

EUROPEAN PARLIAMENT

2004



2009

*Committee on Legal Affairs
The Chairman*

21.11.2006

Mr Gerardo Galeote
Chairman
Committee on Regional Development
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Council Regulation concerning Community financial contributions to the International Fund for Ireland (2007-2010)
(COM(2006)0564 final – 2006/0194(CNS))

Dear Mr Chairman,

By letter of 8 November 2006 and pursuant to Rule 35(3) of the Rules of Procedure, the Committee on Budgets requested the Committee on Legal Affairs, which I have the honour of chairing, to give an opinion on the most appropriate legal basis for the above-mentioned proposal.

At the first exchange of views held in the Committee on Budgets, the question was raised as to whether the proposed legal basis - Article 308 - ought not more properly to be replaced by Article 159 of the EC Treaty.

It is clear from settled case-law of the Court of Justice that the choice of legal basis is not in the discretion of the Community legislator but must be determined by objective factors which are amenable to judicial review¹, such as the aim and content of the measure in question². Furthermore, the decisive factor should be the main object of the measure³.

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, and Case C-42/97, *European Parliament v. Council* [1999] ECR I-869, para. 36.

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

Moreover, the Court of Justice has stated that Article 308 of the EC Treaty is an appropriate legal basis only where no other article of the Treaty gives the Community its necessary powers¹. Thus, before choosing this provision as a legal basis, the Community legislator must establish that there are no other Treaty provisions conferring the necessary powers for the proposed measure.

As clearly stated in recital 1, the objectives of the IFI are *"to promote economic and social advance and to encourage contact, dialogue and reconciliation between nationalists and unionists throughout Ireland"*.

In keeping with this approach, the aim of the proposed Regulation is set out in recital 10 (*"Assistance from the Fund should be regarded as effective only in so far as it brings about sustainable economic and social improvement and is not used as a substitute for other public or private expenditure"*) and in the third paragraph of Article 2 (*"The contribution shall be used in such a way as to bring about sustainable economic and social improvement in the areas concerned. It shall not be used as a substitute for other public and private expenditure"*).

The overall content of the proposal essentially consists in the allocation of the European Community's contribution to the International Fund for Ireland with a view to promoting economic and social advance of the areas of Northern Ireland concerned.

It follows from the above considerations that the aspects of the proposal concerning sustainable economic and social improvement are predominant and constitute the main, if not the sole, objective factors for determining the legal basis. Those factors point unequivocally to Article 159 of the EC Treaty as the only possible legal basis.

Furthermore, it must be borne in mind that the European Community's PEACE programme, which aims at the same goal as the IFI, has been set up within the activities financed by the Structural Funds (see Article 7(4) of the Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds: *"Under Objective 1, a PEACE programme in support of the peace process in Northern Ireland shall be established for the years 2000 to 2004 for the benefit of Northern Ireland and the border areas of Ireland"*²).

This is indisputable evidence that instruments financed by the Structural Funds can aim at promoting inter-community peace and reconciliation and that, consequently, any other Community financial contribution pursuing the same objective - such as the contribution to the IFI - can fall within the remit of economic and social cohesion policy. As a result, the third paragraph of Article 159 of the EC Treaty proves the most appropriate legal basis for the proposal in question: indeed, that provision clearly refers to *"specific actions [which] prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Community policies"*. What is more, Article 159(3) makes the codecision procedure applicable to the relevant decision-making process, thus assigning a stronger role to the European Parliament.

¹ Case C-45/86, *Commission v. Council* [1987] ECR 1493, para. 13.

² OJ L 161, 26.06.1999, p. 1. In recognition of the special effort for the peace process, the PEACE programme has been allocated additional support from the Structural Funds for the period 2007 to 2013 pursuant to paragraph 22 of Annex II to Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25).

On the other hand, this conclusion - namely the applicability of Article 159(3) - seems to be suggested by the very wording of the proposal under consideration: the second paragraph of Article 2 refers to the mission of the IFI as *"to complement the activities financed by the Structural Funds, and especially those of the PEACE programme"*, where this complementarity clearly evokes the same aim for both initiatives. In other terms, given that they have the same objectives, both the PEACE programme and the contribution to the IFI should have the same legal basis.

In addition, recital 9 (*"It is vital to ensure proper co-ordination between the activities of the Fund and those financed under the Community Structural Funds provided for by Article 159 of the Treaty, in particular the PEACE programme"*) shows that, notwithstanding the choice of Article 308 as the legal basis for the proposal, the Commission probably had had Article 159 at the back of its mind.

Owing to the applicability of Article 159 of the EC Treaty as the most specific and appropriate legal basis, Article 308 is no longer relevant. As has been seen, Article 308 is applicable only when it is necessary *"in the course of the operation of the common market"*, which is obviously not the case - at least not directly - when aiming at the promotion of inter-community peace and reconciliation. What is more, that provision provides only consultation of the European Parliament, along with a unanimous vote in the Council.

At its meeting of 20 November 2006, after hearing the Legal Service of the European Parliament and the representative of the European Commission, the Committee on Legal Affairs examined this question and decided unanimously that the third paragraph of Article 159 of the EC Treaty should be regarded as the only lawful legal basis for the abovementioned proposal¹.

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the final vote: Giuseppe Gargani (chairman), Maria Berger, Carlo Casini, Rosa Díez González, Jean-Paul Gauzès, Manuel Medina Ortega, Gabriele Stauner, Jaroslav Zvěřina.