

EUROPEAN PARLIAMENT

2004



2009

*Committee on Legal Affairs
The Chairman*

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

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) 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 13 July 2005.

The proposal is based on Article 63, first paragraph, point (1)(a), in conjunction with Article 300(2), first subparagraph, first sentence, of the EC Treaty. In this particular case, Parliament has merely to be consulted.

On 19 January 2001 the Community concluded an agreement with Iceland and 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 Norway². Article 12 of that Agreement stipulates that Denmark may request to participate under conditions to be laid down by the Community, Norway, and Iceland, acting with Denmark's consent, in a protocol to the Agreement.

¹ Not yet published in OJ.

² Agreement published in OJ L 93, 3.4.2001, p. 40.

In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark played no part in the proceedings when the Council adopted 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 (the ‘Dublin II Regulation’) and Council Regulation (EC) No 2725/2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention (the ‘Eurodac Regulation’). However, Denmark is a party to the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (the ‘Dublin Convention’), signed in Dublin on 15 June 1990.

On 16 February 2001 Denmark asked to become a party to the agreement between the Community, Iceland, and Norway.

By 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, in accordance with Article 12 thereof.

The negotiations to conclude the protocol to the Agreement with Norway and Iceland ended when the text was initialled on 12 January 2005.

Under the resulting Protocol (Article 4), whenever either Iceland or Norway disagrees with Denmark on a matter relating to its application or interpretation, the dispute has to be settled by a joint committee, namely the one set up under Article 3 of the Agreement, which has the power to take decisions in a number of areas.

The question is whether a joint committee of that type can be deemed to have established ‘a specific institutional framework by organising cooperation procedures’ within the meaning of Article 300(3), second subparagraph, of the EC Treaty: in that event, Parliament should be called upon to give its assent.

The case law of the Court of Justice makes it clear that the Community legislative authority cannot select legal bases at its discretion; instead, the choice must be based on objective considerations admitting of judicial review. Among the key elements in that connection are the aim and substance of a legal instrument¹.

Given the aim and substance of the proposal for a Council decision concluding the above Protocol, the Joint Committee can be considered a ‘specific institutional framework’, since it serves to create organisational machinery for exercising discretionary power to take decisions binding on the parties to the Agreement, not least as regards its reinstatement and the

¹ See for example the CJEC judgment of 23 February 1999 in Case C-42/97 *Parliament v Council* [1999] ECR I-869, at paragraph 36.

settlement of disputes (see Article 4(7) of the Agreement and Article 4 of the Protocol).

It consequently follows that the proposal for a Council decision is not founded on the proper legal basis, since the provision that should have been invoked is the second subparagraph of Article 300(3) of the EC Treaty, which requires the assent procedure, and not the first sentence of the first subparagraph of Article 300(2), which entails ordinary consultation.

At its meeting of 13 July 2005 the Committee on Legal Affairs, in the light of the foregoing and on a proposal from its draftsman for legal bases, Mr Antonio López-Istúriz White, accordingly decided, unanimously¹, that the legal basis to be specified for the proposal for a Council decision should be the second subparagraph of Article 300(3) of the EC Treaty, as opposed to the first sentence of the first subparagraph of Article 300(2).

The wisest course, therefore, would no doubt be for Parliament to request that the matter be referred to it.

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the final vote: Giuseppe Gargani (chairman), Katalin Lévai (vice-chairwoman), Antonio López-Istúriz White (draftsman), Maria Berger, Monica Frassoni, Piiia-Noora Kauppi, Kurt Lechner, Klaus-Heiner Lehne, Eva 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.