



EUROPEAN PARLIAMENT

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*Committee on Legal Affairs
The Chair*

23.11.2011

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

Copy to Ms Pervenche Berès,
Chair
Committee on Employment and Social Affairs
BRUSSELS

Subject: ***Verification of the legal basis of the proposal for a directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (COM (2010) 378)***

Dear Mr Chair,

By letter of 4 July 2011 the Chair of the Committee on Employment and Social Affairs, which is an associated committee within the meaning of Rule 50, with the main committee being the Committee on Civil Liberties, Justice and Home Affairs, asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to take up a question relating to the legal basis of the above-mentioned proposal for a directive.

The committee has duly considered this request as follows.

The legal basis proposed by the Commission for the proposed directive is Article 79(2)(a) and (b) TFEU, which falls under Title V on the Area of Freedom, Security and Justice of Part Three of the TFEU, entitled Union Policies and Internal Actions. It must be borne in mind that this provision is subject to Protocol No 21 on the position of the United Kingdom and Ireland and Protocol No 22 on the position of Denmark. Under those protocols, Denmark

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never takes part in the adoption of measures and the United Kingdom and Ireland have a choice whether or not to participate.

The Employment Committee considers that the proposed legal basis is not appropriate for the directive and proposes adding Article 153(1)(a), (b) and (g) TFEU, which falls under Title X on Social Policy of Part Three of the TFEU, entitled Union Policies and Internal Actions. The reason for the additional legal basis is stated as being that the proposal for a directive does not regulate only issues of migration, but also questions of employment rights of the categories of workers concerned.

I. BACKGROUND

The proposal for a directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (COM (2010) 378) was presented by the Commission on 13 July 2010 as a follow up to the Commission Communication "A Policy Plan on Legal Migration" (COM (2005) 669), which provided for the adoption of legislative proposals on labour, including a proposal for a directive on intra-corporate transferees.

The Stockholm Programme, adopted by the European Council of 10 and 11 December 2009, recognises that labour immigration can contribute to increased competitiveness and economic vitality and that, in the context of the important demographic challenges that will face the EU in the future with an increased demand for labour, flexible immigration policies will make an important contribution to the EU's economic development and performance in the longer term. It thus invites the Commission and Council to continue to implement the 2005 Policy Plan on Legal Migration.

II. LEGAL BASIS PROPOSED BY THE COMMISSION

In the explanatory memorandum to the proposal, the Commission states that the appropriate legal basis is Article 79 (2) (a) and (b) TFEU, which reads as follows:

"Article 79

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(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;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States".

III. LEGAL BASIS PROPOSED TO BE ADDED

The Employment Committee proposes adding to the legal basis Article 153(1)(a), (b) and (g), which reads as follows:

"Article 153

1. With a view to achieving the objectives of Article 151¹, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(...)

(g) conditions of employment for third-country nationals legally residing in Union territory".

These provisions have to be read in conjunction with Article 153(2), which reads as follows:

"2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary

¹ *The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.*

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).¹

IV. THE EUROPEAN COURT OF JUSTICE'S APPROACH

It is settled case-law of the European Court of Justice that the choice of the legal basis for an act "must be based on objective factors which are amenable to judicial review and include in particular the aim and the content of the measure."²

If examination of the act "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."³

Exceptionally, "if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect to the other, the measure must be founded on the corresponding legal bases."⁴

However, "no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other."⁵

V. AIM AND CONTENT OF THE PROPOSAL

Recital 2 in the preamble to the proposed directive recalls that "The Treaty provides that the Union is to develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows and fair treatment of third-country nationals residing legally in Member States". In order to pursue this objective, the European Parliament and the Council are to adopt measures on the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits.

Articles 5 to 12 of the proposal lay down the rules governing the above-mentioned conditions and standards.

¹ Emphasis supplied.

² Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, para. 41.

³ *Ibid.*, para. 42.

⁴ Case C-338/01 *Commission v Council* [2004] ECR I-4829, para. 55.

⁵ *Ibid.*, para. 56.

Recital 2 provides as well that the measures adopted shall define the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States.

Articles 13 to 15 lay down the mentioned rights including those for the purpose of family reunification.

VI. DETERMINATION OF THE APPROPRIATE LEGAL BASIS

Taking into account that the aim and content of the proposal is (1) to introduce a special procedure for entry and residence and standards for the issue by Member States of residence permits for third-country nationals applying to reside in the EU for the purpose of an intra-corporate transfer, and (2) to define the rights of the above-mentioned category of third-country nationals, Article 79(2)(a) and (b) TFEU would seem to constitute an appropriate legal basis for the proposal.

VII. ANALYSIS OF LEGAL BASIS PROPOSED TO BE ADDED

Article 153(1)(a) and (b) TFEU refer to the working environment and the non-pay aspects of an employee's terms and conditions of employment. They cover such matters as the organisation of work and work activities, training, skills and employability, health, safety and well-being.

In the light of the foregoing analysis such matters do not constitute key aspects of the proposal such as to justify recourse to those provisions as an additional legal basis in accordance with the strictures of the Court of Justice.

As far as Article 153(1)(g) TFEU is concerned, it is concerned with conditions of employment for third country nationals legally residing in Union territory. However, the third subparagraph of Article 153(2) prescribes a special legislative procedure for Article 153(1)(g) ("*the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees*"). This legal basis is therefore incompatible with Article 79(2)(a) and (b) TFEU, which prescribes the ordinary legislative procedure (see Case C-338/01 *Commission v Council* cited above).

This, however, is not the only incompatibility. It is considered that Article 153 TFEU, under which legislation is adopted for the whole of the Union, cannot be used in conjunction with Article 79 TFEU, since Denmark does not participate at all in the adoption of legislation under that article and the United Kingdom and Ireland have the right not to so participate.

VII. CONCLUSION

In the light of the foregoing analysis, Article 79(2)(a) and (b) TFEU is the sole appropriate legal basis for the proposed directive.

At its meeting of 22 November 2011 the Committee on Legal Affairs accordingly decided, by 18 votes in favour, with 1 abstention¹, to recommend that Article 79(2)(a) and (b) TFEU should be retained as the sole appropriate legal basis for the proposed directive.

Yours sincerely,

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Philippe Boulland, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Kurt Lechner, Toine Manders, Antonio Masip Hidalgo, Jiří Maštálka, Gabriel Mato Adrover, Alajos Mészáros, Bernhard Rapkay, Alexandra Thein, Diana Wallis, Rainer Wieland.