



EUROPEAN PARLIAMENT

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*Committee on Legal Affairs
The Chair*

8.3.2010

Mr Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a regulation of the European Parliament and of the Council amending the Convention implementing the Schengen Agreement and Regulation (EC) No. 562/2006 as regards movements of persons with a long-stay visa (COM(2009)0091 – C7-0015/2010 – 2009/0028(COD)(COD))

Dear Mr Chair,

By letter of 26 January 2010 you asked the Committee on Legal Affairs pursuant to Rule 37(2) to consider whether the legal basis of the proposal in the consolidated form annexed to your letter was appropriate.

The committee considered the above question at its meeting of 8 March 2010.

Background

Prior to the entry into force of the Treaty of Lisbon, the Commission presented two proposals on long-stay visas, one under codecision based on Article 62(2)(a) and (3) EC¹, the other under unanimity in Council and with the consultation of Parliament based on Article 63(3)(a) EC².

¹ Proposal for a regulation of the European Parliament and of the Council amending the Convention implementing the Schengen Agreement and Regulation 562/2006 as regards movement of persons with a long-stay visa, COM(2009)0091.

² Proposal amending the Convention Implementing the Schengen Agreement as regards long stay visa and alerts

Under the Treaty of Nice, the respective legal bases were as follows:

Article 62(2)(a) EC:

"[The Council (...) shall (...) adopt (...) measures on the crossing of the external borders of the Member States which shall establish]: *(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders*"

Article 62(3) EC:

"[The Council (...) shall (...) adopt] *measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months*".

on the one hand, and

Article 63(3)(a) EC:

"[The Council (...) shall adopt (...) measures on immigration policy within the following cases]: *(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion.*"

on the other hand.

Given that the ordinary legislative procedure now also applies, following the entry into force of the Treaty of Lisbon, to the legal basis of the second proposal, it is now proposed to integrate the second proposal into the first one (the result is referred to hereinafter as the "merged proposal"), with the legal bases being as follows:

Article 77(2)(b) and (c) TFEU

"[Parliament and the Council shall adopt measures under the ordinary legislative procedure concerning] *(b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period.*"

Article 79(2)(a) TFEU

"[Parliament and the Council shall adopt measures under the ordinary legislative procedure concerning] *(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification.*"

The LIBE Chairman's letter does not show any hint of disagreement by Parliament or any other institution with this change of legal basis.

in the Schengen Information System COM(2009)0090 – C6-0107/2009 – 2009/0025(CNS).

Aim and content of the proposal

According to the Court of Justice's settled case-law, the choice of legal basis for a Union measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure¹.

Furthermore, the Court has recently repeated that if examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those 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.

Exceptionally, if on the other hand it is established that the 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 founded on the various corresponding legal bases.²

According to its first recital, the merged proposal aims "to facilitate the free movement of third country nationals - holders of national long-stay visas in the Schengen area without internal borders". The content of the "merged" proposal is in essence an attempt to enable holders of long-stay visas to move freely throughout the Schengen area in an equivalent way to holders of short-stay visas. In order to achieve this, the proposal makes long-stay visas equivalent to residence permits. Its underlying philosophy is that people should be able to travel around the Schengen area for short stays for three months in any half year with the document on the basis of which they are legally present in a Member State.

According to Recital 4b, which concerns consultation of the Schengen Information System whilst processing long-stay visa applications, "the free movement of holders of a long-stay visa in the other Member States should not constitute any extra security risk for Member States".

In order to achieve these two aims, the merged proposal:

- extends the checks and alerts applicable to the issuing of residence permits³ to long-stay visas, both matters being expressly covered by Article 79(2)(a) TFEU;
- enables a degree of free movement for up to three months and a level of border checks for holders of long-stay visas which is equivalent to that of holders of residence permits⁴. Both the question of free movement for short periods and checks at external borders are covered by Article 77(2)(b) and (c)⁵.

¹ See Case C-178/03 *Commission v Parliament and Council*, paragraph 41, and Case C-155/07 *Parliament v Council* [2008] ECR I-0000, paragraph 34

² See Case C-411/06 *Commission v Parliament and Council*, paragraphs 46-47. See also Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 40, and Case C-178/03 *Commission v Parliament and Council*, paragraph 43.

³ Article 1(1a) of the merged proposal. These are contained in the Convention Implementing the Schengen Agreement, OJ L 239, 22.09.2000, p. 19.

⁴ By amending the Convention Implementing the Schengen Agreement and the Schengen Borders Code (Regulation 562/2006).

⁵ Article 1(1) and (2) of the merged proposal.

Both these elements are two sides of the same coin: on the hand, the free movement of certain persons is facilitated on the basis of a given document (a long-stay visa), and on the other hand, the issuing of such a document is subject to certain additional security checks.

Conclusion

At its meeting of 8 March 2010 the Committee on Legal Affairs accordingly decided, unanimously¹, to recommend that you that the consolidated proposal be based on Article 77(2)(b) and (c) and Article 79(2)(a) TFEU, given that the act simultaneously has several components that are indissociably linked, without one being secondary and indirect in relation to the other.

Yours sincerely,

Klaus-Heiner Lehne

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Kurt Lechner (Rapporteur), , Françoise Castex, Sergio Gaetano Cofferati, Marielle Gallo, Eva Lichtenberger, Toine Manders, Antonio Masip Hidalgo, Bernhard Rapkay, Francesco Enrico Speroni, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka.