertwined with national policies, practices, and interests. Concerns
a result, the Community's strategy of persuading member states to comply with the amendment will probably meet with limited success.\textsuperscript{53}

B. Enforcement Strategy

Current enforcement strategy is slow and ineffective.\textsuperscript{54} One remedy would be to increase the monitoring of member state compliance, thereby decreasing the time needed to discover non-compliance.\textsuperscript{55} Community environment ministers recently adopted a directive that could provide "watchdog groups" with information needed to report instances of non-compliance.\textsuperscript{56} The directive provides citizens with greater access to environmental information held by member states.\textsuperscript{57} The directive, however, permits member states to deny access to information in many instances, and therefore may greatly diminish the monitoring capacity of watchdog groups.\textsuperscript{58}

Another effort to more closely monitor member state compliance was the establishment of the European Environment Agency (EEA).\textsuperscript{59} The new EEA has been criticized, however, because an

\textsuperscript{53} See id. at 621. "Several of the newer member states are arguing that they need EC money to fulfill the obligations in EC [environmental] legislation." Id. Attempts to keep the costs of compliance low will probably account for most instances of non-compliance. See Lomas, supra note 22, at 356.


\textsuperscript{55} See Amendment, supra note 1, at art. 1(2)(arts. 10, 12.)


\textsuperscript{57} See Ministers Accept New Rules Guaranteeing Public Access to Environmental Information, 13 Int'l Env't Rep. (BNA) No. 4, at 143–44 (Apr. 11, 1990). Scheduled to become effective January 1, 1993, the directive gives anyone, upon written request, the right of access to any environmental information held by public authorities. It also requires member states to provide information more frequently through regular publication of reports.

\textsuperscript{58} Id. at 144. Requests for information can be denied if they are deemed to affect matters before a court, under inquiry, or the subject of a preliminary investigation; the confidentiality of government proceedings; industrial and commercial confidentiality; the confidentiality of personal data; material supplied by third parties under legal obligation; and material which, if disclosed, would make environmental damage more likely.

A spokesman for the European Environment Bureau, to which most EC-based environmental lobby groups belong, stated that "the directive doesn't really give any weight to persons seeking information, and it is little more than wishful thinking." Id.

\textsuperscript{59} See Regulation 1210/90, Council Regulation for the establishment of the European Environment Agency and the European environment information network, O.J. L120/1 (1990); Environment Ministers Set Up Agency but Site Location Remains Uncertain, 13 Int'l
increase in monitoring may accelerate initiation of enforcement action, but does not resolve the inherent ineffectiveness of enforcement actions. The Parliament of the European Communities (Parliament) wants the EEA to play a much larger role in environmental affairs. The Environment Committee of the Parliament believes that the EEA should have its own environmental inspectorate to enforce Community rules. Nevertheless, member states have rejected the possibility of the EEA playing a regulatory role, a task which remains the responsibility of the Commission.

The Commission has demonstrated its disappointment with non-compliance and seems willing to expand its enforcement methods. In February 1990, the Commission announced its desire to establish a "green police force" under the control of the Commission, to ensure member state compliance. Police force discovery of non-compliance could lead to withdrawal of Community funds and subsidies. The Commission currently has no sanctioning powers, however, and it has not yet developed a strategy for obtaining such powers.

C. New Methods to Ensure Compliance

It is unlikely that all member states will be able to fully comply with the amended waste directive within the two years allotted. The new strategy needed to ensure compliance requires the Community to adopt Community sanctioning powers and to create a viable Community environment fund, both of which could take longer than two years to implement. Focusing the Community's attention on achieving a new strategy is not a futile exercise, however, because it could mean the difference between late compliance and non-compliance.

Env't Rep. (BNA) No. 4, at 144 (Apr. 11, 1990). The EEA's purpose is to collect and disseminate environmental data and statistics.


See Commission Officials Cite Disappointment, supra note 22, at 239. The Commission's Environment Committee apparently agrees with a report from the EC directorate on environment, which notes that the Community has "reached the boundaries of control using traditional legislative and regulatory measure." Id.

See Implementing Environmental Standards, supra note 21, at 42.

Id. See also L. Brown, supra note 20, at 76-78.

See Amendment, supra note 1, at art. 2(1).

See infra note 68.
Sanctioning powers are important to any new Community strategy because they will function as a deterrent to non-compliance. For the Community to achieve sanctioning power, however, all member states must agree to amend the Treaty of Rome. Member states with a history of non-compliance would find voting for sanctioning powers to be contrary to their unwillingness to comply. Likewise, limiting or withdrawing various Community funds will not facilitate compliance by member states that find compliance economically difficult. In addition, member states would probably view the imposition of sanctions as an assault on their political sovereignty.

To make sanctions palatable to member states, the Community must also provide some form of positive inducement. Community sanctioning powers might be more acceptable to economically disadvantaged member states if the Community were to provide meaningful financial assistance to aid them with compliance. To date, Community funding for environmental causes has been limited.

The possibility of establishing a Community environment fund has received considerable attention lately. For instance, the

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67 The Community may want to structure its sanctioning powers similar to those of article 88 of the European Coal and Steel Community Treaty (ECSC Treaty). See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 11. The ECSC Treaty provisions are such that with a Court determination in favor of the Commission, and Council approval by a two-thirds majority, sanctions could include "the suspension of payment otherwise due to be paid by the Commission to the State in default or the taking of discriminatory measures . . . (e.g. a ban on imports from the State in question)." L. Brown, supra note 20, at 79.

68 See Implementing Environmental Standards, supra note 21, at 43. Because it would require the approval of every member state, adoption of an amendment would take considerable time. Given proper leadership, however, it is not beyond the capability of the Community. Commissioner Ripa di Meana has proposed consideration of the matter at an intergovernmental conference.

69 New European Council President Flynn to Push Advancement of Environment Policy, 13 Intl’l Env’t Rep. (BNA) No. 1, at 9 (Jan. 10, 1990). Padraig Flynn, former President of the Council of Environment Ministers, has stated that "over-reliance on policing for compelling good environmental behavior can be disadvantageous." Id.

70 See Haigh, supra note 52, at 621. "Whereas other EC policies are pursued very largely by financial means—e.g., the agricultural policy and regional policy—by contrast, environmental policy has so far been pursued by legislation." Id.

71 See Ministers Advocate Use of Taxes, Fees to Boost Impact of Environmental Policies, 13 Intl’l Env’t Rep. (BNA) No. 10, at 383 (Sept. 26, 1990). "European Community environment ministers agree that economic and fiscal measures should be used in the future as a basic means of increasing the efficacy of EC Environment policy . . . ." Id. A Community "ecotax" would be the most likely means of financing an environment fund. See Various Environmental Taxes May Be Introduced by End of 1990, 13 Intl’l Env’t Rep. (BNA) No. 6, at
Community is considering offering funds to assist compliance, provided that the member state and the Commission are able to establish a detailed program of receipt. Nevertheless, despite general agreement that both sanctioning powers and funding programs are needed, sanctioning powers and funding programs have not been linked in any comprehensive enforcement proposal.

Creation of a Community funding program should be made contingent on member state acceptance of the Community's right to impose sanctions. If it is not, the Community will have lost an effective bargaining chip that could have been used to obtain sanctioning powers. While creation of an environmental fund would itself provide additional incentive for member state compliance with the amended directive, no Community environment fund can pay all the costs of compliance. Absent Community sanctions or other means of making the costs of non-compliance felt, some member states may still view the costs of compliance as prohibitive.

**Conclusion**

Current prospects for full member state compliance with the amended waste directive are limited. While the amendment does limit member states' interpretive latitude, it does not provide additional incentives—either positive or negative—for member states to comply. To ensure full compliance with sometimes costly and burdensome environmental directives, the Community must be able to provide financial assistance for member state compliance, and impose sanctions for non-compliance.

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72 See Implementing Environmental Standards, supra note 21, at 43.

73 Id. According to Commissioner Ripa di Meana, "Over the past 12 months there has been increasing public pressure on the Commission to produce results . . . . We must consider setting up a green police force under the control of the Commission which will have the power to investigate and administer sanctions." Id.

74 See Lomas, supra note 22, and accompanying text.