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*Committee on Legal Affairs
The Chairman*

14.6.2006

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II) (COM(2005)0236 – C6-0174/2005 - 2005/0106(COD))¹

By letter of 6 June 2006 you asked the Committee on Legal Affairs pursuant to Rule 35(2) of the Rules of Procedure to consider whether the legal basis of the above Commission proposal was valid and appropriate, in particular if it was appropriate to add Article 63(3)(b) of the EC Treaty as a further legal basis to the articles proposed by the Commission in the above-mentioned proposal for a Regulation.

The Commission proposed to base the regulation on Articles 62(2)(a) and 66 of the EC Treaty. The rapporteur of your committee for the proposals of the Commission on the new second generation Schengen Information System (SIS II), who is currently negotiating with the Presidency in view of concluding the procedures in first reading, has the intention to table an amendment adding Article 63(3)(b) EC as a legal basis, as proposed by the Council. The Council considers this addition to be necessary because the information stored in the SIS II under Article 15 as modified by Council would not only cover the refusal of entry but also the refusal of stay. If a third country national, who does not enjoy the right of free movement and is entered in the system, has already entered (illegally) a Member State, he/she can be refused to stay and therefore expelled (see Art. 15(3)). Article 62(2)(a) EC covers only the refusal of entry, whereas Article 63(3)(b) is about illegal immigration and therefore covers the refusal of stay.

¹ OJ C ... /Not yet published in OJ.

The Committee on Legal Affairs considered the above question at its meeting on 12.06.2006.

General remarks on legal basis

It is clear from settled case law of the Court of Justice that the choice of legal basis is not a subjective one, but "must be based on objective factors which are amenable to judicial review"¹, such as the aim and content of the measure in question². Furthermore, the decisive factor should be the main object of a measure.³

However, where a measure has several contemporaneous objectives which are indissolubly linked with each other without one being secondary and indirect in respect to the others, the measure must be based on the various relevant Treaty provisions⁴ unless this is impossible on account of the mutual incompatibility of the decision-making procedures laid down by the provisions⁵.

Purpose and content of the proposed Regulation

The main objective of the proposed regulation - together with the proposal for a Council Decision on the establishment, operation and use of the second generation of the Schengen Information System (COM(2005)0230 - 2005/0103(CNS)) based on Title VI of the Treaty on the European Union - is to establish the legal framework that is to govern the SIS II.

Both proposals lay down common provisions on the architecture, financing, responsibilities and general data-processing and data-protection rules for SIS II. Apart from those common rules, the proposed regulation contains rules on the processing of SIS II data supporting the implementation of policies linked to the movement of persons as part of the Schengen acquis (e.g. external borders and visa). A computerised information system is to be established to enable competent authorities of the Member States to cooperate by exchanging information for the purposes of controls on persons and objects.

The proposal for a regulation defines the conditions and procedures for the processing of alerts issued in respect of third country nationals in SIS II and the exchange of supplementary information for the purpose of refusing entry into the territory of the Member States (Article 2(1) of the proposal) and also lays down provisions on the technical architecture of SIS II, responsibilities of the Member States and the Commission, general data processing, rights of individuals concerned and liability.

Article 15(1) of the proposed regulation sets out the conditions for issuing alerts in respect of third country nationals for the purpose of refusing entry into the territory of the Member States on the basis of a decision defining the period of refusal of entry taken by the competent administrative or judicial authorities.

¹ Case 45/86, *Commission v. Council* [1987] ECR 1439, para. 5.

² Case C-300/89, *Commission v. Council* [1991] ECR I-287, para. 10.

³ Case C-377/98, *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 27.

⁴ Case 165/87 *Commission v. Council* [1988] ECR 5545, para. 11.

⁵ See, e.g., Case C-300/89 *Commission v. Council* [1991] ECR I-2867, paras 17-21 (*Titanium dioxide case*), Case C-388/01 *Commission v. Council* [2004] ECR I-4829, para. 58 and Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paras 103-111.

Procedure

In Declaration N° 5 annexed to the Treaty of Nice, the Member States agreed that, from 1 May 2004, the co-decision procedure in accordance with Article 251 EC would be applicable to the adoption of measures referred to in Article 63(3)(b) and that it would also apply to the adoption of measures referred to in Article 62(2)(a) from the date on which agreement is reached on the scope of the measures concerning the crossing by persons of the external borders of the Member States. Pursuant to Council Decision 2004/927/EC of 22 December 2004¹, the Council is to act in accordance with the procedure of Article 251 of the EC Treaty when adopting measures referred to in Article 62, point 2(a) of the EC Treaty. The procedure of Article 251 EC is also to apply for measures based on Article 63 point 3(b) EC.

Pursuant to the Protocol on Article 67 of the Treaty establishing the European Community, annexed by the Treaty of Nice to the EC Treaty, the Council is to act by qualified majority, on a proposal of the Commission and after consulting the European Parliament, in order to adopt the measures referred to in Article 66 EC.

Conclusions

It follows from the aim and the content of the proposed regulation, that Articles 62(2)(a) and 66 of the EC Treaty are the appropriate legal basis for the regulation as proposed by the Commission. The main objective of the proposal is to establish the legal framework for the setting up, operation and use of the new SIS II as an instrument for cooperation between the competent authorities of the Member States through the exchange of information, with a view to realising the policies of the EC and its Member States on migration and the movement of third country nationals within the Community.

In so far as the proposed regulation aims at establishing procedures for the systematic exchange of information between Member States and at defining the architecture of the information system (SIS II) that shall support them, the appropriate legal base is Article 66 of the EC Treaty. This article focuses on the cooperation of administrations of the Member States in practice, such as exchange of information, setting up national contact points, measures for the infrastructure etc. According to that provision the Council shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in areas covered by Title IV of part three of the EC Treaty, as well as between those departments and the Commission. The exchange of information is an action of cooperation between Member States' relevant departments, as laid down in Article 66 EC. The legal basis of Article 66 EC can also cover provisions on what authorities have access to the SIS II; thus, the proposal allows for the access of the authorities responsible for external borders, visas, asylum and immigration.

In so far as substantive rules are laid down which affect the policy on the control at external borders, Article 62 (2) (a) EC constitutes a pertinent legal base for the proposed regulation; this particularly relates to the nature of the alerts which can be issued and the action to be taken thereon by the authorities responsible for the control of external borders. Those

¹ OJ L 396 of 31 December 2004, p. 45

authorities must, as part of the checks at the external borders, search the person wishing to enter Community territory against the SIS. According to Article 62(2) (a) EC, the Council is to adopt measures on the crossing of the external borders of the Member States establishing standards and procedures to be followed by Member States in carrying out checks on persons at those borders. Articles 15 and 16 of the proposed regulation enact normative provisions concerning the refusal of entry. Their application creates reasons for refusing persons entry into the territory of the Member States. Such alerts are controlled primarily upon crossing the external borders of the Member States. Therefore, the standards and procedures to be followed by the competent authorities of the Member States in carrying out checks on persons at the external borders of the Member States are affected.

The combination of Articles 62(2)(a) and 66 EC as legal bases for the proposed regulation implies that the procedure referred to in Article 251 EC will have to be followed for the adoption of the measure as a whole.

As regards the question, whether it is appropriate to add Article 63(3)(b) EC as an additional legal base, it follows from the proposed amendments, in particular to Article 15 of the proposal, that it would be appropriate to add Article 63 (3) (b) EC to the legal bases of the proposal.

Under Article 63(3) (b) EC, the Council is to adopt measures on immigration policy, and more particularly on illegal immigration and illegal residence, including the repatriation of illegal immigrants. If Article 15 of the proposal were to be amended as proposed by the Council, it would be appropriate to add Article 63(3)(b) EC as an additional legal basis. According to the proposed amendment, issuing an alert for third country nationals would have the purpose of refusing entry or stay. The amendment to Article 15 as proposed by the Council and as considered by the LIBE committee would include the conditions for issuing alerts on refusal of stay. Article 15(1) thus amended would read as follows:

“Data on third country nationals for whom an alert has been issued for the purposes of refusing entry or stay shall be entered on the basis of a national alert resulting from a decision taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law. This decision may only be taken on the basis of an individual assessment, except for the case foreseen by paragraph 2(c). Appeals against these decisions shall be carried out in accordance with national legislation.”

Furthermore, pursuant to the proposed amendment to Article 15(3) a decision to issue an alert may also be based on the fact that the third country national has been subject to measures involving expulsion, refusal of entry or removal. The amended paragraph 3 of Article 15 would read as follows:

“A decision to issue an alert may also be based on the fact that the third country national has been subject to measures involving expulsion, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a

failure to comply with national regulations on the entry or residence of third country nationals”.

Such an amendment would provide explicitly that alerts for the purpose of refusal of entry or stay also have the purpose of removal of persons from within the territory of the Member States, and would therefore grant authorities responsible for police and immigration checks within the country access to those alerts on the same footing as border control authorities. It would therefore be appropriate to add Article 63(3)(b) EC as a legal basis.

It has to be pointed out, that the addition of Article 63(3)(b) EC as a legal basis on top of Articles 62(2)(a) EC and 66 EC would not result in a change in the procedure, given that Article 63(3)(b) EC refers to the procedure of Article 251 EC.

The appropriate legal basis for the proposed regulation as amended according to the proposal of the Council should therefore be Articles 62(2)(a), 63(3)(b) and 66 of the EC Treaty.

At its meeting of 12 June 2006 the Committee on Legal Affairs accordingly decided unanimously¹, to recommend that Article 63(3)(b) EC should be added as a legal basis to Articles 62(2)(a) and 66 EC in the event that the amendments proposed by the Council are adopted in Parliament.

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the final vote: Rainer Wieland (acting chairman), Diana Wallis (draftsperson), Maria Berger, Rosa Díez González, Bert Doorn, Monica Frassoni, Piia-Noora Kauppi, Klaus-Heiner Lehne, Hans-Peter Mayer, Aloyzas Sakalas, Francesco Enrico Speroni, Jaroslav Zvěřina, Tadeusz Zwiefka.