

EUROPEAN PARLIAMENT

2004



2009

*Committee on Legal Affairs
The Chairman*

Mr Joseph Daul
Chairman
Committee on Agriculture and Rural Development
BRUSSELS

Subject: Legal basis of the Proposal for a Council Directive on Community measures for the control of Avian Influenza (COM(2005)0171 – C6-0195/2005 – 2005/0062(CNS)).

Dear Mr Chairman,

On 6 October 2005 the Committee on Legal Affairs decided, pursuant to Rule 35(3) of the Rules of Procedure, to consider on its own initiative whether the legal basis of the above Commission proposal was valid and appropriate.

The Committee then went on to consider that question at that very meeting on the basis of an oral presentation by its rapporteur for legal bases, Mr López Istúriz White.

It considered, in particular, whether the proposed legal basis of Article 37 of the EC Treaty should not be supplemented by Article 152.

It should be noted that all Community acts must be founded upon a legal basis laid down in the Treaty (or in another legal act which they are intended to implement). The legal basis defines the Community's competence *ratione materiae* and specifies how that competence is to be exercised, namely the legislative instrument(s) which may be used and the decision-making procedure.

In view of the consequences of the legal basis, its choice is of basic importance, particularly for Parliament, since it determines what say, if any, Parliament has in the legislative process.

According to the Court of Justice the choice of legal basis is not a subjective one, but "must be based on objective factors which are amenable to judicial review"¹, such as the aim and content of the measure in question². Furthermore, the decisive factor should be the main object of a measure.³

According to the case-law of the Court of Justice, a general Treaty article constitutes a sufficient legal basis even though the measure in question also seeks, in a subordinate manner, to attain an aim sought by a specific Treaty article⁴.

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 provisions⁵ unless this is impossible on account of the mutual incompatibility of the decision-making procedures laid down by the provisions⁶.

The Commission's proposal for a directive is based on Article 37 of the EC Treaty. The question which arises is whether it would be appropriate to add the additional legal basis of Article 152, in particular paragraph 4(b), which indeed refers to Article 37.

It would appear, however, that to combine these two articles would be ruled out by the very wording of paragraph 4(b) of Article 152, which provides that measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health may be adopted under the codecision procedure "by way of derogation from Article 37".

Moreover, although questions of public health are strongly emphasised in the preamble to the proposed Directive, it cannot be said that they loom largely in the provisions of the enacting terms, most of which are concerned with the machinery for controlling outbreaks of avian influenza. The object of the proposed measure therefore clearly falls within the sphere of animal health and hence agricultural policy.

It therefore cannot reasonably be argued that animal health and human health are indissolubly linked with each other without one being secondary and indirect in respect to each other, this being the test laid down by the case-law for the use of more than one legal basis.

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.

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

⁴ Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, paras 27-28; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 93-94.

⁵ Case 165/87 *Commission v. Council* [1988] ECR 5545, para. 11.

⁶ 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.

Although Article 152 offers the consultation procedure, whereas Article 37 provides only for consultation of Parliament, this has no bearing on the choice of legal basis according to the case-law of the Court of Justice where it is stated that the fact that an institution wishes to participate more fully in the adoption of a given measure is irrelevant⁷.

Consequently, the centre of gravity of the proposed Directive clearly falls within agricultural policy and Article 37 constitutes the only appropriate legal basis.

At its meeting of 6 October 2005 the Committee on Legal Affairs accordingly decided, by a unanimous vote⁸, to recommend that you retain Article 37 of the EC Treaty as the sole legal basis.

Yours sincerely,

Giuseppe Gargani

⁷ Case C-269/97 *Commission v. Council* [2000] ECR I-2257, para. 43.

⁸ The following were present for the vote Giuseppe Gargani (chairman), Antonio López-Istúriz White (draftsman), Maria Berger, Jean-Paul Gauzès (for Rainer Wieland), Kurt Lechner, Klaus-Heiner Lehne, Hans-Peter Mayer, Manuel Medina Ortega (for Antonio Masip Hidalgo), Aloyzas Sakalas and Jaroslav Zvěřina.