European Parliament
2019-2024

Plenary sitting

A8-0171/2018/err01

2.4.2024

ADDENDUM

to the report

on the proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU
(COM(2016)0467 – C8-0321/2016 – 2016/0224A(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Fabienne Keller

A8-0171/2018

The following opinion is inserted:

12.3.2024

Mr Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis on the Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467 – C8-0321/2016 – 2016/0224A(COD))

Dear Mr Chair,

By letter of 15 February 2024[1], the Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested the Committee on Legal Affairs (JURI), pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of, *inter alia*, the legal basis for the proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU[2] (hereinafter 'the proposed Regulation').

JURI will consider the above question at its extraordinary meeting on 11 March 2024.

I - Background

In December 2023 the European Parliament and the Council reached a provisional agreement on the legislative proposals included in the New Pact on Migration and Asylum[3] presented by the Commission in September 2020. The proposed Regulation, which the Commission initially based on Article 78(2), point (d), of the Treaty on the Functioning of the European Union (TFEU) and later amended and added Article 79(2), point (c), TFEU as the legal basis, was part of that Pact.

Following the provisional agreement reached by the co-legislators, the Legal Services of the European Parliament and of the Council were requested to assess the outcome of the interinstitutional negotiations and make technical recommendations aiming to ensure that the operability and coherence of the Schengen *acquis* is observed.

Having conducted the assessment, the Legal Services recommended that the provisions of Schengen relevance be included in a standalone act. Besides certain derogations and amendments from certain other legislative proposals provisionally agreed under the New Pact on Migration and Asylum, the draft standalone act essentially includes the provisions on the return border procedure, negotiated and provisionally agreed under the proposed Regulation.

The European Parliament and the Council endorsed this recommendation on 31 January 2024 during the meeting of the Asylum Contact Group with the five rotating Presidencies of the Council[4]. As a consequence, the question of deletion of Article 79(2), point (c), TFEU from the legal basis for the proposed Regulation appeared. LIBE therefore requested JURI opinion on the appropriateness of the modification of the legal basis.

II - The relevant Treaty Articles

Chapter 2 ("Policies on border checks, asylum and immigration") of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

Article 78
(ex Articles 63, points 1 and 2, and 64(2) TEC)

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1 D(2024)5159.
2 COM(2016) 467 of 13.7.2016 and amended COM(2020) 611 of 23.9.2020.
3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (COM(2020) 609 of 23.9.2020).
4 Format established under the Joint EP-Council Roadmap for the negotiations on the CEAS and the New Pact on migration and asylum, signed in September 2022.

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

(...)

Article 79
(ex Article 63, points 3 and 4, TEC)

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States

of long-term visas and residence permits, including those for the purpose of family reunification;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

(...)

III – CJEU case law on the choice of legal basis

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union's competence[5].

According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure[6].

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component[7]. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases[8]. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament[9].

IV – Aim and content of the proposed Regulation

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5 Opinion 2/00 *("Cartagena Protocol")*, ECLI:EU:C:2001:664, para 5.

6 Case C-300/89, *Commission v Council ("Titanium dioxide")*, ECLI:EU:C:1991:244, paragraph 10.

7 Ibid. paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

8 Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; *Opinion 2/00*, paragraph 23; Case C-94/03, *Commission v Council ("Rotterdam Convention")*, ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

9 Case C-300/89, paragraphs 17-25; Case C-268/94, *Portugal v Council*, ECLI:EU:C:1996:461.

Before going into the aim and the content of the proposed Regulation as provisionally agreed it is useful to note that the appropriateness of Article 78(2), point (d), TFEU is not disputed What is disputed, in essence, is the presence of Article 79(2), point (c), TFEU as an additional legal basis in the proposed Regulation following the provisional agreement. It is therefore useful to start with the examination of the reasons that lead to this double legal basis in the first place.

In July 2016, the Commission put forward the proposed Regulation and based it solely on Article 78(2), point (d), TFEU. In September 2020, the Commission then amended the proposed Regulation in the context of the New Pact on Migration and Asylum and it was at that moment that Article 79(2), point (c), TFEU was added to the legal basis.

In that amended proposed Regulation, the Commission reiterated in the explanatory statement that "[*t*]*he objectives of the 2016 proposal for an Asylum Procedure Regulation are still relevant and need to be pursued. It is necessary to establish a common asylum procedure, which replaces the various divergent procedures in the Member States and which is applicable to all applications made in the Member States*". However, it also stated that it did "*not consider necessary to make far-reaching amendments to the 2016 proposal on which the co-legislators have already made significant progress*." but it continued that it made "*targeted amendments to the 2016 proposal to address these specific challenges which will further the objectives and put in place, together with the proposal for a Regulation introducing a screening, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return*" (emphasis added). During the screening, migrants would be registered and screened to establish their identity and health and security risks. Following that, migrants would be referred to the "*appropriate procedure, be it asylum, refusal of entry or return*" (emphasis added). It would then be determined whether an asylum application should be assessed without authorising the applicant's entry into the Member State's territory in an asylum border procedure or in a normal asylum procedure. Where an asylum border procedure would be used and if it was determined that the individual was not in need of protection, a return border procedure would follow. Following this conception of the procedure at the border, the Commission amended the proposed Regulation by inserting provisions on return of third-country nationals through the creation of a border procedure for carrying out such returns.

As a consequence, the Commission added Article 79(2), point (c), TFEU to the legal basis of the proposed Regulation. In the first bullet point on legal basis under point 2 of the explanatory memorandum of the 2020 amended proposed Regulation the Commission explained that the legal bases for the proposed Regulation "*are Articles 78(2)(d) and 79(2)(c) of the Treaty on the Functioning of the European Union. These foresee the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status as well as illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation, respectively*" and that it was "*necessary to add the latter legal basis to provide for specific provisions regulating the return of rejected asylum seekers, notably in relation to the joint issuance of a return decision following a negative decision on an application, the joint remedy against such decisions and the seamless asylum and return border procedures*" (emphasis added).

During the interinstitutional negotiations the co-legislators provisionally agreed on the return

border procedure within the context of the proposed Regulation. However, in the concluding steps the co-legislators agreed that for reasons of the so-called Schengen variable geometry, the proposed Regulation needed to be split in two: while the first text (subject of this opinion) would include all provisions establishing a common procedure for international protection in the Union, the provisions on the return border procedure would be removed and placed into the second text.

Hence, the result is that the objective of the proposed Regulation as provisionally agreed "*is to streamline, simplify and harmonise the procedural arrangements of the Member States by establishing a common procedure for international protection in the Union*" (recital 1) which is also reflected in Article 1. The proposed Regulation applies "*to all applications for international protection made in the territory of the Member States, including at the external border, in the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection*" (Article 2(1)). It provides for rights and obligations of applicants (Articles 7 to 9), personal interviews of applicants (Articles 10 to 13), provision of legal counselling, legal assistance and representation during the procedure (Articles 14 to 17), special guarantees (Articles 19 to 22) and medical examination and age assessment of applicants (Articles 23 and 24). It also frames the administrative procedure for launching and registering applications for international protection (Articles 25 to 32), as well as the procedure for examining the applications and its duration (Articles 33 and 34), special procedures (Article 40 to 43) and provisions on the concepts of safe third countries (Article 43a to 50). Lastly, it contains provisions on procedures for withdrawal of international protections (Article 51 and 52) and appeal procedure (Articles 53 to 55), followed by certain final provisions (Articles 56 to 62). Articles 41g and 41h on border procedure for carrying out return and on detention have, together with the corresponding recitals, effectively been removed from the proposed Regulation as provisionally agreed.

V – Analysis

It follows from the above that the aim and content of the proposed Regulation, as provisionally agreed, is indeed to establish a common procedure for granting and withdrawing international protection, which undisputedly requires Article 78(2), point (d), TFEU as its legal basis. The provisions on common procedure for international protection in the Union are not part of the Schengen *acquis* and should be maintained in one, separate act. It is also worth noting here that the proposed Regulation makes a number of substantive changes to its predecessor, Directive 2013/32/EU[10] which it repeals and replaces. That Directive is also based solely on Article 78(2), point (d), TFEU.

On the other hand, provisions concerning the return of third-country nationals were originally part of the Schengen Convention (Articles 23 and 24) under Chapter VI of Title II "*Abolition of checks at internal borders and movement of persons*". It is essential to preserve the operability and coherence of the Schengen *acquis*[11], as well as its full compliance with, on the

[10] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60).

[11] See, *inter alia*, judgment of 26.10.2010 in Case C-482/08, *UK v. Council* (*VIS*), ECLI:EU:C:2010:631, paragraph 48, in which the Court refers to *"the need for coherence of* [the Schengen] *acquis, and the need – where that acquis evolves – to maintain that coherence*"; see also paragraphs 49 and 58 of that judgment.

one hand, the relevant JHA Protocols[12] and, on the other hand, the Schengen Association Agreements concluded by the Union with Norway, Iceland, Switzerland and Liechtenstein. All returns of third-country nationals from the Schengen area have to be considered as a development of the Schengen *acquis* since all third-country nationals entering the Schengen area are also subject to the uniform entry conditions set out in the Schengen Borders Code. The return border procedure should, therefore, also be seen as a part of the Schengen *acquis* related to integrated border management. Those provisions should thus be included, with their respective recitals, in a separate Schengen-relevant act.

The co-legislators have therefore agreed to split the procedure and move Schengen-related provisions from the proposed Regulation into an autonomous and standalone act. Consequently, Article 79(2), point (c), TFEU should rightly be removed from the legal basis of the proposed Regulation as provisionally agreed.

VI – Conclusion and recommendation

At its meeting of 11 March 2024 the Committee on Legal Affairs accordingly decided, by 17 votes in favour, none against and one abstention[13], to recommend to the Committee on Civil Liberties, Justice and Home Affairs that deleting Article 79(2), point (c), TFEU and basing the proposed Regulation solely on Article 78(2), pint (d), TFEU seems to be appropriate.

Yours sincerely,

Adrián Vázquez Lázara

(Affects all language versions.)

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12 Protocols (No 19) on the Schengen *acquis* integrated into the Framework of the European Union, (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, security and Justice, and (No 22) on the position of Denmark.

13 The following were present for the final vote: Adrián Vázquez Lázara (Chair), Marion Walsmann (Vice-Chair), Lara Wolters (Vice-Chair), Alessandra Basso, Ilana Cicurel, Ibán García Del Blanco, Pascal Durand, Daniel Freund (for Sergey Lagodinsky, pursuant to Rule 209(7)), Heidi Hautala, Pierre Karleskind, Gilles Lebreton, Maria-Manuel Leitão-Marques, Karen Melchior, Sabrina Pignedoli, René Repasi, Franco Roberti, Michaela Šojdrová (for Jiří Pospíšil, pursuant to Rule 209(7)), Axel Voss, Javier Zarzalejos.