



*Committee on Legal Affairs
The Chair*

22.6.2018

Ms Marita Ulvskog
Acting Chair
Committee on Employment and Social Affairs
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a directive of the European Parliament and of the Council amending Directive 2004/37/EC on the Protection of workers from the risks related to exposure to carcinogens or mutagens at work (COM(2017)0011 – C8-0010/2017 – 2017/0004(COD))

Dear Mr Chair,

By letter of 6 June 2018 you asked the Committee on Legal Affairs pursuant to Rule 39(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 20 June 2018.

The legal basis proposed by the Commission is Article 153(2) of the Treaty on the Functioning of the European Union (TFEU). The Commission also relies on secondary EU law, namely Article 17(1) of Directive 2004/37/EC on the protection of workers from the risks related to exposure of carcinogens or mutagens at work¹ (hereafter “the Directive”), which is the directive that the said proposal seeks to amend.

This legal basis was unchanged in the EMPL report on this proposal.² However, the Council general approach changes the legal basis by adding to the existing Article 153(2) TFEU a reference to its point (b) as well as to Article 153(1)(a) TFEU and by deleting the reference to Article 17(1) of the Carcinogens Directive.

¹ OJ L 158, 30.4.2004, p. 50.

² See A8-0142/2018.

I - Background

The proposal aims at improving workers' health protection by reducing occupational exposure to carcinogenic chemical agents, increasing the effectiveness of the EU legislation in this area and at providing more clarity and a better level playing field for economic operators. It is among the priority actions identified in the Commission Work Programme for 2016.

Estimates of the recent and future burden of occupational diseases indicate that work-related cancer is a problem and will remain so in the future as a result of exposure of workers to carcinogens. Cancer is the first cause of work-related deaths in the EU. Annually, 53 % of occupational deaths are attributed to cancer, compared with 28% for circulatory diseases and 6% for respiratory diseases.¹

The Commission took a first step to address these issues by adopting on 13 May 2016 a legislative proposal to amend the Directive with a view to revise or to introduce exposure limit values for 13 chemical agents. In accordance with Article 16 of the Directive, the Council shall set such limit values on the basis of the available information, including scientific and technical data, in respect of all those carcinogens or mutagens for which this is possible, in Annex III to the Directive.

JURI gave an opinion to that proposal², and the current proposal and request for an opinion present exactly the same set of questions as regards the legal basis.

II - The proposed legal basis

The following Article of the Treaty on the Functioning of the European Union, under Title X on 'Social Policy' of Part Three of the TFEU, entitled Union Policies and Internal Actions, is presented as the legal basis in the Commission proposal (emphasis added):

Article 153 *(ex Article 137 TEC)*

1. [...]

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;

¹ European estimates of work-related injury and ill health, *Work-related Illnesses Identification, Causal Factors and Prevention Safe Work — Healthy Work — For Life*, Takala, J., Workplace Safety and Health Institute, Singapore, presentation to EU Presidency Conference, Athens, June 2014.

² See Opinion on legal basis of 20 June 2017 to the EMPL Chair.

(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 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).

The Commission is also proposing to include in the legal basis Article 17 of Directive 2004/37/EC, which has the following wording (emphasis added):

Article 17
Annexes

1. Annexes I and III may be amended in accordance only with the procedure laid down in Article 137(2) of the Treaty (now Article 153(2) TFEU).

2. Purely technical adjustments to Annex II in the light of technical progress, changes in international regulations or specifications and new findings in the field of carcinogens or mutagens shall be adopted in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC.

III - Relevant Treaty Articles

The Council general approach proposes to amend the legal basis of the proposal by adding to the existing **Article 153(2) TFEU** a reference to **point (b)** as well as to **Article 153(1) point (a)** and by deleting the reference to **Article 17(1) of the Carcinogens Directive**. The new provisions read as follows (emphasis added):

Article 153 (1)
(ex Article 137(1) TEC)

1. With a view to achieving the objectives of Article 151, 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;

- (c) social security and social protection of workers;
- (d) protection of workers where their employment contract is terminated;
- (e) the information and consultation of workers;
- (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;
- (g) conditions of employment for third-country nationals legally residing in Union territory;
- (h) the integration of persons excluded from the labour market, without prejudice to Article 166;
- (i) equality between men and women with regard to labour market opportunities and treatment at work;
- (j) the combating of social exclusion;
- (k) the modernisation of social protection systems without prejudice to point (c).

Article 151 TFEU has the following wording (emphasis added):

Article 151
(ex Article 136 TEC)

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 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.

IV - Case-law on legal basis

It is settled case-law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure".¹ The choice of an incorrect legal basis may therefore justify the annulment of the act in question. In this context, an institution's wish for

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

more active participation in the adoption of a given measure, the circumstances in which a measure was adopted as well as the work that has been done in other aspects within the scope of action covered by a given measure are irrelevant for the identification of the right legal basis.¹

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.² However, where a measure has several contemporaneous objectives or components, which are indissociably linked, without one being secondary and indirect in relation to the other(s), such a measure will have to be based on the various corresponding legal bases,³ if procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament.⁴

Article 153 TFEU constitutes the legal basis in the Treaty for the approximation of national legislation in the field of social policy.⁵ Paragraphs (1) and (2) confer on the Union the power to support and complement the activities of the Member States with a view to achieving the objectives of Article 151 TFEU⁶.

V - Aim and content of the proposed regulation

Recital 1 of the proposal points out that Directive 2004/37/EC aims to protect workers against risks to their health and safety from exposure to carcinogens or mutagens at the workplace. For this purpose it lays down minimum requirements to that effect including limit values, on the basis of the available scientific and technical data.

Recitals 2-4 state that the limit values should be revised when necessary in the light of scientific data, whereas alternative absorption pathways, including the possibility of penetration through the skin, also need to be considered for some carcinogens and mutagens to ensure the best possible level of protection.

Recitals 5-11 specify the substances that could be classified as carcinogenic following latest scientific information, those substances for which a skin notation should be set and those substances which should be kept under particularly close review.

Finally, recitals 12-19 set out the background to final provisions on internal coherence of the

¹ Case C-269/97 *Commission v Council* [2000] ECR I-2257, para 44.

² Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; C-490/10 *Parliament v Council* EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

³ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, paras 43-56.

⁴ Case C-300/89 *Commission v Council* ("Titanium dioxide") [1991] ECR I-2867, paras. 17-25; Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

⁵ See Case C-343/08 *European Commission v Czech Republic* [2010] ECR I-00275, para 67 with regard to the predecessor of Article 153, namely Article 137 TEC; See Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-01061, para 17.

⁶ See Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-06467, para 4 with regards to the predecessor of Article 153, namely Article 137 TEC.

proposal, comitology and consultation aspects as well as standard provisions on fundamental rights, review, subsidiarity, proportionality, transposition and explanatory documents.

Against this background, Article 1 states that the Directive is amended through the addition in Annex I of a new entry to include 'work involving exposure to oils that have been used before in internal combustion engines to lubricate and cool the moving parts within the engine' and through the replacement of Annex III by the text in the Annex to this proposed Directive. Articles 2 to 4 contain the usual provisions on transposition into the Member States' national law.

VI - Analysis and determination of the appropriate legal basis

It becomes clear from the above that the aim and content of the proposal is to strengthen the level of worker health protection in line with Article 153(1)(a) of the TFEU, by including in Annex I to Directive 2004/37/EC work involving exposure to oils that have been used before in internal combustion engines to lubricate and cool the moving parts within the engine. This is achieved through the establishment of additional minimum requirements for workers' health protection in the form of limit values in Annex III to the Directive.

In this regard, it should be noted that Article 153(2) TFEU contains in effect, in points (a) and (b) respectively, two different legal bases for measures of very different nature. While point (a) of Article 153(2) refers to the adoption of "measures designed to encourage cooperation between Member States", point (b) empowers Parliament and the Council to 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". The proposed directive falls clearly within this latter category of measures, hence the reference to point (b) of Article 153(2) in the legal basis is a useful specification in the current circumstances.¹

In addition, Article 153(2), which is the usual legal basis for adopting social policy measures, provides for different legislative procedures depending on the "field" of Article 153(1) in which the measure envisaged will operate. The analysis of the aim and content of the proposal shows that point (a) of Article 153(1) more aptly corresponds to the measures envisaged therein. As is apparent from its preamble, the proposal shares the same objective as the Carcinogens Directive which it seeks to amend, i.e. to protect workers against risks to their health and safety, including the prevention of such risks, arising or likely to arise from exposure to carcinogens or mutagens at work. Likewise, the proposal consists of amendments to Annexes I and III to the Carcinogens Directive, adding a new substance to the list of substances, mixtures and processes which are to be considered as carcinogens within the meaning of the Directive, as well as new limit values for occupational exposure to these substances. These amendments are clearly health protection measures to the benefit of workers.

Pursuant to the second and third subparagraphs of Article 153(2), a special legislative procedure applies, with unanimity voting in Council, in the fields referred to in points (c), (d), (f) and (g) of Article 153(1), while in all other fields referred to in Article 153(1) the ordinary

¹ See SJ-0058/18, point 12.

legislative procedure applies. Therefore, in order to indicate the legal basis in a manner that allows for determining both which procedure is applicable to the adoption and the required majority necessary in the Council, it is appropriate to give more detail than what the Commission had proposed, by indicating not only whether point (a) or (b) of Article 153(2) is being used, but also which fields among those referred to in Article 153(1) the co-legislators are acting upon.¹

Unlike the first point (a) of the second paragraph of Article 153 TFEU, which does not entail any reference to specific fields of activity of Article 153(1) TFEU, Article 153(2)(b) TFEU does make such an explicit reference. As a result, Article 153(2)(b) TFEU does not constitute an adequate legal basis for the proposal and needs to be complemented by a reference to Article 153(1)(a) to render it sufficiently clear and precise. It follows that, in light of its aim and content, the proposal squarely falls within the scope of the field of activity set out in point (a) of Article 153(1), i.e. “the improvement of the working environment to protect workers’ health and safety”, and hence that point (a) of Article 153(1) may safely be added as a legal basis for the Proposal, in conjunction with point (b) of Article 153(2), thus providing for the ordinary legislative procedure.

As regards the secondary law legal basis proposed by the Commission, i.e. Article 17(1) of the Carcinogens Directive, it should be observed that article 17(1) of the Carcinogens Directive provides that “*Annexes I and III may be amended in accordance only with the procedure laid down in Article 137(2) of the Treaty.*” It is therefore apparent from its very wording that Article 17(1) does not itself provide a legal basis for amending the Annexes concerned, since it merely refers to Article 137(2) TEC (now, Article 153(2) TFEU), which is the legal basis for the Directive. In other words, Article 17(1) amounts to a mere reminder of the fact that amendments to Annexes I and III require recourse to Article 153(2) TFEU and, therefore, to an ordinary legislative procedure. As Article 17(1) of the Directive refers to (current) Article 153(2) TFEU, and Article 153(2) TFEU is already specifically mentioned as the legal basis of the Proposal, there is no need to refer twice to the same provision.²

VII - Conclusion and recommendation

In light of the foregoing analysis, the changes to the legal basis of the proposal envisaged by the Council appear to amount, as far as they concern the reference to Article 153 TFEU, to mere technical specifications, which are appropriate from a legal point of view. As regards the reference to Article 17(1) of the Carcinogens Directive, its deletion may be considered as the simple correction of a material error.

A reference to point (b) of Article 153(2) TFEU should therefore be added to the legal basis. Furthermore, Article 153(1)(a) TFEU should be referred to in the legal basis and Article 17(1) of the Directive should be deleted from the legal basis.

Article 153(2)(b) TFEU and Article 153(1)(a) TFEU therefore constitute the legal basis of the proposal.

¹ Ibid, point 13.

² See SJ-0058/18, point 20.

At its meeting of 20 June 2018 the Committee on Legal Affairs accordingly decided, unanimously¹, to recommend that you should take the position in trilogue negotiations that Article 153(2)(b) TFEU and Article 153(1)(a) TFEU constitute the appropriate legal basis of the proposal.

Yours sincerely,

Pavel Svoboda

¹ The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (Vice-Chair), Joëlle Bergeron, Marie-Christine Boutonnet, Sergio Gaetano Cofferati, Geoffroy Didier, Angel Dzhambazki, Rosa Estaràs Ferragut, Enrico Gasbarra, Mary Honeyball, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Angelika Niebler, Evelyn Regner, József Szájer, Francis Zammit Dimech, Tadeusz Zwiefka.