



*Committee on Legal Affairs
The Chair*

17.7.2018

Ms Anneleen Van Bossuyt
Chairwoman
Committee on the Internal Market and Consumer Protection
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 (COM(2017)0256 – C8-0141/2017 – 2017/0086(COD))

Dear Chair,

By letter dated 15 June 2018, you asked, on behalf of the Committee on the Internal Market and Consumer Protection (IMCO), the Committee on Legal Affairs (JURI), pursuant to Rule 39(2) of Parliament's Rules of Procedure, to provide you with an opinion on the appropriateness of a modification of the legal basis of the proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 in light of the outcome of inter-institutional negotiations aimed at a first-reading agreement.

I - Background

The proposal has been subject to inter-institutional negotiations in accordance with Rule 69c of the Rules of Procedure. A provisional agreement was reached at a trilogue on 24 May 2018. By letter of 20 June 2018, the Chairman of COREPER (Part 1) informed the IMCO Chair that the Council could approve the compromise text set out in the annex to that letter (the 'compromise').

The compromise provides for the establishment of a single digital gateway. Under Article 2, that gateway consists of a common user interface which links to national and Union webpages

and gives access to information, procedures and assistance and problem-solving services regarding Union and national rules applicable to citizens and businesses exercising or intending to exercise their internal market rights.

Annex I contains a list of the internal market rights, obligations and rules on which information should be available via the single digital gateway, relating to, inter alia, travel, work and retirement and vehicles. Information on matters not listed in Annex I may, in accordance with Article 5, only be made accessible via the gateway if it concerns the exercise of rights in the field of the internal market within the meaning of Article 26(2) TFEU.

The gateway shall moreover give access to information on and links to procedures that have been established to enable users to exercise the rights and comply with the obligations and rules in the fields of the internal market listed in Annex I. Annex II contains a list of procedures that are among those to be covered by the gateway.

The gateway shall also provide access to information on and links to “*assistance and problem-solving services*”, which citizens and businesses can refer to with questions or problems related to the rights, obligations or procedures that are within the scope of the gateway. Annex III lists seven such services, such as Product Contact Points and EURES. Under Article 7(3), the Commission may add links to additional services to the gateway if certain conditions are met. In any case, the service must offer information or assistance within the areas and for the purposes covered by the Regulation.

The compromise imposes obligations on the Member States and the Commission to ensure access to the information, procedures and assistance and problem-solving services at national and Union level respectively, and lays down certain quality and access requirements on such information, procedures and services.

Under Article 6, the compromise obliges Member States to allow users to access all of the procedures that are listed in Annex II fully online, at least in so far as those procedures are established in the Member State concerned. Article 6 explains when access shall be considered fully online, and provides that only in exceptional cases appearance in person before a competent authority may be required.

In accordance with Article 14, the Commission shall establish a technical system for the automated cross-border exchange of evidence in the context of the procedures listed in Annex II and of procedures provided for in Directives 2005/36 (the Professional Qualifications Directive), 2006/123 (the Services Directive), 2014/24 (the Public Procurement Directive) and 2014/25 (the Utilities Public Procurement Directive). The aim of this system is to avoid that users must provide the same evidence each time they have to complete a different procedure.

Article 25 obliges the Commission to provide users of the gateway with a user-friendly tool to provide feedback on the services of the gateway. Under Article 26 the Commission shall provide a similar tool for users to signal any obstacles they encounter in exercising their internal market rights. The Commission and the Member States shall analyse and investigate the problems raised and address them by appropriate means wherever possible.

The Commission relied on Article 21(2) TFEU (Union citizens’ right to move and reside freely),

Article 48 TFEU (social security) and Article 114(1) TFEU (internal market) as joint legal bases for its proposal. In the compromise, Article 48 TFEU has been deleted, leaving Articles 21(2) and 114(1) TFEU as joint legal bases.

II - Relevant Treaty Articles

Article 21

(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

Article 48

(ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

Article 114(1)

(ex Article 95 TEC)

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.

III. CJEU case law on the choice of legal basis

It is important to recall from the outset the principles governing the choice of legal basis for the acts of the Union. According to settled case law of the Court of Justice, *"the choice of legal basis for a [Union] measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure"*.¹

If an act pursues a twofold purpose or has a twofold component, one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, *"the act must be based on a single legal basis, namely that required by the main or predominant purpose or component"*.²

An act may only be based on several legal bases "exceptionally". This may be the case if an act simultaneously pursues a number of objectives or has several components that are "indissociably linked, without one being secondary and indirect in relation to the other". Such an act will have to be based on the various corresponding legal bases.³

It follows from the above that the aim and content of a proposed measure should be examined in order to establish whether the legal basis is appropriate or not. In this instance, such examination should be made as regards the aim and content of the proposed Regulation as provisionally agreed following inter-institutional negotiations.

IV. Aim and content of the compromise

According to recital 73, *"the objective of this Regulation is to ensure that users who operate in other Member states have online access to comprehensive, reliable, accessible and understandable Union and national information on rights, rules and obligations, to online procedures that are fully transactional cross-border and to assistance and problem solving services"*.

Recital 6, more in detail, clarifies that the draft Regulation pursues a threefold purpose, namely *"reducing additional administrative burden on citizens and businesses that exercise or want to exercise their internal market rights, including the free movement of citizens"*, *"eliminating*

¹ See judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518, paragraph 45.

² See judgment of 25 April 2013, *Inuit Tapiriit Kanatami*, T-526/10, EU:T:2013:215, paragraph 66.

³ See judgment of 6 November 2008, *Parliament v Council*, C-155/07, EU:C:2008:605, paragraphs 35-36.

discrimination” and “ensuring the functioning of the internal market with regard to provision of information, procedures and assistance and problem solving services”.

Other recitals contain similar clarifications. According to recital 7, the compromise aims at establishing a single digital gateway that offers Union citizens and businesses access to information in order for them *“to enjoy their right to free movement within the internal market”*. Recital 16 explains that the information areas that should be covered within the scope of the gateway are those *“which are relevant for citizens and businesses exercising their rights and complying with their obligations within the internal market”*. Similarly, recital 23 provides that Member States should ensure that certain procedures are available online, *“in order to allow citizens and businesses to directly enjoy the benefits of the internal market without unnecessary additional administrative burden”*.

The content of the proposed Regulation reflects the abovementioned aims. The aspects listed in Annex I, on which information should be available via the gateway, all concern matters that are likely to be relevant for citizens and businesses exercising their free movement rights. The provision of easily accessible information on those aspects that complies with certain quality requirements may be expected to genuinely contribute to a smoother exercise of those rights.

Similarly, Annex II lists a series of procedures which, if not available fully online, would appear to constitute significant obstacles for citizens and businesses engaged in or intending to engage in cross-border activity. The obligation on Member States to ensure, for example, that prospective students may apply for a study grant, that migrant workers may request a proof of registration of birth or that an income tax declaration may be submitted from abroad, without having to appear in person, facilitates the exercise of citizens and businesses’ internal market rights.

It is important to note that, as the Explanatory Memorandum to the proposal clarifies, the draft Regulation *“does not affect the substance of or competence regarding any [...] rules or procedures.”* The compromise enshrines this principle in Article 1(3) and in recital 25. the latter recital clarifies that the proposed Regulation *“does not lay down material or procedural rules within the areas covered by annex II, including taxation matters”*, but merely lays down *“the technical requirements in order to ensure that such procedures, where they exist in the Member State concerned, are made available fully online”*.

V. Analysis and determination of the appropriate legal basis

Under Article 114(1) TFEU, the European Parliament and the Council may 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. In accordance with Article 114(2) TFEU, however, measures relating to the free movement of persons cannot be based on the previous paragraph.

Article 21(2) TFEU provides that the European Parliament and the Council may adopt provisions with a view to facilitating the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, as laid down in Article 21(1) TFEU.

In light of its aims and content, it is clear that the compromise mainly concerns the creation of a single digital gateway in order to remove barriers to the exercise by businesses and citizens of their internal market rights. Considering that the compromise concerns the free movement of persons, not as an ancillary issue but as an aspect equivalent to the other internal market rights of businesses and citizens, it is appropriate to use Articles 114(1) and 21(2) TFEU as a dual legal basis.

As for Article 48 TFEU, it is true that the compromise touches upon the area of social security. For example, the list in Annex I contains “*social security rights and obligations in the Union (registering as employer, registering employees, notifying the end of contract of an employee, paying social contributions, rights and obligations related to pensions)*”. As a result, the single digital gateway must ensure access to the relevant information, and to procedures and services concerning these matters. Similarly, due to the inclusion in Annex II of a “*request for determination of applicable legislation in accordance with Title II of Regulation (EC) No 883/2004*” (the Regulation on the coordination of social security systems), procedures to obtain the corresponding decision must be made available online under the compromise.

However, considering the aim and content of the proposed Regulation, and having regard in particular to the express statement of the legislator that it does not intend to affect the material and procedural rules related to issues listed in Annex II, thus including social security rules, the social security aspect seems to be of only secondary importance in the economy of the compromise. It cannot be considered, in respect of the objectives aiming at the removal of obstacles to the internal market rights of citizens and businesses, to be “*indissociably linked, without one being secondary and indirect in relation to the other*”. In other words, Article 48 TFEU does not meet the criteria set by the Court concerning joint legal bases, and thus should not be used as a third legal basis for this legislative act.

VI. Conclusion and recommendation

In light of all the above, Articles 21(2) and 114(1) TFEU appear to provide an appropriate joint legal basis for the compromise.

The Committee on Legal Affairs therefore concluded that the appropriate legal basis for the proposed Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 is Articles 21(2) and 114(1) TFEU.

At its meeting of 10 July 2018, the Committee on Legal Affairs accordingly decided unanimously¹, by 18 votes in favour, that the appropriate legal basis for the proposed Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012, as amended in the course of concluded interinstitutional

¹ The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada, Lidia Joanna Geringer de Oedenberg (Vice-Chairs), Axel Voss (rapporteur for opinion), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Kostas Chrysogonos, Pascal Durand, Angel Dzhambazki, Evelyne Gebhardt, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Răzvan Popa, Emil Radev, Francis Zammit Dimech, Tadeusz Zwiefka.

negotiations, is Article 21(2) and Article 114(1) TFEU.

Yours sincerely,

Pavel Svoboda