



*Committee on Legal Affairs
The Chair*

15.6.2017

Mrs Vicky Ford
Chair
Committee on the Internal Market and Consumer Protection
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services (COM(2015)0615 – C8-0387/2015 – 2015/0278(COD))

Dear Madam Chair,

By letter of 22 May 2017 you asked the Committee on Legal Affairs pursuant to Rule 39(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 12 June 2017.

The Commission has presented a proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, which proposal on Article 114 TFEU.

The report adopted by IMCO on 25 April 2017 adds a citation which seeks to add Article 26 of the Charter of Fundamental Rights of the European Union as a second legal basis

At its meeting of 12 June 2017 the Committee on Legal Affairs accordingly decided unanimously¹, to recommend that that you retain only Article 114 TFEU as the legal basis for

¹ The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (Vice-Chair), Laura Ferrara (Vice-Chair), Max Andersson, Joëlle Bergeron, Dominique Bilde (for Marie-Christine Boutonnet, pursuant to Rule 200(2)), Antanas Guoga, Heidi Hautala, Mary Honeyball, Bogdan Brunon Wenta (for Tadeusz Zwiefka, pursuant to Rule 200(2)), Sylvia-Yvonne Kaufmann, Katerina Konečná (for Jiří Maštálka, pursuant to Rule 200(2)), Merja Kyllönen (for Kostas Chrysogonos, pursuant to Rule 200(2)), Gilles Lebreton, Victor Negrescu, António Marinho e Pinto, Emil

the Directive. Article 26 of the Charter of Fundamental Rights of the European Union cannot be used as a legal basis. The citation referring to Article 26 of the Charter should therefore be removed.

Background

The question raised concerns the correct legal basis for the proposal for a directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services (COM(2015)0615 – C8 0387/2015 – 2015/0278(COD)) (henceforth ‘the Directive’).

The Commission’s proposal is based on Article 114 TFEU which reads as follows:

Article 114

(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

Radev, Dariusz Rosati (for Rosa Estaràs Ferragut, pursuant to Rule 200(2)), Virginie Rozière, Sajjad Karim, Elly Schlein (for Evelyn Regner, pursuant to Rule 200(2)), József Szájer, Axel Voss, Kosma Złotowski.

6. *The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.*

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. *When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.*

8. *When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.*

9. *By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.*

10. *The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.*

The report adopted by IMCO on 25 April 2017 adds the following citation, the drafting of which indicates that it seeks to add Article 26 of the Charter of Fundamental Rights of the European Union (henceforth ‘the Charter’) as a second legal basis:

Having regard to the Charter of Fundamental Rights of the European Union, in particular Article 26 thereof,

Article 26 of the Charter of Fundamental Rights of the European Union reads as follows:

*Article 26
Integration of persons with disabilities*

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Analysis

a) The legal basis proposed by the Commission

The legal basis proposed by the Commission, Article 114 TFEU, provides the competence to adopt measures the object of which is the establishment and functioning of the internal market. The appropriateness of said article as a legal basis for the proposal has not been contested by IMCO. The appropriateness of Article 114 TFEU as legal basis for the Directive is, furthermore, confirmed, i.e., by recital 1, including as amended by IMCO with the following formulation as the result:

Amendment

(1) The purpose of this Directive is to contribute to the proper functioning of the internal market by approximating laws, regulations and administrative provisions of the Member States **and** by eliminating barriers to the free movement of certain accessible products and services. This will increase the availability, **and improve the accessibility and practicality, of information on** accessible products and services **in** the internal market.

b) The proposed additional legal basis

It is settled case law of the Court of Justice that: “the choice of legal basis for a Community (now Union) 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.²

As regards multiple legal bases, 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.³

However, in the present case it is not necessary to examine the purpose and content of the proposed directive, as Article 26 of the Charter cannot be used as a legal basis. Paragraph 2 of Article 51 of the Charter explicitly states that *(T)he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*.

Furthermore, it follows from the principle of conferral, enshrined in Article 5 TEU that the Union shall act only when the treaties provide it with the competence to do so. Article 289

¹ Case C 411/06 *Commission v Parliament and Council* [2009] E.C.R. I 7585, para. 45 and Case C 130/10 *Parliament v Council* [2012] E.C.R., para. 42, and the case law cited therein.

² Opinion 2/00 on the *Cartagena Protocol* [2001] E.C.R. I-9713, para. 5.

³ Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; Case C-411/06 *Commission v Parliament and Council*, [2009] E.C.R. I-7585, para.46 and the case-law cited there; C-490/10 *Parliament v Council* EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

TFEU clarifies that the procedure for the adoption by the Union of a legal act covering a specific field is explicitly referred to in a treaty provision. A provision in the treaties which does not refer to a procedure for the adoption of an act cannot, therefore, constitute a legal basis for a legislative act of the Union.

Parliament should also respect the rules concerning the drafting of legislative acts adopted under the ordinary legislative procedure, as these have been agreed by the three institutions. The *Joint handbook for the presentation and drafting of acts subject to the ordinary legislative procedure* stresses that citations in such acts should refer either to the legal basis or to the procedure. They should not refer to provisions that clarify the content:
References which do not constitute citations

9.13. When drafting citations, care should be taken to ensure that they refer to either the legal basis, or the procedure. Any reference to the content of provisions other than the legal basis which is necessary for a proper understanding of the enacting terms or in order to check their lawfulness should appear in the recitals. More general references may be made, for background information, in the explanatory memorandum.¹

The citation referring to Article 26 should, therefore, be deleted.

Conclusion

Article 114 TFEU is the correct legal basis for the Directive. Article 26 of the Charter of Fundamental Rights of the European Union cannot be used as a legal basis. The citation referring to Article 26 of the Charter should be removed.

Yours sincerely,

Pavel Svoboda

¹ EUROPEAN COUNCIL EUROPEAN, PARLIAMENT OF THE EUROPEAN UNION, COMMISSION JOINT HANDBOOK FOR THE PRESENTATION AND DRAFTING OF ACTS SUBJECT TO THE ORDINARY LEGISLATIVE PROCEDURE, May 2016 edition.