



*Committee on Legal Affairs
The Chair*

13.3.2024

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

Subject: Opinion on the legal basis of the Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum (COM(2020)0613 – C9-0308/2020 – 2020/0277(COD))

Dear Mr Chair,

By letter of 15 February 2024¹, the Chair of the Committee on Civil Liberties, Justice and Home Affairs requested the Committee on Legal Affairs, pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the added legal basis for the proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum² (hereinafter ‘the proposed Regulation’).

JURI committee will consider the above question at its extraordinary meeting on 11 March 2024.

I - Background

In December 2023 the European Parliament and the Council reached a provisional agreement on the legislative proposals included in the New Pact on Migration and Asylum³ which was presented by the Commission in September 2020. The proposed Regulation, which the Commission based on Article 78(2), points (c), (d) and (e), and Article 79(2), point (c), of the

¹ D(2024)5159.

² COM(2020) 613 of 23.9.2020.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (COM(2020) 609 of 23.9.2020).

Treaty on the Functioning of the European Union (TFEU), was part of that Pact.

Following the provisional agreement reached by the co-legislators, the Legal Services of the European Parliament and of the Council were requested to assess the outcome of the interinstitutional negotiations and make technical recommendations aiming to ensure that the operability and coherence of the Schengen *acquis* is observed.

Having conducted the assessment, the Legal Services recommended that the provisions of Schengen relevance be removed from the proposed Regulation and included in a standalone act. What resulted was a proposal for a Regulation establishing a return border procedure, and amending Regulation (EU) 2021/1148⁴, which essentially includes provisions on the return border procedure, negotiated and provisionally agreed in the framework of the proposal for a Regulation establishing a common procedure for international protection in the Union⁵, together with derogations brought in from the proposed Regulation and with amendments to the Instrument for Financial Support for Border Management and Visa Policy, established by Regulation (EU) 2021/1148⁶.

The European Parliament and the Council endorsed this recommendation on 31 January 2024 during the meeting of the Asylum Contact Group with the five rotating Presidencies of the Council. As a consequence, the question of deletion of Article 79(2), point (c), TFEU from the legal basis of the proposed Regulation appeared.

In addition, the proposed Regulation initially foresaw also to repeal Council Directive 2001/55⁷ (hereinafter ‘the Temporary Protection Directive’) and provide for new rules on granting immediate protection status in crisis situations to displaced persons from third countries who are unable to return to their country of origin, which warranted the inclusion of Article 78(2), point (c), TFEU as the legal basis. In the course of the interinstitutional negotiations it was provisionally agreed that Temporary Protection Directive would not be repealed nor would a new immediate protection status be created. Therefore, Article 78(2), point (c), TFEU should also be deleted from the legal basis of the proposed Regulation.

Following the above, LIBE requested JURI opinion on the appropriateness of the legal basis as modified.

II - The relevant Treaty Articles

Chapter 2 (“Policies on border checks, asylum and immigration”) of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

Article 78
(ex Articles 63, points 1 and 2, and 64(2) TEC)

⁴ 2016/0224B(COD)

⁵ 2016/0224A(COD) (COM(2016) 467 of 13.7.2016 and amended COM(2020) 611 of 23.9.2020).

⁶ Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (OJ L 251, 15.7.2021, p. 48).

⁷ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7.8.2001, p. 12).

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.*

(...)

Article 79
(ex Article 63, points 3 and 4, TEC)

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;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

(...)

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 of the Treaty on European Union) and determining the nature and scope of the Union's competence⁸.

According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure⁹.

If examination of a 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, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component¹⁰. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases¹¹. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament¹².

IV – Aim and content of the proposed Regulation

As explained in the explanatory memorandum of the proposed Regulation, recalling the experience of the 2015 refugee crisis, the Union needs a structured approach to handle crisis in order to avoid *ad hoc* responses. Although the initial Commission text seems to have been

⁸ Opinion 2/00 ("*Cartagena Protocol*"), ECLI:EU:C:2001:664, para 5.

⁹ Case C-300/89, *Commission v Council ("Titanium dioxide")*, ECLI:EU:C:1991:244, paragraph 10.

¹⁰ Ibid. paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

¹¹ Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; Opinion 2/00, paragraph 23; Case C-94/03, *Commission v Council ("Rotterdam Convention")*, ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

¹² Case C-300/89, paragraphs 17-25; Case C-268/94, *Portugal v Council*, ECLI:EU:C:1996:461.

considerably altered during interinstitutional negotiations, the purpose of the proposed Regulation as provisionally agreed remains to complement legislative framework operating in the field of migration as an instrument that ensures that the Union has at its disposal specific rules that can address the exceptional situation of crisis in an effective manner.

The proposed Regulation defines crisis situation (Article 1(4)), as well as *force majeure* (Article 1(5)), that allow Member States to temporarily derogate from complying with the obligations under Regulation on the management of asylum and migration¹³ and the Asylum Procedure Regulation¹⁴. In those situations and circumstances Member States can request to exceptionally apply temporary measures pursuant to the proposed Regulation (Article 2). The situation of crisis or *force majeure* would then be established by a Commission implementing Decision (Article 3) while simultaneously proposing a Council implementing decision authorising derogations and establishing solidarity measures (Article 4). The proposed Regulation provides “*the time period for the application of the derogations and solidarity measures*” which is three months and can be extended once for the same period (Article 5). It also provides for continuous monitoring of the situation by the Commission as well as for solidarity coordinator (Articles 6 and 7 respectively). Chapter III (Article 8 and 9) governs “*solidarity and support measures in a situation of crisis*” while Chapter IV (Articles 10 to 13) establishes the derogations from legislative framework operating in the field of migration that may be temporarily applied during the situation of crisis or *force majeure*. Part of the provisional agreement on this Chapter was also Article 14 “*on measures applicable to the return border procedure in a situation of crisis*” (emphasis added). That Article has subsequently been moved to a standalone Schengen-relevant act and no longer figures in the final text of the provisional political agreement. Lastly, the proposed Regulation as provisionally agreed also contains an expedite procedure for examination of applications for international protection under certain conditions (Article 15) and a Chapter on final provisions (Articles 16 to 20).

V – Analysis

Although the appropriateness of Article 78(2), points (d) and (e), TFEU, which provide legal basis for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status and for the adoption of criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection, is not disputed, it is worth noting that it is clear from the forgoing that the proposed Regulation is pursuing precisely those aims in the situation of crisis or *force majeure*. It is also useful to note here that those provisions are not part of the Schengen *acquis*.

What is disputed is the presence of Article 78(2), point (c), and Article 79(2), point (c), TFEU as additional legal bases in the proposed Regulation following the provisional agreement and the technical appraisal of that agreement in light of the coherence of the Schengen *acquis*.

Article 78(2), point (c), TFEU was warranted by the inclusion of new rules for granting immediate protection status in crisis situations and, consequently, repealing the Temporary Protection Directive in the proposed Regulation, as initially adopted by the Commission.

¹³ 2020/0279(COD) (COM(2020) 610 of 23.9.2020)

¹⁴ 2016/0224(COD) (COM(2016) 467 of 13.7.2016 and amended COM(2020) 611 of 23.9.2020).

Given that in the outcome of interinstitutional negotiations as provisionally agreed by the co-legislators the proposed Regulation would no longer repeal the Temporary Protection Directive nor create a new immediate protection status, it seems indeed appropriate to remove Article 78(2), point (c), TFEU from its legal basis.

Turning now to Article 79(2), point (c), TFEU, in the context of the present Regulation the co-legislators negotiated and provisionally agreed also on measures applicable to the return border procedure in a situation of crisis. However, provisions concerning the return of third-country nationals were originally part of the Schengen Convention (Articles 23 and 24) under Chapter VI of Title II “*Abolition of checks at internal borders and movement of persons*”. It is essential to preserve the operability and coherence of the Schengen *acquis*¹⁵, as well as its full compliance with, on the one hand, the relevant JHA Protocols¹⁶ and, on the other hand, the Schengen Association Agreements concluded by the Union with Norway, Iceland, Switzerland and Liechtenstein. All returns of third-country nationals from the Schengen area have to be considered as a development of the Schengen *acquis* since all third-country nationals entering the Schengen area are also subject to the uniform entry conditions set out in the Schengen Borders Code. The Article on measures applicable to the return border procedure in situation of crisis, and any other provision on return, in the proposed Regulation should, therefore, also be seen as a part of the Schengen *acquis* related to integrated border management and should be removed from the proposed Regulation which is not a Schengen-relevant act. Consequently, Article 79(2), point (c), TFEU should rightly be removed as the legal basis of the proposed Regulation.

VI – Conclusion and recommendation

At its meeting of 11 March 2024 the Committee on Legal Affairs accordingly decided, by 17 votes in favour, none against and one abstention¹⁷, to recommend to the Committee on Civil Liberties, Justice and Home Affairs that the deletion of Article 78(2), point (c), and Article 79(2), point (c), TFEU from the legal basis of the proposed Regulation and basing it on the remaining Article 78(2), points (d) and (e), TFEU seems to be appropriate.

Yours sincerely,

Adrián Vázquez Lázara

¹⁵ See, *inter alia*, judgment of 26.10.2010 in Case C-482/08, *UK v. Council (VIS)*, ECLI:EU:C:2010:631, paragraph 48, in which the Court refers to “*the need for coherence of [the Schengen] acquis, and the need – where that acquis evolves – to maintain that coherence*”; see also paragraphs 49 and 58 of that judgment.

¹⁶ Protocols (No 19) on the Schengen *acquis* integrated into the Framework of the European Union, (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, security and Justice, and (No 22) on the position of Denmark.

¹⁷ The following were present for the final vote: Adrián Vázquez Lázara (Chair), Marion Walsmann (Vice-Chair), Lara Wolters (Vice-Chair), Alessandra Basso, Ilana Cicurel, Ibán García Del Blanco, Pascal Durand, Daniel Freund (for Sergey Lagodinsky, pursuant to Rule 209(7)), Heidi Hautala, Pierre Karleskind, Gilles Lebreton, Maria-Manuel Leitão-Marques, Karen Melchior, Sabrina Pignedoli, René Repasi, Franco Roberti, Michaela Šojdrová (for Jiří Pospíšil, pursuant to Rule 209(7)), Axel Voss, Javier Zarzalejos.

