06.12.2013

Mr Klaus-Heiner Lehne  
Chair  
Committee on Legal Affairs  
BRUSSELS


Dear Mr Chair,

The Committee on Legal Affairs has decided, pursuant to Rule 37(3) of the Rules of Procedure, to verify the legal basis of the above Commission proposal.

The committee considered this question at its meeting of 26 November 2013.

I - Background

The legal basis proposed by the Commission for the above proposal was Articles 50(2)(g), 53 and 62 of the Treaty on the Functioning of the European Union (TFEU).

In the context of trilogue negotiations, the Council took the position that the reference to the first Article enumerated above should be changed to Article 50(1) TFEU, since the originally suggested reference does not point to any explicit competence for the legislator to adopt legislative acts. This position was also supported by the Commission.

The rapporteur, Mrs Marielle Gallo, therefore asked the Committee on Legal Affairs, pursuant to Rule 37(3) of the Rules of Procedure, to verify the legal bases of the proposal and the
suggested alternative reference to Article 50(1) TFEU.

**II - Relevant Articles of the TFEU**

The following Articles of the TFEU were presented as the legal basis in the Commission proposal (emphasis added):

*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. 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.

2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

Article 62

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

III - Determination of the 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 at stake.

The suggested Article 53 TFEU is placed under the "Right of Establishment" heading in the TFEU and provides for the adoption of directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States. Furthermore, Article 62 TFEU under the "Services" heading provides that Article 53 shall apply to the matters covered by that chapter. It could be noted that these two articles provided the legal basis for the orphan works directive\(^2\).

The change to the reference in Article 50 TFEU - from paragraph 2, point g to paragraph 1 - is justified by the fact that paragraph 1 provides for Parliament and the Council to act by means of directives in accordance with the ordinary legislative procedure in order to attain freedom


of establishment as regards a particular activity, whereas paragraph 2, point g, merely identifies the activity in question, namely safeguards for the protection of the interests of members and others, which are required by Member States of companies or firms with a view to making such safeguards equivalent throughout the Union.

One of the main aims of the proposal is to address the fragmentation of rules applicable to collective rights management across Europe, notably by introducing key governance and transparency standards in collecting societies. The proposal therefore contains numerous provisions which aim at safeguarding the protection of the interests of members thereof. The operative part of the legal basis for this purpose is however in paragraph 1 of Article 50 TFEU, and not in paragraph 2, point g.

The correct reference to Article 50 TFEU is therefore to be found in its first paragraph.

The Legal Service also points out that it would be more appropriate to refer to Article 53(1) TFEU and not to Article 53 TFEU as a whole, since its second paragraph relates specifically to medical and pharmaceutical professions which are not concerned by the proposed directive. Furthermore, taking into account that the reference to this article in the legal basis of the above-mentioned orphan works directive was to its first paragraph, it would be appropriate to also change the reference accordingly in the legal basis of the proposal at hand.

The correct reference to Article 53 TFEU is therefore to be found in its first paragraph.

In light of the foregoing analysis, Article 50(1) TFEU must take the place of Article 50(2)(g) TFEU, and Article 53(1) TFEU must take the place of Article 53 TFEU in order to form the legal basis of the proposed directive together with Article 62 TFEU.

**IV - Conclusion and recommendation**

The correct legal basis of the proposal is Articles 50(1), 53(1) and 62 TFEU.

At its meeting of 26 November 2013 the Committee on Legal Affairs accordingly decided, unanimously, to give the opinion that Articles 50(1), 53(1) and 62 TFEU should constitute the legal basis for the proposal.

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1 The following were present for the final vote: Raffaele Baldassarre (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Françoise Castex (Vice-Chair), Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Eduard-Raul Hellvig, Klaus-Heiner Lehne (Chair), Eva Lichtenberger, Antonio López-Istúriz White, Antonio Masip Hidalgo, Evelyn Regner (Vice-Chair), Dagmar Roth-Behrendt, Francesco Enrico Speroni, Dimitar Stoyanov, József Szájer, Alexandra Thein, Axel Voss, Cecilia Wikström, Tadeusz Zwiefka.
Yours sincerely,

Klaus-Heiner Lehne