EUROPEAN PARLIAMENT

2004 *2009*

Committee on Legal Affairs
The Chairman

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Legal basis of the Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children (14207/2004 – C6-0244/2004 – 2004/0818(CNS))[1]

Dear Chairman,

By letter of 6 October 2005 you asked the Committee on Legal Affairs pursuant to Rule 35(2) to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The Committee considered the above question at its meeting of 22 November 2005.

General

Whereas the present legal basis is Article 31(1)(a)[2] and Article 34(2)(b) of the EU Treaty, the rapporteur of the Civil Liberties Committee, Mr Sonik, considers that adding a reference to Article 31(c) so as to make the legal basis Article 31(1)(a) and (c) and Article 34(2)(b) will "improve access to information on prohibitions (through compulsory registration of prohibitions in the criminal record) and make it compulsory to enforce them".

Legal basis

All Community acts must be founded upon a legal basis laid down in the Treaty (or in another

[1] Not yet published in the OJ.
[2] There is a typographical error in the initiative: Article 31(a) should read Article 31**(1)**(a).

legal act which they are intended to implement). The legal basis defines the Community's competence *ratione materiae* and specifies how that competence is to be exercised, namely the legislative instrument(s) which may be used and the decision-making procedure.

According to the Court of Justice the choice of legal basis is not a subjective one, but "must be based on objective factors which are amenable to judicial review"[1], such as the aim and content of the measure in question[2]. Furthermore, the decisive factor should be the main object of a measure.[3]

According to the case-law of the Court of Justice, a general Treaty article constitutes a sufficient legal basis even though the measure in question also seeks, in a subordinate manner, to attain an aim sought by a specific Treaty article[4].

However, where a measure has several contemporaneous objectives which are indissolubly linked with each other without one being secondary and indirect in respect to the others, the measure must be based on the various relevant Treaty provisions[5] unless this is impossible on account of the mutual incompatibility of the decision-making procedures laid down by the provisions[6].

The relevant provisions of the EU Treaty

Article 31

1. Common action on judicial cooperation in criminal matters shall include:

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;

(b) ...

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
....

Article 34
1. ...

2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To

[1] Case 45/86, *Commission* v. *Council* [1987] ECR 1439, para. 5.
[2] Case C-300/89, Commission v. *Council* [1991] ECR I-287, para. 10.
[3] Case C-377/98, *Netherlands* v. *European Parliament and Council* [2001] ECR I-7079, para. 27.
[4] Case C-377/98 *Netherlands* v. *European Parliament and Council* [2001] ECR I-7079, paras 27-28; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 93-94.
[5] Case 165/87 *Commission* v. *Council* [1988] ECR 5545, para. 11.
[6] See, *e.g.*, Case C-300/89 *Commission* v. *Council* [1991] ECR I-2867, paras 17-21 (*Titanium dioxide* case), Case C-388/01 *Commission* v. *Council* [2004] ECR I-4829, para. 58 and Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paras 103-111.

that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

(a) ....

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;
....

Aim and content of the proposed framework decision

According to the explanatory note to the initiative of the Kingdom of Belgium, the purpose of the proposed framework decision is to improve cooperation between Member States in the protection of children from sexual abuse, with the particular aim of ensuring effective application of disqualifications linked to criminal convictions for this type of offence.

At present, nothing guarantees that a disqualification handed down in one Member State has any legal effect in the other Member States, even though the convicted person has freedom of movement within the territory of the European Union. A person who has been convicted for paedophile acts in one Member State and is subject in that State to a prohibition on pursuing activities likely to bring that person into contact with children may therefore evade the prohibition by moving to another Member State.

The proposed framework decision would apply the principle of mutual recognition to prohibitions arising from foreign convictions for sexual offences committed against children. In Belgium's view, this solution is facilitated by the fact that the scope *ratione materiae* is clearly defined and limited to a sector in which the definitions of offences were harmonised by Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography[1]. It may be noted that the legal basis for that framework decision is Article 29, Article 31(1)(c) and Article 34(2)(b) of the EU Treaty.

The framework decision would also require Member States to provide in their national legislation for a sentence of disqualification associated with convictions for such offences.

The aim is therefore to improve cooperation between Member States by obliging the Member State where the convicted person is resident to recognise prohibitions handed down abroad and to enforce them on its territory.

In order to ensure that the principle of mutual recognition of disqualifications and prohibitions is effective, the proposed instrument would allow information on criminal records to be circulated among the Member States so that they can be brought to the attention of the competent authorities of the State to which the convicted person moves. Currently, Member States have only a partial view of a person's foreign convictions. Only convictions handed down against their own nationals in another Member State are automatically brought to their attention, under Article 22 of the 1959 European Convention on Mutual Assistance in

[1] OJ L 13, 20.1.2004, p. 44.

Criminal Matters[1]. This lack of knowledge is exacerbated by the fact that several Member States do not record such foreign convictions in their national criminal records. In the case of disqualifications and prohibitions associated with such convictions, the situation is all the more problematic, since such measures may not appear in the foreign criminal records.

To remedy this situation and make the principle of mutual recognition of disqualifications and prohibitions genuinely effective, the proposed framework decision provides for a minimum number of obligations regarding information vis-à-vis other Member States of the Union.

One final lacuna identified in cooperation in this area within the European Union is that such cooperation remains for the most part strictly limited to subsequent judicial proceedings and is therefore devoid of any preventive impact. Indeed, the very purpose of the disqualification is primarily to prevent the commission of fresh offences. It is thus essential to be able immediately to give legal effect to disqualifications associated with convictions imposed abroad, without waiting for further offences to be committed. In this context, it is not acceptable to restrict consultation of the foreign criminal records to judicial purposes, since a major part of the significance of access to such information is administrative and preventive. There must, on the contrary, be an obligation on a Member State to consult the criminal records of the State of origin in all cases where its own national criminal records are consulted, including where the information taken from the criminal records is required with a view to authorising the pursuit of a given activity, in the context of the scope of the Framework Decision.

The proposed substantive provisions

Accordingly, **Article 1** sets out the purpose of the framework decision, *viz.* to establish the rules under which a Member State shall recognise and enforce in its territory prohibitions arising from convictions covered in Articles 2, 3 and 4 of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography[2].

Article 2 sets out a series of definitions.

Article 3 makes it obligatory for any prohibition (temporary or permanent ban on exercising professional activities related to the supervision of children arising from an offence within the

[1] Council of Europe, ETS No 30.

[2] Broadly, these offences are:
- coercing a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;
- recruiting a child into prostitution or into participating in pornographic performances;
- engaging in sexual activities with a child, where
(i) use is made of coercion, force or threats;
(ii) money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities; or
(iii) abuse is made of a recognised position of trust, authority or influence over the child.
- production of child pornography;
- distribution, dissemination or transmission of child pornography;
- supplying or making available child pornography;
- acquisition or possession of child pornography,
- instigating, aiding, abetting and attempts in relation to those offences.

meaning of Articles 2, 3 and 4 of Council Framework Decision 2004/68/JHA) to be registered in the offender's criminal record.

Article 4 provides that when the Member State in which the person concerned was convicted passes on criminal record information to another Member State under the applicable international rules on mutual legal assistance in criminal matters, it has to mention the prohibition (and its duration) in the excerpt from the criminal record.

Article 5 provides that information about criminal records has to be obtained from the relevant national central authority.

Article 6 deals with the recognition and enforcement of prohibitions in the following terms:

"1. The competent authorities of the enforcing State shall recognise any prohibition, without any formalities being required, and shall enforce it, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-enforcement provided for in Article 7.
2. When an enforcing State is informed of the existence of a prohibition, it shall forward that information to the competent authority for the purposes of applying paragraph 1. The competent authority shall issue its decision within thirty days of such information being forwarded."

Article 7 deals with reasons for non-recognition or non-enforcement as follows:

"The competent authorities in the enforcing State may refuse to recognise and enforce a prohibition only if:
(a) the penalty is time-limited under the law of the enforcing State, where the offences concerned are subject to the jurisdiction of that State under its own criminal law;
(b) the conviction was handed down in default of appearance and the person concerned was not summoned in person nor otherwise informed of the date and location of the hearing that led to the conviction handed down in default of appearance;
(c) a conviction was handed down on the person concerned for the same offences in the enforcing State."

Article 8 provides that to enforce a prohibition, the competent authority of the issuing State is not to require any formalities other than the relevant form on the exchange of information extracted from the criminal record.

Article 9 provides that Member States have to put in place the necessary arrangements to ensure that the convicted person has a non-suspensive legal remedy against the recognition and enforcement of a prohibition and that the substantial reasons for handing down the conviction and the sentence cannot be challenged before a court in the enforcing State.

Article 10 deals with subsequent measures affecting prohibitions, including review, pardon, amnesty, rehabilitation and erasure.

Articles 10 and 11 deal with implementation and entry into force, respectively.

The appropriate legal basis

The Civil Liberties Committee has asked whether it would not be appropriate to add (as their rapporteur is proposing in the first amendment in his draft report) point (c) of Article 31(1) of the EU Treaty, in addition to point (a) of that provision and Article 34(2)(b).

The grounds given in the draft report for adding this extra provision are as follows:

"*As the objective of the instrument is twofold: to improve access to information on prohibitions (in particular through compulsory registration of prohibitions in the criminal record) and to make it compulsory to enforce them.*

Giving the fact that the criminal law varies in the Member States of the EU it is necessary to ensure a certain level of compatibility in rules applicable to criminal convictions."

As will be recalled, point (c) of Article 31(1) reads as follows:

[*Common action on judicial cooperation in criminal matters shall include]*

"(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;"

Therefore the question to be answered is whether the proposed framework decision goes beyond "*facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions"*, as provided for in point (a) of Article 31(1).

Given that no procedural implications are involved, this is the only question to be answered.

In view simply of the purpose of the framework decision as set out in Article 1 - "*Its purpose is to establish the rules under which a Member State shall recognise and enforce in its territory prohibitions arising from convictions for such offences.*" - recourse to point (c) of Article 31(1) would seem desirable if only *ex ambundanti cautela*.

However, it is plain from further examination of the provisions of the proposed framework decision that some of them do seek to ensure compatibility in rules applicable in the Member States within the meaning of point (c) of Article 31(1).

Indeed, Article 3 requires Member States to "*take the necessary steps to ensure that any prohibition is registered in the criminal record*". In this respect, the explanatory note to the Belgian initiative could not put it in any plainer terms: "*The framework decision would also require Member States to provide in their national legislation for a sentence of disqualification associated with convictions for such offences."*

In addition, Article 6 requires Member States to "*recognise any prohibition, without any formalities being required, and ... enforce it*". Then again, Article 7 sets out a limited list of circumstances in which national competent authorities may refuse to recognise and enforce a prohibition. Article 8, for its part, makes enforcement of a provision conditional only upon presentation of a particular form. Lastly, Article 9 requires Member States to "*put in place the necessary arrangements to ensure that the convicted person has a non-suspensive legal remedy*".

All those provisions go beyond facilitating and accelerating cooperation between competent national authorities within the meaning of point (a) of Article 31(1) of the EU Treaty.

They are in fact likely to necessitate changes in at least the law of criminal procedure in the Member States. As a result, they may be considered to be designed to ensure compatibility in rules applicable in the Member States within the meaning of point (c) of Article 31(1) of the EC Treaty.

At its meeting of 22 November 2005 the Committee on Legal Affairs accordingly decided, unanimously[1], to recommend that the legal basis for the proposed framework decision should be not only Article 31(1)(a) and Article 34(2)(b) of the EU Treaty, but also Article 31(1)(c).

Yours sincerely,

Giuseppe Gargani

[1] The following were present for the vote Giuseppe Gargani (chairman), Rainer Wieland (vice-chairman), Antonio López-Istúriz White (draftsman), Maria Berger, Bert Doorn, Nicole Fontaine, Othmar Karas, Piia-Noora Kauppi, Kurt Lechner, Klaus-Heiner Lehne, Arlene McCarthy, Marie Panayotopoulos-Cassiotou, Michel Rocard, Aloyzas Sakalas, Nicola Zingaretti and Tadeusz Zwiefka.