

EUROPEAN PARLIAMENT

2004



2009

Session document

FINAL
A6-0054/2006

1.3.2006

REPORT

on the proposal for a Council regulation amending Regulation (EC, Euratom)
No 2728/94 establishing a Guarantee Fund for external actions
(COM(2005)0130 – C6-0176/2005 – 2005/0025(CNS))

Committee on Budgets

Rapporteur: Esko Seppänen

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.

CONTENTS

	Page
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION	2
EXPLANATORY STATEMENT	2
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS	2
PROCEDURE.....	2

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council regulation amending Regulation (EC, Euratom) No 2728/94 establishing a Guarantee Fund for external actions (COM(2005)0130 – C6-0176/2005 – 2005/0025(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the Commission proposal to the Council (COM(2005)0130)¹,
 - having regard to Article 308 of the EC Treaty and to Article 203 of the EAEC Treaty, pursuant to which the Council consulted Parliament (C6-0176/2005),
 - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
 - having regard to Rules 51 and 35 of its Rules of Procedure,
 - having regard to the report of the Committee on Budgets (A6-0054/2006),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty and to Article 113, second paragraph, of the Euratom Treaty;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
 5. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1 CITATION 1

Having regard to the Treaty establishing the European Community, and in particular

Having regard to the Treaty establishing the European Community, and in particular

¹ OJ C ..., 13.1.2006, p. ...

Article 308 thereof,

Article 181a thereof,

Justification

The European Community part of this proposal (the substantive part of the volume of loans covered by the guarantee fund mechanism) falls under Art. 181a of the Treaty, not Art. 308 as proposed by the Commission. Voting procedures will entail qualified majority in the Council. This becomes incompatible with the Euratom part of the proposal, which requires unanimity. The Commission is therefore also invited to present a new proposal concerning the Euratom part. Although the powers of the EP will not be affected (consultation), it is legally correct to proceed in this way and, in some cases, it could also mean the difference whether a proposal falls under co-decision or not, as was the case with the recent report on the Stability Instrument.

Amendment 2
CITATION 2

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof, **deleted**

Justification

See amendment 1.

Amendment 3
RECITAL 4

(4) Should the reserve created to endow the Guarantee Fund be abolished for the Financial Perspectives 2007–2013, ***the funding of*** the Guarantee Fund should be ***provided for as an obligatory expenditure from the general budget of the European Union.***

(4) Should the reserve created to endow the Guarantee Fund be abolished for the Financial Perspectives 2007–2013, the Guarantee Fund should be ***financed outside the Financial Perspective ceilings and included in the reserve.***

Justification

This amendment follows the recommendations on the European Parliament resolution on Policy Challenges and Budgetary Means of the enlarged Union 2007-2013 (2004/2209(INI)) of 8 June 2005, paragraph 46.

Amendment 4

RECITAL 7

(7) The Treaties do not provide, for the adoption of this Regulation, powers, other than those in Article 308 of the EC Treaty and Article 203 of the Euratom Treaty, *deleted*

Justification

See amendment 1

Amendment 5

ARTICLE 1, POINT 4

Article 5, paragraph 2 (Regulation (EC, Euratom) No 2728/94)

2. The calculations based on this smoothing mechanism shall be made separately from the calculations referred to in Article 3, third paragraph, and in Article 4. Nevertheless, they will together result in one annual transfer. The amounts to be paid from the general budget of the European Union under this smoothing mechanism shall be treated as net assets of the Fund for the calculation pursuant to Articles 3 and 4.

2. The calculations based on this smoothing mechanism shall be made separately from the calculations referred to in Article 3, third paragraph, and in Article 4. Nevertheless, they will together result in one annual transfer, ***but clearly indicating the different parts.*** The amounts to be paid from the general budget of the European Union under this smoothing mechanism shall be treated as net assets of the Fund for the calculation pursuant to Articles 3 and 4.

Justification

.For reasons of transparency and information to the Budgetary Authority

Amendment 6

ARTICLE 1, POINT 4

Article 5, paragraph 3 (Regulation (EC, Euratom) No 2728/94)

3. If, as a result of the activation of guarantees on one or more major defaults, resources in the Fund fall below **50 %** of the target amount, the Commission shall submit a report on exceptional measures that might be required to replenish the Fund.”

3. If, as a result of the activation of guarantees on one or more major defaults, resources in the Fund fall below **75%** of the target amount, the Commission shall ***immediately inform the budgetary authority as to the reasons for this situation and*** submit a report on exceptional measures that might be required to replenish the Fund.”

Justification

A mechanism of early-warning is prudent in case some major loans were not to be repaid. A threshold figure of 75 % would give more time for the budgetary authority to assess the situation on the basis of the Commission proposal.

EXPLANATORY STATEMENT

1. The Commission has put forward a proposal to modify the Regulation for the Guarantee Fund for external actions as far as the budgetary provisioning is concerned. It is this "mechanism" of how the fund is provisioned from the EU budget that is being changed in the current proposal.
2. The way in which the actual lending mandates are established (i.e. which countries can be covered by EU guarantees for lending and, how much/which percentage of loans can be covered) is not affected by this proposal.
3. Due to technical factors, the new mechanism for provisioning the Fund would start working in 2007, parallel with the possible introduction of a new Financial Perspective. The proposal is also drafted with the new FP in mind, utilising the structure of budget headings foreseen therein.
4. The rapporteur wishes to recall that the main purpose of the Guarantee Fund is to protect the EU budget from "shocks" that might otherwise occur in case of defaults on loans that are guaranteed by the EU. In the case of such loan defaults, the Fund (rather than the budget directly) would step in and pay back the money to the lender (normally the EIB). In order to have the necessary amounts available in the Fund, a certain percentage, currently 9%, is paid into the fund from the budget for the loans granted. In this way, the total amount available in the Fund (the target amount) will be 9% of the total of outstanding loans.
5. The present mechanism to provision the Fund is based on a system whereby 9% of the loans are paid into the Fund on an "ex-ante" basis. This has meant payments on the basis of planned loan signatures.
6. The present system also means that a number of transfers are presented each year to the EP (normally 2 or 3 transfers per year). These transfers (which are for compulsory expenditure with only an opinion of the EP) are actually of a technical nature. This is particularly the case since the Regulation itself actually specifies that, when a loan is signed, the corresponding 9% shall be transferred into the Fund. The Council would thus be breaking the law if it were to reject one of these transfers.
7. In the modified system now proposed by the Commission, the provisioning of the Fund would be done only once a year. The amount necessary would be known at the time of the PDB and budgeted as other items. One single transfer would then be presented to transfer the money from the budget into the Fund.
8. This, according to the Commission, is possible since the new system would work on an "ex-post" basis and only provision the Fund on the basis of actual net disbursements (loans actually paid out) which would lead to a more reliable target amount for the Fund at the end of each year. The amount for the one single transfer would then be budgeted, in

the PDB for the next year, in order to adjust the Fund so it corresponds to 9% of the outstanding loans.

9. A major difference between the mechanisms proposed is that it is designed to operate under the new FP 2007-2013. This means that, contrary to the present system, the budget line from which appropriations are taken to provision the Fund will be in heading 4 of the proposed FP (external actions) whereas in the present system, this budget line is in heading 6 (reserves). The current maximum figure of this reserve (EUR 200 m in 1999 prices) would also not exist in the new system. This is a consequence of the Commission's proposals for 2007+, not this particular proposal.
10. The reserve for external loans (article 23 of the IIA of 1999) is currently not only the line from which the Fund is provisioned but, in its own right, also a potential cushion between the budget and any loan defaults. This stems from the fact that the full amount of EUR 200 million is automatically budgeted under heading 6 every year. This reserve would disappear if the new IIA is adopted along the lines suggested by the Commission. This approach is, however, somewhat controversial as demonstrated by the fact that the EP's resolution on the Future financial perspective asks for a continued functioning of such an instrument, to the tune of EUR 3 billion a year, but outside the new FP. The rapporteur must therefore clearly ask the Commission to comment on the relationship of this proposal with an IIA which has yet to be negotiated and is not fixed.
11. The rapporteur notes that, as the changes proposed would operate with a budget line under heading 4 of a possible new FP, a special "smoothing mechanism" is foreseen for cases (unlikely) in which the annual amount to be paid into the Fund would exceed EUR 100 million. This mechanism is very technical in nature and the Commission would have to clarify it. The Commission should also clarify the actual "risk" to the EU budget and taxpayer in the new system proposed compared to the old system.
12. The rapporteur notes that the proposed changes could, in part, address one of the Budget Committee's long-standing criticisms as concerns the unnecessary "over-provisioning" of the Fund. In fact, by working on the basis of actually disbursed loans rather than complicated forecasts of the signing of loans, the use of EU budgetary resources would be simplified and some excess amounts paid into the Fund (and then returned to Member States each year in the annual AB on the budgetary surplus) could actually be avoided.
13. The rapporteur has previously called for the provisioning rate of 9% to be adjusted, perhaps to a more realistic rate of 8%. This is, however, something that should be examined in the light of the upcoming proposals of the general lending mandates (which countries? how much guaranteed? which rate?) and, again, not in the scope of the present proposal.

Conclusions

14. To provision the Guarantee Fund on the basis of actual disbursements of loans, instead of ex-ante forecasting, would appear to make sense and to allow for a more rational use of EU budget expenditure. It would also cut down on some red tape.
15. The new system of transfers for the EP (one single annual transfer on the basis of an

amount foreseen in the PDB, instead of two or three transfers on the basis of forecasts) would not seem to be a disadvantage. The EP has in any case only an opinion and these transfers "must" be adopted according to the Regulation in force.

16. The scrapping of the fixed amount for a reserve in the budget (EUR 200m in heading 6 in the current system) is not covered by this proposal but, instead, suggested in the proposals for a new FP 2007-2013. The rapporteur calls on the Commission to clarify the link between this proposal and possible outcomes of the negotiations on a new FP/IIA.
17. The rapporteur is initially positive to the proposed changes by the Commission as they relate to the more effective budgetary treatment of provisioning the Fund.
18. The legislative procedure which concerns the "lending Mandates" is not covered by this proposal. The EP will continue to have its current powers (opinion to the Council).
19. Finally, the rapporteur believes that the Commission may have used the wrong legal base. It would seem that, ever since the Treaty of Nice, article 181A should be used (economic cooperation with third countries). The Commission has suggested art. 308 despite the fact that, in the last report of the rapporteur (Decision 2005/48/CE) on a modification to the general lending mandate, the Council and the EP both agreed to modify the article of the Commission's proposal to 181A instead of art. 308.

24 February 2006

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

for the Committee on Budgets
Mr Janusz Lewandowski
Chairman
Committee on Budgets
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Council Regulation amending Regulation (EC, Euratom) No 2728/94 establishing a Guarantee Fund for external actions (COM(2005)0130 – C6-0176/2005 – 2005/0025(CNS))¹

Dear Mr Chairman,

By letter of 1 February 2006 you asked the Committee on Legal Affairs, pursuant to Rule 35(2), to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The Committee considered the above question at its meeting of 23 February 2006.

The Commission has presented this proposal under Article 308 of the EC Treaty and also under Article 203 Euratom, since a small part of the actions covered by the guarantee mechanism also consists of Euratom loans.

Your rapporteur, Mr Seppänen, is of the opinion that the correct legal basis for the EC part of the proposal would be Article 181a EC (Economic, financial and technical cooperation with third countries) and has therefore presented an amendment changing the legal base from Article 308 EC to Article 181a EC. This change would however lead to a “conflictual” situation in that the same regulation would have two Treaty bases with different voting procedures in the Council, Article 181a EC requiring a qualified majority and Article 203 Euratom requiring unanimity. Consequently, the rapporteur of the Committee on Budgets invites the Commission to present a separate legal instrument for the Euratom part of the proposal.

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"², such as the aim and content of the measure in question. 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 provisions unless this is impossible on account of the mutual

¹ Not yet published in OJ.

² Case 45/86 *Commission v Council* [1987] ECR 1439, para. 5.

incompatibility of the decision-making procedures laid down by the provisions¹.

It follows from the purpose and content of the proposal that the correct legal basis for the EC part of the proposal is Article 181a of the EC Treaty.

Article 181a of the EC Treaty was introduced by the Treaty of Nice in order to get around the problem that no treaty article covered economic, financial and technical cooperation with third countries which were not developing countries. This meant having to adopt measures on the basis of Article 308, possibly in combination with the articles on the common commercial policy or development cooperation. The new Article 181a provides for an explicit legal basis for such cooperation with third countries.

The purpose of the proposal is to improve the rules of the provisioning mechanism of the Guarantee Fund, which has been set up pursuant to Council Regulation (EC, Euratom) No 2728/94 of 31 October 1994 in order to cover the risks related to loans and guarantees covering loans granted to third countries or for projects executed in third countries. The resources are used to repay the Community's creditors in the event of default by the beneficiary of a loan granted or guaranteed by the Community.

It follows from its purpose that the Guarantee Fund and its provisioning mechanism are part of the system of financial cooperation with third countries. It is evident that there is a direct link with the concrete measures of financial cooperation. The provisioning mechanism of the Guarantee Fund cannot be separated as a merely "budgetary" measure from the policy in question.

However, it must be noted, that according to Declaration No 10 annexed to the Treaty of Nice on Article 181a of the Treaty establishing the European Community, balance-of-payments aid to third countries falls outside the scope of Article 181a. It appears, however, that those balance-of-payments measures are not underwritten by the Guarantee Fund.

For the very small part of the Fund which is related to Euratom loans, Article 203 Euratom would be the correct legal basis. This leads to a "conflictual" situation of voting procedures in the Council, as Article 203 Euratom requires unanimity, whereas Article 181a EC requires a qualified majority. This situation could be resolved if a separate proposal were to be presented based on Article 203 Euratom concerning the Euratom part.

At its meeting of 23 February 2006 the Committee on Legal Affairs accordingly decided, unanimously², to recommend that the correct legal basis for the EC part of the proposal is Article 181a of the EC Treaty.

¹ 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.

² The following were present for the vote Giuseppe Gargani (chairman), Andrzej Jan Szejna (vice-chairman), Diana Wallis (draftswoman), Maria Berger, Janelly Fourtou (for Viktória Mohácsi), Jean-Paul Gauzès (for Kurt Lechner), Adeline Hazan (for Katalin Lévai), Piia-Noora Kauppi, Klaus-Heiner Lehne, Aloyzas Sakalas, Nicola Zingaretti and Jaroslav Zvěřina .

Yours sincerely,
Giuseppe Gargani

PROCEDURE

Title	Proposal for a Council regulation amending Regulation (EC, Euratom) No 2728/94 establishing a Guarantee Fund for external actions.		
References	COM(2005)0130 – C6-0176/2005 – 2005/0025(CNS)		
Date of consulting Parliament	2.6.2005		
Committee responsible Date announced in plenary	BUDG 9.6.2005		
Committees asked for opinions Date announced in plenary	AFET 9.6.2005	DEVE 9.6.2005	INTA 9.6.2005
Not delivering opinions Date of decision	AFET 19.4.2005	DEVE 21.6.2005	INTA 12.9.2005
Enhanced cooperation Date announced in plenary	No		
Rapporteur Date appointed	Esko Seppänen 9.6.2005		
Previous rapporteur(s)			
Simplified procedure – date of decision			
Legal basis disputed Date of JURI opinion	Yes 23.2.2006		
Discussed in committee	31.1.2006	20.2.2006	
Date adopted	20.2.2006		
Result of final vote	+: 27 -: 0:		
Members present for the final vote	Richard James Ashworth, Herbert Bösch, Simon Busuttil, Gérard Deprez, Valdis Dombrovskis, Brigitte Douay, James Elles, Szabolcs Fazakas, Salvador Garriga Polledo, Ingeborg Gräßle, Louis Grech, Catherine Guy-Quint, Jutta D. Haug, Anne E. Jensen, Wiesław Stefan Kuc, Alain Lamassoure, Janusz Lewandowski, Vladimír Maňka, Mario Mauro, Gérard Onesta, Esko Seppänen, Nina Škottová, László Surján, Yannick Vaugrenard, Kyösti Virrankoski, Ralf Walter		
Substitute(s) present for the final vote	Jacek Emil Saryusz-Wolski		
Substitute(s) under Rule 178(2) present for the final vote			
Date tabled	1.3.2006		
Comments (available in one language only)	...		