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: Opinion on the legal basis of the proposal for a Council decision on the establishment of a mutual information procedure concerning Member States' measures in the areas of asylum and immigration (COM(2005)0480 – C6-0335/2005 – 2005/0204(CNS))[1]

Dear Mr Chairman,

By letter of 4 April 2006 you asked the Committee on Legal Affairs pursuant to Rule 35(2) of the Rules of Procedure to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The Commission's proposal for a Council decision is based on Article 66 of the EC Treaty. The proposal establishes a procedure for the mutual exchange of information concerning national measures in the areas of asylum and immigration using a web-based network and allowing for an exchange of views on such measures.

Since 1 May 2004, pursuant to the Protocol on Article 67 of the Nice Treaty, such measures have been adopted by a qualified majority vote in the Council and after consulting the European Parliament.

In view of the fact that the proposal refers to certain provisions of directives based on Article 63 of the EC Treaty which impose obligations on Member States to inform the Commission of the provisions of national law adopted in the fields covered by these directives, your committee has sought the opinion of the Committee on Legal Affairs, as to whether the appropriate legal basis for the proposal should be Article 63 of the EC Treaty, the same article of the EC Treaty as that which is used as the legal basis for the aforementioned directives.

The Committee considered the above question at its meeting of 3 May 2006.

[1] Not yet published in the OJ.

General remarks on the legal basis

It is clear from settled case-law of the Court of Justice that 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].

Purpose and content of the proposal

The purpose of the proposal is to establish a procedure for the mutual exchange of information concerning national measures in the areas of asylum and immigration using a web-based network and allowing for an exchange of views on such measures. The information is to be transmitted through a web-based network run by the Commission.

Certain provisions of existing Community legislation impose an obligation on Member States to communicate to the Commission the text of the provisions of national law which they adopt in the fields covered by the directives in question[4]. The proposal contains in Article 3 (see also recital 6) a provision giving Member States the possibility to provide such information using the network established by the proposed Decision, in order to simplify administrative procedures.

Conclusions

It follows from the purpose and content of the proposed Council decision that the correct legal basis for the proposal is Article 66 of the EC Treaty.

The main objective of the proposal is to provide a forum for the mutual exchange of information and views on national asylum and immigration measures by establishing a procedure for the mutual exchange of information using a web-based network and allowing for an exchange of views on such measures. The proposal is aimed, as appears from Article 1 and also from recitals 1, 3 and 7, at achieving closer practical cooperation between Member

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[1] Case 45/86 *Commission* v *Council* [1987] ECR 1493, para. 11.
[2] Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, para. 10.
[3] Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, para. 27.
[4] See. for example:

- Article 8(2) of Council Directive 2001/40/EC (mutual recognition of expulsion decisions; based on Article 63(3) EC);
- Article 7(3) of Council Directive 2001/51/EC (supplementing the provisions of Article 26 of the Schengen Agreement; based on Articles 61(1)(a) and 63(3) b) EC);
- Article 27(2) of Council Directive 2001/55/EC (temporary protection; based on Article 63(2)(a) and (b) EC);
- Article 4(2) of Council Directive 2002/90/EC (facilitation of unauthorised entry; based on Articles 61(a) and 63(3)(b) EC);
- Article 10(2) of Council Directive 2003/110/EC (assistance in removal by air; based on Article 63(3)(b) EC);
- Article 26(2) of Council Directive 2003/9/EC (standards for reception of asylum-seekers; based on Article 63(1)(b) EC);
- Article 38(2) of Council Directive 2004/83/EC (qualifications directive; based on Article 63(1(c), (2)(a) and (3)(a) EC);
- Article 17(2) of Council Directive 2005/71/EC (researchers directive; based on Article 63(3)(a) and (4) EC);
- Article 43, third para., of Council Directive 2005/85/EC (minimum standards on asylum procedures; based on Article 63(1)(d) EC).

States, and in particular at providing secure information exchange and consultation between Member States.

As follows in particular from Article 4, the proposal establishes a procedure for cooperation between the administrations of the Member States and between those administrations and the Commission. Pursuant to Article 4 of the proposal, a web-based network will be used for the exchange of information. According to paragraphs 3 and 5 of Article 4, the network will be set up by using the existing technical platform within the Community framework of the trans-European telematic network for the interchange of data between administrations. Furthermore, national contact points having access to the network will be designated by the Member States.

In other words, the proposal contains measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas of asylum and immigration, as well as between those departments and the Commission. Such measures are covered by the legal basis of Article 66 of the EC Treaty. That article provides an explicit legal basis for administrative cooperation between the Member States and with the Commission. The article focuses on practical cooperation between national administrations, in the form of, for example, exchanges of information, the setting-up of national contact points, infrastructure measures, etc.

The appropriate legal basis for the proposed Council decision should therefore be Article 66 of the EC Treaty.

No other conclusion can be drawn from Article 3 of the proposal. It cannot be concluded from that article that the correct legal basis for the proposal should be Article 63 of the EC Treaty. Article3 of the proposed decision provides that whenever Member States have an obligation to inform the Commission of the provisions of national law which they adopt in the fields covered by the directives based on Article 63 of the Treaty, such obligations shall be deemed to be fulfilled if the information is transmitted through the network. This means that Member States are given the possibility to provide the information required by those directives using the network established by the proposed decision in order to simplify administrative procedures. Article 3 thus contains a merely procedural provision. No additional requirements are created by that article. The obligations of the Member States which follow from the abovementioned directives based on Article 63 are not changed, modified or supplemented by the proposal.

At its meeting of 3 May 2006 the Committee on Legal Affairs accordingly decided, unanimously[1], to recommend that the appropriate legal basis for the proposal should be Article 66 of the EC Treaty.

Yours sincerely,

Giuseppe Gargani

[1] The following were present for the final vote: Giuseppe Gargani (chairman), Diana Wallis (draftswoman), Maria Berger, Bert Doorn, Nicole Fontaine, Jean-Paul Gauzès, Manuel Medina Ortega and Aloyzas Sakalas.