



Plenary sitting

9.4.2019

A8-0398/2018/err02

ADDENDUM

to the report

on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM(2018)0218 – C8-0159/2018 – 2018/0106(COD))

Committee on Legal Affairs

Rapporteur: Virginie Rozière
A8-0398/2018

Insert the following opinion after the first opinion of the Committee on Legal Affairs on the legal basis:

SECOND OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

ON THE LEGAL BASIS

25.3.2019

Mr Pavel Svoboda
Chair
Committee on Legal Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM(2018)0218 – C8-0159/2018 – 2018/0106(COD))

Dear Mr Chair,

On 18 February 2019, pursuant to Rule 39(5) of the Rules of Procedure, the Committee on Legal Affairs decided of its own motion to provide the second opinion on the appropriateness of the legal base of the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law with regard to the results of the interinstitutional negotiations.

The Commission based its proposal on several sectorial legal bases. The legal base is expressed as follows:

'Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 and 325(4) thereof and to the Treaty establishing the European Atomic Energy Community, and in particular Article 31 thereof,'

Within the deadline for amendments, a number of amendments proposed additions to the legal base. Consequently, the Committee on Legal Affairs adopted an opinion on the legal base 25 October 2018 as regards the appropriateness of these amendments. The Council also examined and modified the legal base of the Commission proposal in its general approach.

In the final agreement, the co-legislators agreed to delete Articles 33, 62, 103, 109 and 207 TFEU, while at the same time defining that the references to Articles 43 shall relate to its second paragraph, to Article 168 TFEU shall relate to its fourth paragraph and to Article 192 shall relate to its first paragraph. It is thus relevant to examine whether the legal base as set out in the final agreement is appropriate.

I - Background

In its resolution of 24 October 2017 on Legitimate measures to protect whistle-blowers acting in the public interest and its resolution of 20 January 2017 on the role of whistle-blowers in the protection of the EU's financial interests, Parliament called on the Commission to present a horizontal legislative proposal to guarantee a high level of protection for whistle-blowers in the EU, in both the public and private sectors, as well as in national and EU institutions.

Whistle-blower rules exist currently in some areas of Union law, for instance in the Staff Regulations and in certain regulations relating to money laundering and financial markets.

The present proposal for a directive provides for whistle-blower rules that are applicable to breaches of Union law in the areas specified in the scope of application and the annex which lists the relevant pieces of Union legislation that are set out directly or by reference.

II - Relevant Treaty articles

Article 16 TFEU reads as follows:

Article 16

- 1. Everyone has the right to the protection of personal data concerning them.*
- 2. The European Parliament and the Council, acting in accordance with the ordinary*

legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Article 33 TFEU reads as follows:

Article 33

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

Article 43 TFEU reads as follows:

Article 43

1. The Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title.

These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

4. In accordance with paragraph 2, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:

(a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;

(b) such an organisation ensures conditions for trade within the Union similar to those existing in a national market.

5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union.

Article 50 TFEU reads as follows:

Article 50

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

Article 53(1) TFEU reads as follows:

Article 53(1)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States

concerning the taking-up and pursuit of activities as self-employed persons.

Article 153 TFEU reads as follows:

Article 62 TFEU reads as follows:

Article 62

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

Article 91 TFEU reads as follows:

Article 91

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

Article 100 TFEU reads as follows:

Article 100

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

Article 103 TFEU reads as follows:

Article 103

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

- (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;*
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;*
- (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;*
- (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.*

Article 102 TFEU reads as follows:

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

Article 109 TFEU reads as follows:

Article 109

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

Article 114 TFEU reads as follows:

Article 114

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. *The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.*
4. *If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.*
5. *Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.*
6. *The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.*
In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.
When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.
7. *When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.*
8. *When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.*
9. *By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.*
10. *The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.*

Article 168 TFEU reads as follows:

Article 168

1. *A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.*
Union action, which shall complement national policies, shall be directed towards improving

public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

(b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;

(c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

5. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

6. The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

Article 169 TFEU reads as follows:

Article 169

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

Article 192 TFEU reads as follows:

Article 192

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

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting:

- town and country planning,

- quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,

- land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

3. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

- temporary derogations, and/or

- financial support from the Cohesion Fund set up pursuant to Article 177.

Article 207 TFEU reads as follows:

Article 207

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:
(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. *The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.*

Article 325(4) TFEU reads as follows:

Article 325(4)

4. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.*

Article 31 of the Treaty establishing the European Atomic Energy Community reads as follows:

Article 31 of the Treaty establishing the European Atomic Energy Community

The Commission shall work out the basic standards after obtaining the opinion of a group of authorities appointed by the Scientific and Technical Committee from among the scientific experts, especially public health experts, of the Member States. The Commission shall request the opinion of the Economic and Social Committee on the basic standards thus worked out.

After consulting the Assembly, the Council, acting by means of a qualified majority vote on a proposal of the Commission which shall transmit to it the opinions received from the Committees, shall determine the basic standards.

III - General principle for the choice of legal basis

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

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

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

According to the case law of the Court of Justice, in the first case the act must be based on a

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

single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act will have to be founded on the various corresponding legal bases.²

Furthermore, following the established case law of the Court of Justice, the combination of several legal bases is possible, if they are indissociably linked, without one being secondary and indirect in relation to the others, but only if they do not entail incompatible decision-making procedures.³ The legal bases proposed to be added have to be assessed in this light, that is, whether they do provide for the ordinary legislative procedure or are otherwise compatible with the legal base as proposed by the Commission.

IV - Aim and content as provisionally agreed by the co-legislators

The purpose of the Directive as provisionally agreed is to achieve the dual aim of enhancing the enforcement of breaches of Union law and affording a high level of protection to persons reporting on such breaches, and is of a horizontal nature. The function of the legal base is to set out the policies and areas of Union law to which this aim can be applied in one single legislative act given procedural constraints.

The policy areas the Proposal is intended to cover are set out in Article 1. Those are (i) public procurement; (ii) financial services, prevention of money laundering and terrorist financing; (iii) product safety; (iv) transport safety; (v) protection of the environment; (vi) nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; and (x) protection of privacy and personal data, and security of network and information systems. In addition, the financial interests of the Union as defined by Article 325 TFEU are included, as well as breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.

V - Analysis and determination of the appropriate legal basis

As set out above, the proposal covers a number of policy areas and as there is no single provision in the Treaties that cover its aim and purpose it is inevitable that the legal base would consist of references to several provisions. However, it is desirable to as far as possible limit the number of provisions referred to in the citation setting out the legal base.

In the final agreement, the position has been taken that a number of policy areas can well be covered by Article 114 TFEU, which, according to the case law of the Court of Justice, is the correct legal basis for the approximation of Member States' laws with the aim of improving the functioning of the internal market. This applies according to the Council to Articles 33, 62, 103, 109 TFEU.

Article 33 TFEU concerns the strengthening of customs cooperation within the Union. Article

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

³ Judgments of 6 November 2008 in *Parliament v Council*, C-155/07, EU:C:2008:605, paragraph 37; and of 3 September 2009 in *Parliament v Council*, C-166/07, EU:C:2009:499, paragraphs 68 and 69.

62 TFEU sets out the procedure to adopt measures relating to services. Article 102 TFEU contains rules relating to competition issues and Article 109 TFEU stipulates the procedure as regards measures relating to state aid.

Of the remaining provisions, all but one are procedurally compatible. The only clear issue arises in respect of Article 207 TFEU, which solely allows the adoption of regulations, and therefor is procedurally incompatible with a proposal taking the form of a directive.

In this context, it should further be noted that Article 31 of the Euratom Treaty refers to a procedure of a non-legislative nature. However, there are precedents which combine legislative and non-legislative procedures, for example, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, based on 103 (non-legislative) and 114 (legislative) TFEU.

Finally, by clarifying that Article 43 TFEU shall relate to its second paragraph, that Article 168 TFEU shall relate to its fourth paragraph and that Article 192 TFEU shall relate to its first paragraph, the final agreement has brought customary precision in relation to what parts of these provisions are relevant for the Proposal by the Commission.

VI - Conclusion and recommendation

The measure consists of several components that are indissociably linked, without one being secondary and indirect in relation to the others. On this basis, the general construction of the legal base as proposed by the Commission is correct, in that each policy area covered needs to be supported by a provision in TFEU.

Given the policy areas and the measures covered by the text according to the provisional agreement, the legal base set out in it is appropriate.

At its meeting of 18 March 2019 the Committee on Legal Affairs decided unanimously, by 15 votes⁴, to recommend that the legal base as set out in the provisional agreement should be confirmed.

⁴ The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada (Vice-Chair), Kostas Chrysogonos, Sergio Gaetano Cofferati, Geoffroy Didier, Pascal Durand, Rosa Estaràs Ferragut, Jytte Guteland, Heidi Hautala, Sylvia-Yvonne Kaufmann, Virginie Rozière, Axel Voss, Tadeusz Zwiefka, Dominique Bilde (for Marie-Christine Boutonnet pursuant to Rule 200(2)), Josef Weidenholzer (for Evelyn Regner pursuant to Rule 200(2)).

Yours sincerely,

Pavel Svoboda

(Affects all language versions.)