

EUROPEAN PARLIAMENT

1999



2004

Session document

FINAL
A5-0066/2001

27 February 2001

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REPORT

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1. on the initiative of the Republic of Finland with a view to the adoption of a Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications

(11834/00 – C5-0559/2000 – 2000/0805(CNS))

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2. on the initiative of the Portuguese Republic with a view to adopting a Council Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance

(5736/2001 – C5-0044/2001 – 2001/0802(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Gérard M.J. Deprez

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

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PROCEDURAL PAGE

By letter of 9 June 2000 the Council consulted Parliament, pursuant to Article 67 of the EC Treaty, on the initiative of the Republic of Finland with a view to the adoption of a Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (6481/1/00 – 2000/0805(CNS)).

At the sitting of 16 June 2000 the President of Parliament announced that she had referred this initiative to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0287/2000).

On 17 October 2000 the Council adopted a Decision correcting the Schengen *acquis* relating to the consultation network for the issue of visas (technical specifications of the 'Vision' system).

By letter of 26 October 2000 the Council consequently consulted Parliament, pursuant to Article 67 of the EC Treaty, on the amended initiative of the Republic of Finland with a view to the adoption of a Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (11834/00 – 2000/0805(CNS)).

At the sitting of 13 November 2000 the President of Parliament announced that she had referred the amended initiative to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0559/2000).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Gérard M.J. Deprez rapporteur at its meeting of 10 October 2000.

By letter of 8 February 2001 the Council consulted Parliament, pursuant to Article 67 of the EC Treaty, on the initiative of the Portuguese Republic with a view to adopting a Council Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (5736/2001 – 2001/0802 (CNS)).

At the sitting of 12 February 2001 the President of Parliament announced that she had referred this initiative to Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0044/2001).

At its meeting of 27 February 2001 the committee appointed Gérard M.J. Deprez rapporteur on the Portuguese initiative and decided to deal with the two initiatives (C5-0287/2000 and C5-0044/2001) in a single report .

It considered the initiative of the Republic of Finland and the draft report at its meetings of 12 October 2000, 4 December 2000 and 24 January 2001. It considered the initiative of the Portuguese Republic and the draft report at its meeting of 27 February 2001.

At the latter meeting it adopted:

1. the draft legislative resolution unanimously;
2. the draft legislative resolution unanimously.

The following were present for the vote: ... chairman/acting chairman; ... and ..., vice-chairman/vice-chairmen; ..., rapporteur; ..., ... (for ...), ... (for ... pursuant to Rule 153(2)), ... and

The report was tabled on 27 February 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

1. Initiative of the Republic of Finland with a view to the adoption of a Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (11834/00 – C5-0559/2000 – 2000/0805(CNS))

The initiative is rejected.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the initiative of the Republic of Finland with a view to the adoption of a Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (11834/00 – C5-0559/2000 – 2000/0805(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Republic of Finland (11834/00¹),
 - having regard to Article 62(2) and (3) of the EC Treaty,
 - having been consulted by the Council pursuant to Article 67 of the EC Treaty (C5-0559/2000),
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0066/2001),
1. Rejects the initiative of the Republic of Finland;
 2. Calls on the Republic of Finland to withdraw its initiative;
 3. Instructs its President to forward its position to the Council and Commission, and the Government of the Republic of Finland.

¹ Not yet published in OJ.

LEGISLATIVE PROPOSAL

2. Initiative of the Portuguese Republic with a view to adopting a Council Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (5736/2001 – C5-0044/2001 - 2001/0802 (CNS)).

The initiative is rejected.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the Initiative of the Portuguese Republic with a view to adopting a Council Regulation reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (5736/2001 – C5-0044/2001 – 2001/0802 (CNS)).

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Portuguese Republic (5736/2001¹),
 - having regard to Article 62(2) and (3) of the EC Treaty,
 - having been consulted by the Council pursuant to Article 67 of the EC Treaty (C5-0044/2001),
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0066/2001),
1. Rejects the initiative of the Portuguese Republic;
 2. Calls on the Portuguese Republic to withdraw its initiative;
 4. Instructs its President to forward its position to the Council and Commission, and the Government of the Portuguese Republic.

¹ Not yet published in OJ.

EXPLANATORY STATEMENT

1. Aim of the initiatives

The Finnish initiative is seeking to enable the Council, under the regulation to be adopted, to exercise implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications. The Portuguese initiative is seeking to reserve for the Council, under the regulation to be adopted, implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance. A fundamental legal problem is thus posed.

2. General principle

2.1. Under the Community system, the exercise of implementing powers is governed by Article 202 (formerly Article 145) of the Treaty establishing the European Community (TEC), which states that 'the Council shall ... confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament'.

2.2. The general principle established by Article 202 TEC admits of no ambiguity, since it serves to ensure, in the normal course of events, that the power to implement Council acts is conferred on the Commission. It has been confirmed by a judgment handed down by the Court of Justice on 24 October 1989 (Case 16/88 – [1989] ECR 3457), which stipulates that 'after the amendments made to Article 145 [now Article 202] by the Single European Act, the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision' (point 10 of the judgment).

2.3. The Council itself interpreted the above principle in the same way when, on 28 June 1999, it adopted Decision 1999/468/EC (OJ L 184, 17.7.1999, pp. 23-26) laying down the procedures for the exercise of implementing powers conferred on the Commission. Indeed, Article 1 of the Decision states that 'Other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself, such powers shall be conferred on the Commission ... '.

2.4. It has to be borne in mind, moreover, that Article 202 TEC is not just 'any old article', because, within the TEC, it forms part of the institutional provisions in the strict sense, which the Court of Justice considers to take precedence over other provisions (point 16 of the judgement of 24 October 1989).

3. Do the initiatives constitute specific cases supported by a detailed statement of grounds?

3.1. By reserving the right to exercise implementing powers under the regulations concerned, the Council is departing from the general principle established by an institutional provision of the TEC. It therefore has to show that the initiatives are specific cases and state in detail on what grounds its conclusions are based.

3.2. The Council has never clearly defined the concept of a 'specific case', and the case-law of the Court of Justice is hardly explicit on that point.

3.3. As far as the grounds are concerned, the Council wishes to reserve the right to exercise implementing powers for a five-year transitional period because 'the Member States have an enhanced role in respect of the development of visa policy, reflecting the sensitivity of this area, in particular involving political relations with third countries' (recital 8 of the proposal for a regulation contained in the Finnish initiative and recital 6 of the proposal for a regulation contained in the Portuguese initiative).

3.4. This justification, which is brief to the point of manifest scantiness, is also fundamentally flawed:

3.4.1. Since, as a rule, it empowers the Commission to implement Council acts and forms part of the institutional provisions, Article 202 TEC applies to acts adopted on a legal basis falling under Title IV.

3.4.2. The fact that the regulations are temporary measures cannot be adduced to challenge the supremacy an institutional provision of the Treaty.

3.4.3. Apart from the fact that it does not apply to Article 62 as a whole, the 'enhanced role of the Member States as regards visas and the crossing of borders' (that is to say, the right of initiative accorded to them under Article 67) does not in itself afford sufficient grounds to depart from a general principle of Community law. It can be performed only by exercising a parallel right of initiative. The Treaty does not make any other exception, for instance by waiving standard committology where the whole of Title IV is concerned.

3.4.4. To maintain that visas and border control policy are a sensitive area is not a valid argument, because it is contrary to the principle of the Protocol annexed to the Treaty of Amsterdam integrating the Schengen *acquis* into the framework of the European Union, which has expressly transferred these matters from the intergovernmental framework to the normal Union legal and institutional framework. Furthermore, the Regulation on the list of countries whose nationals are subject to or exempt from the visa requirement, in respect of which the Commission has an exclusive right of initiative, and the Regulation laying down a uniform format for visas, which allows the Commission to take secret implementing measures, are politically just as sensitive if not more so (Article 62(2)(b)(i) and (iii), in conjunction with Article 67(3), first indent, of the EC Treaty).

4. No parliamentary control

4.1. In general, the substance of the arrangement set out in Title IV, Article 67, of the TEC is currently wanting because it makes no provision whatsoever for parliamentary control: for five years the Council may act unanimously after merely consulting Parliament.

4.2. Specifically as regards the Finnish and Portuguese initiatives, the resulting democratic deficit is aggravated by two further factors:

4.2.1. Parliament is being consulted on initiatives intended to empower the Council to alter provisions whose content Parliament does not know. The Council has refused to supply Parliament with certain documents which it has classed as confidential. The only persons

authorised to consult them on the spot are the chairman of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and your rapporteur. It is legitimate to ask whether, given the circumstances, the procedure for consulting Parliament is not being rendered meaningless, with the result that the act in question might have to be declared void.

4.2.2. In addition, by reserving the right to exercise implementing powers itself instead of assigning them to the Commission, the Council is completely depriving Parliament of the information to which it would have been entitled under the usual commitology arrangements (Article 7 of the Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission).

5. For all the reasons set out above, your rapporteur is proposing that the Finnish and Portuguese initiatives be rejected outright.