



*Committee on Legal Affairs
The Chair*

10.1.2020

Ms Karima Delli
Chair
Committee on Transport and Tourism
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Regulation of the European Parliament and of the Council on electronic freight transport information (COM(2018)0279 – C8-0191/2019 – 2018/0140(COD))

Dear Chair,

By letter dated 13 November 2019¹, your Committee requested pursuant to Rule 40(2) of the Rules of Procedure the opinion of the Committee on Legal Affairs concerning the appropriateness of the legal basis of the Commission proposal for a Regulation on electronic freight transport information².

The committee considered the above question at its meeting of 9 January 2020.

I - Background

The Commission proposal is based on Articles 91, 100(2) (transport) and 192(1) TFEU (environment). In its general approach, the Council amended the legal basis by deleting the reference to Article 192(1) TFEU.

II - The relevant Treaty Articles

The relevant provisions of the Treaty on the Functioning of the European Union read as follows:

¹ D 315856/ JURI opinion on legal basis regarding the Commission proposal for a Regulation of the European Parliament and of the Council on electronic freight transport information (2018/0140(COD)).

² Proposal for a Regulation of the European Parliament and of the Council on electronic freight transport information [2018/0140 (COD)], COM/2018/279 final.

Article 91

(ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

Article 100

(ex Article 80 TEC)

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

Article 191

(ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,

- protecting human health,

- prudent and rational utilisation of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

(...)

Article 192
(ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

(...)

III – CJEU case law on the choice of legal basis

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 TEU) and determining the nature and scope of the Union's competence³.

According to the Court'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 measure⁴.

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 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.⁵

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 component⁶.

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 bases⁷, provided that procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament⁸.

³ *Opinion 2/00*, ECLI:EU:C:2001:664, para 5.

⁴ See Case C-411/06 *Commission v Parliament and Council*, 8 September 2009, EU:C:2009:518, paragraph 45

⁵ Judgment in *Commission v Council*, C-269/97, ECLI:EU:C:2000:183, para 44.

⁶ Judgment in *Commission v Council*, C-137/12, EU:C:2013:675, paragraph 53; C-411/06 EU:C:2009:518, paragraph 46 and the case-law cited therein; *Parliament v Council*, C 490/10, EU:C:2012:525, paragraph 45; *Parliament v Council*, C 155/07, EU:C:2008:605, paragraph 34.

⁷ Case C-211/01, *Commission v Council*, ECLI:EU:C:2003:452, para. 40; Case C-178/03 *Commission v European Parliament and Council*, ECLI:EU:C:2006:4, paras. 43-56.

⁸ Case C-300/89 *Commission v Council* ("Titanium dioxide"), ECLI:EU:C:1991:244, paras. 17-25; Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461.

IV – Aim and content of the proposed measure

The proposal is about a regulation harmonising the use of electronic means for the exchange of information in the freight transport (eFTI).

It follows from the explanatory memorandum that the aim of the proposal is to enhance the wider use of electronic freight transport documents in order to strengthen the single market by removing some of the barriers to digitalisation in this area. The main drivers for the proposal are the fragmented legal framework setting out inconsistent obligations for authorities when accepting electronic documents, and the fragmented IT environment characterised by a multitude of non-interoperable systems⁹.

Hence, the provisions aim to achieve in essence two main policy objectives: (a) to establish a uniform binding legal framework for the acceptance of electronic information or documents by relevant national public authorities; and (b) to ensure the interoperability of different IT systems currently used with regard to implementation of existing relevant Union legislation¹⁰.

The same considerations are further explained in recitals 1 to 4 to the proposal as well as under Article 1 thereof. According to the latter, the Regulation “establishes a legal framework for the electronic communication of regulatory information related to the transport of goods on the territory of the Union [...]”. It lays down “the conditions under which Member States’ competent authorities are required to accept regulatory information when made available electronically by economic operators concerned” and the “rules for the provision of services related to making regulatory information available electronically by the economic operators concerned”.

As to the content, Chapter I defines in particular the material scope by shortlisting (by reference to an Annex) the already existing Union acts providing for regulatory information requirements relevant for the purposes of the proposal. Chapter II of the proposal entitled “*Regulatory information made available electronically*”, sets out the obligation on public authorities to accept transport documents in electronic format, as well as the technical requirements for processing electronic information. Chapter III entitled “*eFTI Platforms and services*” provides for detailed rules on the functionalities and certification requirements of the eFTI platforms allowing the treatment of electronic information. Chapters IV and V concern respectively delegated and implementing acts, and final provisions.

V – Analysis and establishment of the appropriate legal basis

In the explanatory memorandum, the Commission justified the choice of the legal bases as follows:

“The legal basis is provided by Article 91, 100(2) and Article 192(1) of the Treaty on the Functioning of the European Union (TFEU).

Articles 91 and, respectively 100(2), which must be understood in light of Article 90 requiring Member States to pursue a common transport policy, set out the requirement that common rules applicable to international transport to or from the territory of a Member State or

⁹ Explanatory memorandum, page 2.

¹⁰ Explanatory memorandum, page 6.

passing across the territory of one or more Member States and, respectively, appropriate provisions for sea and air transport, be laid down by the European Parliament and the Council.

Article 192(1), which must be understood in light of Article 191, establishes that the European Parliament and the Council shall decide on the action to be taken by the Union in order to achieve the objective for protecting inter alia human health and the environment.”

(a) The appropriateness of Articles 91 and 100(2) TFEU

Articles 91 and 100(2) TFEU provide for legal bases in the transport policy field respectively for transport by rail, road and inland waterway, on the one hand, and transport by sea and air, on the other hand.

It is manifest from the aim and content of the proposal that Articles 91 and 100(2) TFEU should be considered as relevant legal bases for the proposal and it is concerned with enhancing the functioning of the internal market in the transport sector.

It is also to be underlined that having recourse simultaneously to both Articles 91 and 100(2) is justified insofar as the Commission proposal follows a multimodal approach.

(b) No necessity to add Article 192(1) TFEU as a legal basis

Although the above quoted section of the explanatory memorandum is supposed to justify the recourse to Article 192(1) TFEU as a legal basis, it does not, however, state explicitly why the addition of this legal basis would indeed be necessary.

It is true that various mentions in the explanatory memorandum contain indications according to which replacing paper-based documents by electronic ones seems to be beneficial for the environment¹¹.

That said, despite the possible positive effects of the proposal on the environment, it is apparent that the main objective of the proposal is not relating to environmental protection. The latter may thus merely be an incidental effect of the legislative instrument. For that reason, it is not necessary to add Article 192(1) as a legal basis.

In the alternative, one may consider that the scope of the proposal captures information requirements set out in various existing Union acts (cf. Article 1(2) of the proposal). Those acts are based on the transport legal basis, with the exception of Union legislation on shipment of waste that is based on [now] Article 192(1) TFEU¹². Whilst this is obviously true, the proposal itself contains elements indicating that this fact is not relevant for the choice of the legal basis. Indeed, according to recitals 5 and 6: “(5) Member States’ authorities should therefore be required to accept information made available electronically whenever economic operators are obliged to make information available as proof of compliance with requirements laid down in Union acts adopted in accordance Title VI of Part Three of the

¹¹ See e.g. the explanatory memorandum, p. 11: “with an average of 1-5 copies of each document per shipment not printed anymore about 2-8 billion sheets of paper would be saved, or the equivalent of 180-900 thousand trees annually”.

¹² Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12.7.2006, p. 1–98).

Treaty or, given the similarity of the situations, with Union legislation on the shipments of waste [...]. (6) Since this Regulation is only intended to facilitate the provision of information, specifically, by electronic means, it should not affect the provisions of Union or national law determining the content of regulatory information and, in particular, should not impose any additional regulatory information requirements [...]". Thus, the proposal does not amend any act based on the environmental legal basis, but focuses on the transport aspect of the shipment of waste. Therefore, the environmental elements, if any, are without any doubt ancillary to the predominant transport component of the proposal¹³.

In the light of the foregoing, Article 91 and 100(2) TFEU appear to be the right legal bases for the proposal. It is not necessary to add Article 192(1) TFEU. Consequently, it is correct to delete the reference to the latter article in the citation.

The amendments adopted further to the inter-institutional negotiations on this file do not put into question the above conclusions.

VI - Conclusion and recommendation

At its meeting of 9 January 2020 the Committee on Legal Affairs accordingly decided, by 21 votes in favour, none against and 1 abstention¹⁴, to recommend to the Committee on Transport and Tourism to retain Articles 91 and 100(2) TFEU as the only legal basis of the proposed regulation.

Yours sincerely,

Lucy Nethsingha

¹³ N.B. according to the case law, even a formal amendment of an act based on a given legal basis does not necessarily require that the legislator base the amending act on the legal basis of the amended act.

¹⁴ The following were present for the final vote: Lucy Nethsingha (Chair), Marion Walsmann (Vice-Chair), Ibán García Del Blanco (Vice-Chair), Raffaele Stancanelli (Vice-Chair), Franco Roberti (rapporteur for opinion), Gunnar Beck, Patrick Breyer, Geoffroy Didier, Angel Dzhambazki, Evelyne Gebhardt, Esteban González Pons, Jackie Jones, Mislav Kolakušić, Gilles Lebreton, Karen Melchior, Sabrina Pignedoli, Jiří Pospíšil, Liesje Schreinemacher, Marie Toussaint, Edina Tóth (for József Szájer pursuant to Rule 209(7)), Bettina Vollath and Axel Voss.