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2009 - 2014

*Committee on Legal Affairs
The Chair*

10.7.2013

Mr Malcolm Harbour
Chair
Committee on the Internal Market and Consumer Protection
BRUSSELS

Subject: Opinion on the legal basis for the proposal for a directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System (COM(2011)0883 – C7-0612/2011 – 2011/0435(COD))

Dear Mr Chair,

By letter of 10 June 2013 you asked the Committee on Legal Affairs pursuant to Rule 37 of the Rules of Procedure, to give its opinion on the appropriateness, to give its opinion on the appropriateness of deleting Article 114 TFEU from the legal basis of the proposal for a directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System (COM(2011)0883, given that the Council has requested to do so during the trilogue negotiations.

Background

1. The proposal

The proposal is aimed at modernising the existing Directive 2005/36/EC¹ by reducing the complexity of procedures through a European Professional Card while using the existing

¹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22).

Internal Market Information system (IMI) based on Regulation No 1024/2012¹; reforming the general rules for establishing in another Member State or moving on a temporary basis; modernising the system of automatic recognition, notably for nurses, midwives, pharmacists and architects; extending the scope of the Directive to not fully qualified professionals and to notaries; clarifying guarantees for patients and consumers of professional services; creating the legal requirement for provision of user-friendly and content-driven information on the rules governing the recognition of qualifications underpinned by comprehensive e-government facilities for the whole recognition process and launching a systematic screening and mutual recognition exercise for all regulated professions in the Member States.

2. The legal bases in question

a. Legal basis of the proposal

The proposal is based on Articles 46, 53(1), 62 and 114 TFEU, which read as follows:

"Article 46

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45 [...]

Article 53

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. [...]

Article 62

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter [on Services].

Article 114

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. [...]

b. Proposed change of the legal basis

IMCO has requested the opinion of the Legal Affairs Committee on the appropriateness of

¹ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation') (OJ L 316, 14.11.2012, p. 1).

removing Article 114 TFEU from the legal basis of the proposal, given that the Council has requested to do so during the trilogue negotiations. IMCO explained that the Council argues that the changes made to the IMI Regulation were ancillary to the main purposes which the proposal seeks to achieve, covered by Article 46, 53(1) and 62 TFEU.

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 importance¹. Secondly, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred upon it by the Treaty². 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"³. Finally, as regards multiple legal bases, if examination of a EU 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 component⁴. 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 indirect in respect of the others, the measure must be based on the various relevant Treaty provisions⁵.

The proposed Directive is an amending act, amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System. It would therefore appear logical that the amending act is to be based on those provisions of the Treaties that provided the legal basis for the basic act.

Directive 2005/36/EC was adopted on the basis of Article 40, Article 47(1), the first and third sentences of Article 47(2), and Article 55 of the Treaty establishing the European Community. Article 40 EC Treaty corresponds to Article 46 TFEU, Article 47 EC Treaty to Article 53 TFEU and Article 55 EC Treaty to Article 62 TFEU. Regulation (EU) No 1024/2012 is based on Article 114 TFEU. By basing the proposed Directive in question here on Articles 46, 53(1), Article 62 and 114 TFEU, the Commission has thus added the provisions which provided the legal basis for the amended acts.

As the principles derived from the jurisprudence of the Court indicate, the aim and content of the proposed measure are decisive and, in case of a multiple legal basis, the question whether

¹ Opinion 2/00 *Carthage Protocol* [2001] E.C.R. I-9713, para. 5; Case C-370/07 *Commission v Council* [2009] E.C.R. I-8917, paras 46-49; Opinion 1/08, *General Agreement on Trade in Services* [2009] ECR I-11129, para. 110.

² Case C-403/05 *Parliament v Commission* [2007] E.C.R. I-9045, para. 49, and the case-law cited therein.

³ See most recently Case C-411/06 *Commission v Parliament and Council* [2009] E.C.R. I-7585.

⁴ 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.

⁵ 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.

several purposes or components of equal weight can be identified within the proposed act.

Directive 2005/36/EC is based on Article 40 of the EC Treaty, which stipulates that "the measures required to bring about freedom of movement for workers [...]" shall be taken in accordance with the co-decision procedure. As regards the right of establishment, Article 47 of the EC Treaty provides that directives shall be issued, in accordance with the procedure referred to in Article 251, "for the mutual recognition of diplomas, certificates and other evidence of formal qualifications", as well as "for the coordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking-up and pursuit of activities as self-employed persons". Under the terms of Article 55 of the EC Treaty, Article 47 applies to the provision of services. Thus Articles 40, 47(1) and (2), first and third sentences, and Article 55 of the EC Treaty appear to have been the appropriate legal basis for Directive 2005/36/EC. As the proposed Directive amends the provisions related to freedom of workers, mutual recognition of diplomas, certificates and other professional qualification documentation, the corresponding administrative provisions and also applies to the area of services, it appears appropriate to base the proposal on the corresponding provisions under the TFEU, i.e. Articles 46, 53(1) and 62 TFEU.

Regulation (EU) No 1024/2013 on which the Internal Market Information System is based, was indeed adopted on the basis of Article 114 TFEU. That Regulation is targeted at improving the conditions for the functioning of the internal market by providing – with the Internal Market Information System – an effective and user-friendly tool which facilitates the practical implementation of those provisions of Union acts which require Member States to cooperate with one another and with the Commission and to exchange information. To this end, Regulation (EU) No 1024/2013 lays down common rules relating to the governance and use of IMI.

The proposed Directive, however, does not touch at all upon the system and the common rules underlying IMI. On the contrary, it merely proposes to add a number of provisions of the amended Professional Qualifications Directive to the Annex of the IMI Regulation, with a view to using the IMI system also in this context. The scope of the changes proposed to Regulation No 1024/2012 has not changed during the legislative procedure. It can therefore be safely said that those changes concerning Regulation No 1024/2012 do not pursue an independent internal market objective, but are merely ancillary to the changes to Directive 2005/36/EC.

The committee considered the above question at its meeting of 20 June 2013. At this meeting, it accordingly decided, by unanimity¹, with 22 votes in favour and no abstentions, to recommend that the appropriate legal basis for the proposal for a directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System should be Articles 46, 53(1) and 62, without Article 114 TFEU.

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair, replacing Standing rapporteur), Evelyn Regner (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Françoise Castex (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Luigi Berlinguer, Sergio Gaetano Cofferati, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Eva Lichtenberger, Antonio Masip Hidalgo, Jiří Maštálka, Alajos Mészáros, Angelika Niebler, Bernhard Rapkay, Dimitar Stoyanov, Rebecca Taylor, Alexandra Thein, Axel Voss, Tadeusz Zwiefka and Frédérique Ries (pursuant to Rule 187(2)).

Yours sincerely,

Klaus-Heiner Lehne