



European Solidarity Towards Equal Participation of People

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Comments on the Commission Non-Paper of 3 February 2006:

Legal basis for a Regulation on a Development Cooperation and Economic Cooperation Instrument

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The Commission's arguments that are presented in its Non paper on the Legal basis for a regulation on a Development Cooperation and Economic Cooperation Instrument (DCECI) from the 3rd of February deviate from the *acquis communautaire* and from the legal case law developed on the matter as well as from the legal opinions expressed on the matter by the Council and the European Parliament.

1. The geographic scope

The non paper argues that Article 181a is also intended to apply to developing countries.

In signing the Constitutional Treaty, both the members of the European Convention and the European Council accepted the interpretation that Article 181a is intended for co-operation with countries '*other than developing countries*'.¹

This has been confirmed by an opinion of the Council Legal Services on 15 April 2005,² which unequivocally stated that:

"Article 181a empowers the Community, within its sphere of competence, to adopt 'economic, financial and technical cooperation measures' with third (non-developing) countries."

This opinion further clearly states that

"Article 179 empowers the Community to take measures necessary to further its objectives in the sphere of development cooperation policy. (...) It seeks to promote the economic and social development of the developing countries, their integration into the world economy and the reduction of poverty, as well as to contribute to the general objective of developing and consolidating democracy and the rule of law, respect for human rights and fundamental freedoms. Community measures may notably take the form of 'multi-annual programmes'." (point 28)

This opinion then declares that the scope of the Regulation on a Development Cooperation and Economic Cooperation Instrument is fully covered by Article 179 and provides the basis for a multi-annual programming approach, which the Commission is seeking to establish.

Finally it emphasises that:

"Development cooperation measures thus remain covered by Article 179 exclusively".

The instrument (DCECI) will be the development instrument of the European Union for the implementation of the competence given to it by the Treaty. The DCECI describes a competence (not a regional policy) and therefore should be defined on the basis of the competences given in that policy area.

2. The relationship between Articles 177-179 and Article 181a

The Non-Paper argues that Article 181a is not restricted to non-developing countries. This view is inconsistent with opinions of both Council and Parliament legal services. Moreover, the Commission never objected to the Articles as they have been agreed in the Constitutional Treaty, which clearly distinguish between Article 179 and Article 181a on the basis of the EU's different policies towards developing and non-developing countries.

¹ Article III-319 of the Treaty Establishing a Constitution for Europe

² Council of the European Union, Opinion of the Legal Services, Commission proposal for a Council Regulation establishing an instrument for Stability – legal basis – scope of Community competence, 8095/05 Jur. Council of the European Union, Opinion of the Legal Service, Jur 176, 26.05.2000 also defines art 177-179 as applying to all developing countries.

The Non-Paper argues that the reference in Art 181a to Art 179 proves the relationship between the two articles. Article 181a was intended not to undermine the scope of Article 179 in any way, and is formulated:

“Without prejudice to the provisions of Title XX...”

At the same time, it is clear that a relationship does exist between the two articles. The Treaty states that those European Union policies that have an impact on developing countries should take the development objectives into account. The Treaty also states that the different components of the EU's external policies should be consistent with each other. However, the relationship does not mean that different policy areas are interchangeable.

3. The policy mix

The arguments with regards to the required policy mix are not related to the scope and definition of the legal Instrument for Development Cooperation. The programming of the EU's resources provided under Articles 177-179 is defined by the Treaty and by the DCECI. Any further competences of the Commission towards developing countries are implemented under the respective policy areas, such as Trade policy, the Common Foreign and Security Policy, internal policies with an external dimension, ... It is the Commission's task to ensure that these activities are coherent and consistent and that the policy mix reflects the needs of the country.

There is no legal argument that sustains the inclusion of Article 181a as a legal basis for the DCECI in order to facilitate the Commission's work to arrive at an optimum policy mix.

4. The scope hitherto of Article 181a

Article 181a has so far served as a legal base to fund activities to support European investment and trade facilitation to the tune of only some €17 millions a year, and has mainly supported visits and meetings of representatives of the business community. These activities are clearly distinct from the long-term development activities which are aimed at in the EU's development policy.³

The Non-Paper states that activities under Article 181a are ODA eligible (according to the OECD DAC definition). To date, no activity that has been deemed ODA eligible has been funded under Article 181a. If this was to happen, it could arguably be questioned why it was not funded under Articles 177-179, which cover all ODA.

The Commission raises the point that the European Neighbourhood and Partnership Instrument (ENPI) is based on both Articles 177-179 and Article 181a and that no questions were raised on the part of other institutions. However, the ENPI describes a policy with a specific purpose, covering a region that includes both developing and non-developing countries. It is therefore acceptable and logical that this instrument, with its specific focus refers to the two articles that cover policy towards the two groups of countries. However, this does not make Articles 177-179 and Article 181a interchangeable in the DCECI.

5. Specific thematic areas

The Non-Paper mentions a number of areas for which it believes Article 181a is required:

- Higher education: support to higher education can be provided as ODA to developing countries and is currently already provided by the commission under Articles 177-179;

³ Commission report on the implementation of Regulation No 382/2001 regarding the implementation of projects promoting cooperation and commercial relations between the European Union and industrialized countries of North America, the Far East and Australasia.

- Transport, energy, the environment and research are all areas which fall under Articles 177-179. In as far as these are the 'external dimension of internal EC policies', this is foreseen in the Treaty insofar as those "take the development objectives" into account. It is clear that the DCECI is not intended to fund the external dimensions of the EC's internal policies if this were not the case.
- The development of non-state actors such as local authorities is and can be supported under Articles 177-179 and is part and parcel of the EU's *acquis communautaire* to developing countries. In fact, the EU has a long-standing funding arrangement with non-state actors under Articles 177-179.

All of the areas identified could be implemented under Articles 177-179 and the Commission does not provide any arguments as to why it believes that these proposed activities are inconsistent with the objectives expressed in Article 177. If these activities were inconsistent with the objectives expressed in Article 177, this would create another problem, in that the Treaty asks specifically the consistency and coherence of the different EU (external and internal) policies.

6. Specific geographic priorities

The Commission makes specific reference to a range of 'strategic' actors, such as China, Brazil, India, Chile and Mexico. In other parts, it refers to support to High Middle Income Countries – including Malaysia, Mauritius and South Africa. These countries have little in common. The Commission does not have a specific problem with High Middle Income Countries, or with 'strategic partners' such as China and India, but with the range. This weakens the Commission's case to draw attention to 'exceptional circumstances'.

Article 181a itself is clear that it does not apply to these countries. The legal opinion on this by the European Parliament states that:

*"Even though, as mentioned above, the scope of Article 181a EC is wide, it is limited by the phrase: 'without prejudice to the other provisions of this Treaty, and in particular those of Title XX', i.e. by the scope of development cooperation. Accordingly, if the beneficiary is a 'developing country', then Article 179 applies and not Article 181a."*⁴

The opinion is very clear on this:

"Does this mean that one developing country can receive both development aid and economic cooperation as defined in Article 181a EC? The answer must be negative, because already the introductory phrase of Art 181A EC: 'without prejudice to the other provisions of this Treaty, in particular those of Title XX' indicates that cooperation with developing countries is excluded. This can be considered as the rationale of Art 181a." (Point 22)

The opinion further states:

"Moreover, the term 'cooperation' in both Title XX (development cooperation) and Article 181a EC (economic, financial and technical cooperation) sustains that reasoning – 'cooperation' with developing countries falls outside the ambit of Article 181a EC, since that 'cooperation' is covered by Title XX." (Point 23)

The opinion also notes that:

⁴ European Parliament, Legal Opinion Scope Purpose and appropriate use as a legal base of Article 181A EC and the interaction between Article 179 EC (development cooperation) and Article 181A EC (economic cooperation). -12-2005

“the number of acts (...) based on Article 181a EC alone, as a legal basis, strengthens this interpretation.” (Point 23)

Article 177 further specifically sets out that:

“the Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.” The Community is therefore fully bound by what has been agreed in the OECD DAC.

The Commission has every possibility to distinguish and organise specific responses to the different kinds of countries it is dealing with under the DCECI. However, if it disagrees with the DAC list of developing countries, this point should be taken up in the OECD Development Assistance Committee. If the Commission wants to make specific responses to different countries, it should do this with the instruments available to it under the competences defined by the Treaty. These are not arguments that have a bearing on the Treaty base for the DCECI.

7. The scope of the DCECI

Legal opinions are clear in that the purpose of an instrument should be specific. The different opinions are all clear that the choice of a legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the particular aim and the content of that measure. If there is an identifiable predominant purpose, which in the case of the DCECI is the establishment of an instrument for the EU's development co-operation, the act must be based on a single legal basis.

The Commission's arguments regarding the specific activities that it would like to fund, for which Article 181a is required are not relevant for the discussion of the scope of the DCECI. The possibilities for the Commission to deal with such activities essentially two ways:

1. the activities the Commission wants to include fall within the development policy (economic and social development of developing countries), and therefore fall under Articles 177-179;
2. the activities the Commission wants to include do not fall within the development policy and therefore should fall under another of the European Union's competences, e.g. trade, CFSDP, some of the internal policies etc – and should be defined on the basis of their respective articles.

The legal opinions and case law are entirely consistent on this point. In an earlier case where the Commission considered bringing together two separate activities under one legal base, the Council rejected the approach and the regulations had to be split to clarify the intent and scope in two separate instruments⁵.

⁵ The Council did not share the Commission approach regarding regulations 975/99 (development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms) a regulation 976/99 (community cooperation measures which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries). Considering that these regulations were two separate instruments with two different scopes of application, the Council decided that each of the amending regulations had to be adopted separately, on based on Article 179, covering activities in developing countries in Regulation 975/99, and the other one for actions linked to third countries in Regulation 976/99, based on Article 181a.