



EUROPEAN PARLIAMENT

2009 - 2014

*Committee on Legal Affairs
The Chair*

5.3.2012

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

Subject: Opinion on the legal basis of the Legal basis for the proposal for a Decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European refugee Fund for the period 2008 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC (COM(2009)0456 – C7-0123/2009 – 2009/0127 (COD))

Dear Mr Chair,

By letter of 28 February 2012 you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to give its opinion on whether the deletion of Article 80 TFEU from the legal basis for adopting the proposal for a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European refugee Fund is appropriate.

The Commission submitted the proposal on the basis of Article 63(2)(b) of the Treaty establishing the European Community. Parliament adopted its position in first reading on 18 May 2010. In Parliament's first reading position, Articles 78 and 80 TFEU are mentioned as the legal basis. The Council is currently pre-negotiating its first reading position with Parliament. As regards the legal basis, the Council mandate refers only to Article 78(2)(g) TFEU and not to Article 80 TFEU.

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Background

I. The proposal

The proposal aims at amending the Decision establishing the European Refugee Fund in the light of the establishment of a Joint EU Resettlement Programme. In the explanatory memorandum and the accompanying Communication¹, the Commission explains that the efforts to establish a Joint EU Resettlement Programme are a response to the requests by the Council to come forward with such a programme in order to remedy current shortcomings. The idea is to increase the impact of the EU resettlement efforts in providing protection to refugees and to maximise the strategic impact of resettlement through a better targeting to those persons who are in greatest need of resettlement, and to formulate common priorities of resettlement at EU level on a regular basis.

In detail, the amended Decision - as agreed, in substance, between Council and Parliament - identifies priorities for resettlement, including yearly common EU resettlement priorities (specified in an Annex for 2013, i.e. the only remaining year covered by this decision). Member States will receive additional financial assistance per person to be resettled according to these priorities. Member States will also provide the Commission with an estimate of the number of persons whom they will resettle in the course of the following calendar year according to these priorities.

II. The legal bases in question

1. Legal basis of the Commission proposal

The Commission proposal is based on Article 63(2)(b) EC Treaty, which reads as follows:

"Article 63

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry of the Treaty of Amsterdam, adopt:

[...]

2. measures on refugees and displaced persons within the following areas:

[...]

(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons".

The Commission explains this legal basis in the explanatory memorandum as follows: *"The proposal is based on Article 63(2)(b) of the Treaty establishing the European Community, which is the legal basis of the act being amended".*

¹ Communication from the Commission of 2.9.2009 to the European Parliament and the Council on the establishment of a Joint EU Resettlement Programme (COM(2009)0447).

After the entry into force of the Treaty of Lisbon, the Commission adopted its communication of 2 December 2009 on the consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making proposals (COM(2009)0665). In Annex 4 to that communication, the Commission set out an indicative list of the pending proposals that it had presented before the entry into force of the Treaty of Lisbon, while indicating the consequences of the entry into force of the Treaty of Lisbon for each of the proposals. As regards the proposal in question, the Commission mentions "Articles 78, 80" as the new legal basis under the TFEU.

Article 78 TFEU reads as follows:

"1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

Article 80 TFEU reads:

"The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle".

The Parliament position in first reading¹ refers to Articles 78(2) and Article 80 TFEU as the legal basis.

2. Proposed change of the legal basis

LIBE has requested the opinion of the Legal Affairs Committee as to whether the deletion of Article 80 as legal basis is appropriate. It explains by way of background that the negotiations with Council "resulted in a positive agreement, except on the point of the legal basis where Council want to rely on Article 78(2)(g) instead of the double legal basis of Articles 78 and 80 TFEU".

III. Analysis

Certain principles emerge from the case law of the Court as regards the choice of legal basis. First, in view of the consequences of the legal basis in terms of substantive competence and procedure, the choice of the correct legal basis is of constitutional importance². Secondly, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred upon it by the Treaty³. Thirdly, according to the case-law of the Court of Justice, "*the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure*"⁴. Finally, as regards multiple legal bases, 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 component⁵. On the other hand, where a measure has several contemporaneous objectives or components which are indissolubly linked with each other without one being secondary and

¹ Position of the European Parliament adopted at first reading on 18 May 2010 with a view to the adoption of Decision No .../2010/EU of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows", P7_TA(2010)0160.

² Opinion 2/00 *Carthage Protocol* [2001] E.C.R. I-9713, para. 5; Case C-370/07 *Commission v. Council*, paras. 46-49; Opinion 1/08, *General Agreement on Trade in Services* [2009] ECR I-11129, para. 110.

³ Case C-403/05 *Parliament v. Commission* [2007] E.C.R. I-9045, para. 49, and the case-law cited therein.

⁴ See most recently Case C-411/06 *Commission v Parliament and Council* [2009] E.C.R. I-7585.

⁵ Case C-42/97 *Parliament v Council* [1999] E.C.R. I-868, paras. 39-40; Case-C 36/98 *Spain v Council* [2001] E.C.R. I-779, para. 59; Case C-211/01 *Commission v Council* [2003] E.C.R. I-8913, para. 39.

indirect in respect of the others, the measure must be based on the various relevant Treaty provisions¹.

The objective of the decision in question is to amend the decision establishing the European Refugee Fund in the light of the establishment of a Joint EU Resettlement Programme, as an instrument, as the Commission explains in its accompanying communication² *"(1) to increase the humanitarian impact of the EU by ensuring that it gives greater and better targeted support to the international protection of refugees through resettlement, (2) to enhance the strategic use of resettlement by ensuring that it is properly integrated into the Union's external and humanitarian policies generally, and (3) to better streamline the EU's resettlement efforts so as to ensure that the benefits are delivered in the most cost-effective manner."*

The amended act, i.e. Decision No 573/200/EC³, is based, as mentioned by the Commission in its proposal for the amending act, on Article 63(2)(b) EC Treaty. Article 2, paragraph 1, of that decision describes the general objective of the European Refugee Fund as *"to support and encourage the efforts made by the Member States in receiving, and in bearing the consequences of receiving, refugees and displaced persons"*. This is consistent with having Article 63(2)(b) EC Treaty as the legal basis .

The question then is by which legal basis Article 63(2)(b) EC Treaty would have to be replaced after the entry of the Lisbon Treaty or, more specifically, whether Article 78 TFEU would be sufficient or whether Article 80 TFEU would need to be included as well.

The enumeration in the indicative list set out in Annex 4 to Commission communication COM(2009)665 mentions both Articles 78 and 80.

Firstly, it is worth mentioning that Article 78 as a whole does not afford a legal basis in this case: whereas Article 78(1) stipulates that the Union is to develop a common policy on asylum, subsidiary protection and temporary protection, and Article 78(3) deals with emergency situations, it is Article 78(2) that provides for the adoption of a range of specific measures under the ordinary legislative procedure. Point (g) appears to be the appropriate provision here, as the act in question indeed deals with managing refugee flows, and partnership and cooperation with third countries in that respect.

Thus, as Article 78(2)(g) TFEU provides the appropriate legal basis for the decision in question, no further analysis as regards Article 80 TFEU is necessary.

¹ Case C-165/87 *Commission v. Council* [1988] E.C.R. 5545, para. 11; Case C-178/03 *Commission v. European Parliament and Council* [2006] E.C.R. I-107, paras. 43-56.

² (COM(2009)0447)(see footnote 1), p. 7.

³ Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC (OJ L 144, 6.6.2007, p. 1).

The Committee on Legal Affairs considered the above question at its meeting of 1 March 2012. At this meeting, it accordingly decided, with 20 votes in favour and 2 abstentions¹, to recommend that the appropriate legal basis for the proposal for a decision of the European Parliament and of the Council amending Decision No 573/2007/EC establishing the European refugee Fund should be Article 78(2)(g) TFEU, and that Article 80 TFEU should not be included.

Yours sincerely,

Klaus-Heiner Lehne

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Françoise Castex (Vice-Chair), Marielle Gallo, Giuseppe Gargani, Alajos Mészáros, Rainer Wieland, Tadeusz Zwiefka, Luigi Berlinguer, Lidia Joanna Geringer de Oedenberg, Antonio Masip Hidalgo, Bernhard Rapkay, Evelyn Regner, Alexandra Thein, Cecilia Wikström, Christian Engström, Sajjad Karim, Jiří Maštálka, Jacek Włosowicz, Kurt Lechner, Angelika Niebler, Dagmar Roth-Behrendt, Cristian Silviu Buşoi, Eva Lichtenberger.