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REPORT

on the proposal for a Council decision on the conclusion of a Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway
(COM(2005)0131 – 8479/2005 – C6-0197/2005 – 2005/0031(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Martine Roure

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council decision on the conclusion of a Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (COM(2005)0131 - 8479/2005 – C6-0197/2005 – 2005/0031(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the proposal for a Council decision (COM(2005)0131)¹,
 - having regard to the Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway (8479/2005),
 - having regard to Article 63(1)(a) and Article 300(2), first subparagraph of the EC Treaty,
 - having regard to Article 300(3), first subparagraph of the EC Treaty, pursuant to which the Council consulted Parliament (C6-0197/2005),
 - having regard to the powers and responsibilities conferred under the Protocol on the Joint Committee set up pursuant to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway,
 - whereas that Joint Committee constitutes 'a specific institutional framework' within the meaning of Article 300(3), second subparagraph of the EC Treaty,
 - having regard to the opinion of the Committee on Legal Affairs, which deems Article 300(3), second subparagraph of the EC Treaty (which stipulates application of the assent procedure) to be the appropriate legal basis,
 - having regard to Rule 51, Rule 83(7) and Rule 35 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0380/2005),
1. Approves the proposal for a Council decision as amended and approves conclusion of the Protocol;
 2. Reserves the right to protect the prerogatives conferred upon it under the Treaty;
 3. Instructs its President to forward its position to the Council and Commission and to the governments and parliaments of the Member States and of the Republic of Iceland and the Kingdom of Norway.

¹ Not yet published in OJ.

Amendment 1
Citation 1

Having regard to the Treaty establishing the European Community, and in particular Article 63(1)(a), taken in conjunction with the first sentence of the first subparagraph of Article 300(2) and the *first* subparagraph of Article 300(3) thereof,

Having regard to the Treaty establishing the European Community, and in particular Article 63(1)(a), taken in conjunction with the first sentence of the first subparagraph of Article 300(2) and the *second* subparagraph of Article 300(3) thereof,

Amendment 2
Citation 3

Having regard to the *opinion* of the European Parliament,

Having regard to the *assent* of the European Parliament,

EXPLANATORY STATEMENT

1. Background

The purpose of the two proposals under consideration (Agreement and Protocol) is to extend to Denmark the provisions of the Eurodac system and the procedure for determining the Member State responsible for examining a Dublin Regulation asylum application.

Pursuant to the Protocol on Denmark which is appended to the Amsterdam Treaty, Denmark does not take part in measures based on Title IV of the EC Treaty other than those relating to visa policy. As regards the development of the Schengen *acquis*, Denmark decides within six months of any decision adopted by the Council whether or not it will incorporate that decision into its laws.

Since the Eurodac¹ and Dublin II² regulations are not part of the development of the Schengen *acquis*, Denmark cannot resort to an opt-in in order to participate in those regulations.

However, following the conclusion of an agreement between the EU and Norway and Iceland which enables those countries to participate in the Eurodac and Dublin regulations, Denmark has expressed a wish to participate as well. In order to enable Denmark to participate, an international agreement between the Community and Denmark³ (hereinafter 'the Agreement') will have to be drawn up, together with a Protocol to the Agreement between the Community, Iceland and Norway⁴ (hereinafter 'the Protocol').

2. Legal construction

The legal construction is based on two separate legal acts:

The Agreement is needed if the Court of Justice is to have jurisdiction over Denmark as regards both the interpretation and the application of the agreements and regulations concerned and if mutual obligations are to be regulated in the context of international agreements⁵.

The Protocol is needed for the purpose of establishing the terms and conditions under which Denmark will participate in the Agreement between the Community and Norway and Iceland⁶ and in particular for the purpose of establishing the rights and obligations which obtain between Iceland and Norway on the one hand and Denmark on the other⁷.

¹ Council Regulation (EC) No 2725/2000 of 11 December 2000.

² Council Regulation (EC) No 343/2003 of 18 February 2003.

³ COM(2004)594 final.

⁴ COM(2005)131 final.

⁵ Page 2 of the Explanatory Statement to the Agreement and page 8 of the Preamble to the Protocol.

⁶ OJ L 093, 03.04.2001, p. 38. Pursuant to Article 12 of the Agreement, Denmark may ask to participate in the Agreement and the Community, Norway and Iceland (acting with Denmark's consent) shall determine the conditions for such participation in a Protocol to the Agreement.

⁷ See Preamble to the Protocol.

From a political point of view this legal construction means the two legal instruments must at all costs be kept in step. This is necessary if the regulations are to be applied simultaneously by the contracting parties, thereby preventing greater complexity from arising.

3. Substance of the Agreement

Under the Agreement the provisions of the Dublin II Regulation, the Eurodac Regulation and the implementing rules¹ relating thereto are made applicable to relations between the Community and Denmark.

As regards the amendments to the above-mentioned regulations and the new implementing rules, Denmark must notify the Commission of its decision to or not to incorporate them into its internal law. Delayed notification (or a failure to notify) on Denmark's part will cause the Agreement to be denounced unless the parties decide otherwise within 90 days.

If the Community or Denmark wishes to conclude international agreements with non-EU countries which may have an effect on the scope of the regulations, there must - according to the Agreement - be proper liaison between the contracting parties.

Pursuant to the Agreement the Court of Justice has jurisdiction over Denmark as regards both the interpretation and the uniform application of the Agreement and the regulations concerned, just as it has jurisdiction over the other Member States. Similarly, the Court of Justice has been deemed competent to rule on the contracting parties' compliance with the Agreement, pursuant to the EC Treaty provisions which govern proceedings at the Court.

Under the Agreement, Denmark is required to pay part of the cost of the initial setting-up of the Eurodac Central Unit and in future an annual share of the cost of running the system.

If Denmark informs the other Member States that it no longer wishes to take advantage of Part I of the Protocol on Denmark, or should one of the contracting parties denounce the Agreement, the latter will cease to apply.

The Dublin II Regulation and the Eurodac Regulation are appended to the Agreement and they constitute an integral part thereof.

4. Substance of the Protocol

The Protocol makes applicable to relations between Iceland, Norway and Denmark the rights and obligations which stem - in the case of Denmark - from the Agreement between that country and the Community and - in the case of Iceland and Norway - from the Agreement between those countries and the Community².

Hence the Dublin II Regulation and Eurodac Regulation provisions and implementing rules³,

¹ In this sphere, relations between the Community and Denmark must take into account the special position which Denmark has adopted vis-à-vis Title IV of the EC Treaty and will therefore be governed by international law.

² See the 6 May 2003 negotiating directives, 8314/03, ASILE 24.

³ Article 2(1) and (2) of the Protocol.

the amendments to the two regulations and the new implementing rules¹ will apply to relations between the three countries in accordance with international law.

Pursuant to the Protocol the Court of Justice is competent to receive notes or written comments from Iceland and Norway in cases where a Danish court asks it for a preliminary ruling concerning the interpretation of the Agreement between the Community and Denmark.

Any disputes between Iceland or Norway on the one hand and Denmark on the other as regards the application or the interpretation of the Protocol will be settled by a Joint Committee². Denmark is not represented within the Joint Committee but it will be able to take part in the proceedings thereof by means of the written comments which it may submit. If the Joint Committee is unable to resolve a conflict within 180 days, the Protocol will lapse.

Lastly, the Protocol may be denounced by any of the contracting parties. Furthermore, should the Agreement between the Community and Denmark be denounced, the Protocol will also lapse.

The Dublin II and Eurodac Regulations are appended to the Protocol and they constitute an integral part thereof.

5. Rapporteur's view

5.1 Legal basis of the proposal concerning the Protocol

As a legal basis for the proposal under consideration the Commission has taken the first subparagraph of Article 300(3) of the EC Treaty, pursuant to which Parliament is merely consulted.

In a letter dated 23 June 2005 the Committee on Civil Liberties, Justice and Home Affairs requested (pursuant to Rule 35(2) of the Rules of Procedure) the Legal Affairs Committee's opinion concerning the proposed legal basis. On 13 July the latter committee decided that the Joint Committee set up under the Agreement between the Community, Iceland and Norway and entrusted with particular powers and responsibilities in relation to the Protocol may be regarded as a 'specific institutional framework' within the meaning of the second subparagraph of Article 300(3) of the EC Treaty. Consequently, the Commission should have taken the second subparagraph of Article 300(3) of the EC Treaty as the legal basis for the above-mentioned proposal. This calls for application of the assent procedure.

For this reason the following assessment will deem this procedure appropriate in the case of the Protocol.

¹ Article 2(3) and (4) of the Protocol.

² This Joint Committee will be set up under the Agreement between the Community, Iceland and Norway and will comprise representatives of the Community (represented by the Commission) and representatives from Norway and Iceland.

5.2. Assessment of the proposals

The rapporteur is proposing to endorse the conclusion of both the Agreement and the Protocol, although not without drawing attention to a range of fairly serious problems.

Firstly, drawing up an International Agreement between the Community and Denmark (an agreement in which Denmark is regarded as a non-Member State) creates 'a new form of flexibility' under Title IV of the EC Treaty which may lead not only to political tensions but also to legal fragmentation in this area¹.

As the Commission states in its Explanatory Memorandum, such international agreements² may be concluded only under special circumstances and for a limited period of time. The rapporteur is not willing to endorse other agreements of this type which go beyond the existing opt-ins and opt-outs.

Secondly, Denmark is to apply the Dublin II and Eurodac regulations in its relations with the Community on the one hand and with Iceland and Norway on the other but it will have no part in any other measure adopted at European level in respect of the common asylum policy. This may prompt questions regarding the differing guarantees which asylum seekers will enjoy depending on the place at which their asylum application is dealt with: in Denmark or in one of the countries participating in the European asylum policy.

In view of these considerations the rapporteur is of the opinion that in future, Denmark should renounce the Protocol on Denmark which is appended to the Amsterdam Treaty and take part in all measures under Title IV of the EC Treaty³.

Thirdly, the rapporteur would ask the Council and the Commission to inform Parliament regarding all the other agreements which it is planning to conclude in order to extend the application of the Eurodac/Dublin system.

Finally, in the rapporteur's view it should be pointed out that the Member States⁴ should regularly supply the Commission with all information and statistics relating to the application of the Dublin II and Eurodac regulations in order to enable the Commission to perform its assessment task effectively⁵.

¹ Monar, Jorg, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, European Law Review, Vol. 23, No. 4, August 1998, p. 332-334.

² Two other international agreements concerning the Brussels I Regulation (COM(2005)145) and the Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (COM(2005)146) have recently been finalised and submitted to Parliament for consultation purposes.

³ According to Article 7 of the Protocol, Denmark can exercise that right at any time.

⁴ And also Iceland and Norway.

⁵ See Article 28 of the Dublin II regulation, Article 23(4) and (3) of the Eurodac regulation and page 16 of the report on Eurodac (2004).

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS CONCERNING THE LEGAL BASIS

Letter from the Committee on Legal Affairs

Subject: Legal basis of the proposal for a Council decision on the signing of a Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway
(COM(2005)0131 – C6-0197/2005 – 2005/0031(CNS))¹

Dear Mr Chairman,

By letter of 23 June 2005 you asked the Committee on Legal Affairs (pursuant to Rule 35(2) of the Rules of Procedure) to consider the validity and the appropriateness of the legal basis selected for the above Commission proposal.

The Committee considered the matter at its meeting of 13 July 2005.

The proposal is based on Article 63, first paragraph, figure 1(a), in conjunction with Article 300(2), first subparagraph, first sentence and Article 300(3), first subparagraph of the EC Treaty. This means that Parliament merely has to be consulted.

On 19 January 2001 the European Community concluded with the Republic of Iceland and the Kingdom of Norway an agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway². Pursuant to Article 12 of the agreement, Denmark may ask to be allowed to participate in the Agreement and the Community, Norway and Iceland (acting with the consent of Denmark) shall determine the conditions for such participation in a Protocol to the Agreement.

Pursuant to Articles 1 and 2 of the Protocol on Denmark which is appended to the Treaty on European Union and the Treaty establishing the European Community, Denmark has not participated in the adoption by the Council of Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin II Regulation') and Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention ('Eurodac Regulation'). However, Denmark is party to the Convention on the determining of the State responsible for examining an asylum application lodged in one of the Member States (the 'Dublin Convention'), which was signed in Dublin on 15 June 1990.

¹ Not yet published in the OJ.

² Agreement published in OJ L 093, 03.04.2001, p. 40.

On 16 February 2001, Denmark asked to be allowed to participate in the agreement between the European Community, Iceland and Norway.

By means of its decision of 6 May 2003 the Council authorised the Commission to negotiate a Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, pursuant to Article 12 of that Agreement.

The negotiations on the conclusion of the Protocol to the Agreement with Norway and Iceland were brought to a close when the text was initialled on 12 January 2005.

It should be noted that pursuant to the Protocol in question, disputes between Iceland or Norway on the one hand and Denmark on the other concerning the application and the interpretation of the Protocol shall be settled by a Joint Committee (Article 4 of the Protocol).

This is the same Joint Committee which is set up under the Agreement (Article 3 thereof) and which is granted decision-making powers in various spheres.

The question which arises is that of deciding whether such a committee should or should not be regarded as constituting ‘a specific institutional framework by organising cooperation procedures’ within the meaning of Article 300(3), second subparagraph of the EC Treaty, and for which Parliament’s assent would be required.

It is clear from previous Court of Justice rulings that the task of selecting a legal basis is not left to the discretion of the Community legislator but must be based on objective considerations subject to judicial review. Those considerations include in particular the purpose and the substance of the legal act¹.

Bearing in mind the purpose and the substance of the proposal for a Council decision on the conclusion of the abovementioned Protocol, the Joint Committee may be regarded as a ‘specific institutional framework’, since such a committee involves the establishment of an organisational structure which has the discretionary power to take decisions which are binding on the parties to the Agreement, with particular regard to the re-establishment of the Agreement and the settlement of disputes (see Article 4(7) of the Agreement and Article 4 of the Protocol).

Hence the legal basis selected for the proposal for a Council decision under consideration is not the correct one. It should be Article 300(3), second subparagraph of the EC Treaty (which stipulates the assent procedure) instead of Article 300(3), first subparagraph, first sentence of the EC Treaty, pursuant to which Parliament is merely consulted.

At its meeting of 13 July 2005 the Committee on Legal Affairs therefore decided

¹ See in particular the Court of Justice judgment of 23 February 1999 in Case C-42/97, Parliament v Council, ECR 1999, p. I-869, paragraph 36.

unanimously¹ (in the light of the above considerations and on a proposal from the rapporteur responsible for legal bases - Mr Antonio López-Istúriz White) that the legal basis for the proposal for a Council decision in question should be Article 300(3), second subparagraph of the EC Treaty and not Article 300(2), first subparagraph, first sentence.

Hence it would be wise if Parliament were to ask to be consulted again.

Yours faithfully,

Giuseppe Gargani

¹ The following were present for the vote: Giuseppe Gargani (chairman), Katalin Lévai (vice-chairman), Antonio López-Istúriz White (draftsman), Maria Berger, Monica Frassoni, Pii-Noora Kauppi, Kurt Lechner, Klaus-Heiner Lehne, Evelin Lichtenberger (for Alain Lipietz), Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega (for Nicola Zingaretti), Viktória Mohácsi, Aloyzas Sakalas, Diana Wallis and Tadeusz Zwiefka.

PROCEDURE

Title	Proposal for a Council decision on the conclusion of a Protocol to the Agreement between the European Community, the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway	
References	(COM(2005)0131 – 8479/2005 – C6-0197/2005 – 2005/0031(CNS))	
Date of consulting Parliament	15.6.2005	
Committee responsible Date announced in plenary	LIBE 22.6.2005	
Committee(s) asked for opinion(s) Date announced in plenary		
Not delivering opinion(s) Date of decision		
Enhanced cooperation Date announced in plenary		
Rapporteur(s) Date appointed	Martine Roure 10.5.2005	
Previous rapporteur(s)		
Simplified procedure – date of decision Date of decision		
Legal basis disputed Date of JURI opinion	JURI 13.7.2005 /	
Financial endowment amended Date of BUDG opinion		
Parliament to consult European Economic and Social Committee – date decided in plenary		
Parliament to consult Committee of the Regions – date decided in plenary		
Discussed in committee	5.10.2005 24.11.2005	
Date adopted	24.11.2005	
Result of final vote	+ : 36 - : 0 0 : 0	
Members present for the final vote	Edit Bauer, Johannes Blokland, Mihael Brejc, Kathalijne Maria Buitenweg, Michael Cashman, Giusto Catania, Jean-Marie Cavada, Charlotte Cederschiöld, Carlos Coelho, Agustín Díaz de Mera García Consuegra, Rosa Díez González, Kinga Gál, Patrick Gaubert, Adeline Hazan, Livia Járóka, Ewa Klamt, Magda Kósáné Kovács, Wolfgang Kreissl-Dörfler, Barbara Kudrycka, Stavros Lambrinidis, Sarah Ludford, Edith Mastenbroek, Martine Roure, Inger Segelström, Antonio Tajani, Manfred Weber, Stefano Zappalà, Tatjana Ždanoka	
Substitute(s) present for the final vote	Gérard Deprez, Genowefa Grabowska, Jeanine Hennis-Plasschaert, Sylvia-Yvonne Kaufmann, Bill Newton Dunn, Siiri Oviir, Herbert Reul, Marie-Line Reynaud	
Substitute(s) under Rule 178(2) present for the final vote	Sharon Margaret Bowles, Othmar Karas	

Date tabled	30.11.2005
Comments (available in one language only)	...