

Brussels, 11 July 2017

Dissenting note for legal basis from Ms Heidi Hautala

Subject: Dissenting note for legal basis on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 230/2014 of the European Parliament and of the Council 11 March 2014 establishing an instrument contributing to stability and peace (COM(2016)447 - 2016/0207(COD))

Ms Hautala would like to thank the rapporteur for legal basis, Mr Jean-Marie Cavada for his note. Ms Hautala cannot, however, agree with the conclusion and recommendation and therefore wishes to present the following dissenting note:

The choice of legal basis

The rapporteur summarizes the CJEU case law on the choice of legal basis on page 5 of the note:

“The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 TEU) and determining the nature and scope of the Union’s competence.¹ According to settled case law of the Court of Justice, “the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure”.² The choice of an incorrect legal basis may therefore justify the annulment of the act in question. In this context, an institution’s wish for more active participation in the adoption of a given measure, the circumstances in which a measure was adopted as well as the work that has been done in other aspects within the scope of action covered by a given measure are irrelevant for the identification of the right legal basis.³

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,

¹ *Opinion 2/00* [2001] ECR I-9713, para 5.

² Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

³ Case C-269/97 *Commission v Council* [2000] ECR I-2257, para 44.

namely that required by the main or predominant purpose or component.⁴ However, where a measure has several contemporaneous objectives or components, which are indissociably linked, without one being secondary and indirect in relation to the other(s), such a measure will have to be based on the various corresponding legal bases,⁵ if procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament.⁶”

Aim and content of the proposed measure

The Commission proposal, according to its Recital 3, aims to support security sector actors, including the military under exceptional circumstances, in third countries in a context of conflict prevention, crisis management or stabilisation. It is not disputed that that these conflict prevention and crisis management actions contribute in creating appropriate conditions for poverty eradication and development. However, this nexus does not change the fact that these actions primarily and irrevocably fall within the scope of Common Foreign and Security Policy (CFSP) and only indirectly and derivatively contribute to the primary objective of the Union development cooperation policy, ie. the reduction and, in the long term, the eradication of poverty.

The European Parliament Legal Service discusses the boundaries of the development cooperation policy in its legal opinion, 31 August 2016. The Legal Service underlines that *“the Court has also set limits to the scope of the development cooperation policy, Union measures having to be sufficiently linked to the policy’s economic and social development objectives for them to fall within the scope of development cooperation”*. The Legal Service also points out the relevant case law clarifying that *“even if a measure contributes to the economic and social development of developing countries, it does not fall within the development cooperation policy if it has as its main purpose the implementation of another policy.”* (EP Legal Service opinion, paragraph 19, 31 August 2016)

When the Legal Service studies the main objective of the Commission proposal, it notes that the main objective of the Commission proposal is the support to the capacity of military actors, in a context of a wider security sector reform and/or capacity building in support of security and development. Even if recurrent military expenditure, the procurement of arms and ammunitions and the training in the context of fighting capacity are excluded, it remains that Union measures under the Commission proposal concern military activities and equipment, not linked to specific development cooperation objectives delivered by the military in third countries. The content of the proposal thus consists in enabling Union assistance to be used for military capacity building. (EP Legal Service opinion, paragraph 20, 31 Aug 2016)

Finally, the Legal Service came to the following conclusion: *“The proposed Regulation pursues objectives that predominantly fall within the scope of the common foreign and security policy. It may therefore not be adopted under the legal basis of Article 209(1) and*

⁴ Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; C-490/10 *Parliament v Council* EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

⁵ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, paras 43-56.

⁶ Case C-300/89 *Commission v Council* (“Titanium dioxide”) [1991] ECR I-2867, paras. 17-25; Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

Article 212(2) TFEU.” (EP Legal Service opinion, paragraph 24, 31 August 2016, emphasis added)

EP Legal Service legal opinion, 6 January 2017

In January 2017 the Legal Service issues a second opinion on the matter, showing a bit more sympathy to the proposal. The Legal Service further examines the relevant jurisprudence and case law and concludes that “[b]oth the policy commitments at global level and the current practise of the Union consider support to **capacity building of the military outside the scope of the development cooperation policy**. However, neither of them constitute legal limits to the scope of the development cooperation policy.” The Legal Service underlines that while measures with military component or impact are not, as such, excluded from the scope of the development cooperation policy defined in Article 208 TFEU, such measures have to be sufficiently linked to the development policy. (EP Legal service opinion, paragraph 42, 6 January 2017, emphasis added)

The Legal Services approaches the issue with due diligence and on various occasions cautions that it would seem to be of interest for Parliament to establish a closer link to the Union’s development cooperation policy: “*The military component of Union assistance under Article 3a new of Regulation (EU) 230/2014 can be seen, given the exceptional circumstances under which assistance is provided, as incidental and necessary for development. The actions which may be financed under the proposal can therefore be compatible with the legal basis of Articles 209 TFEU, possibly with a strengthened link to development activities.*” (EP Legal Service opinion, paragraph 42, 6 January 2017, emphasis added).

Commission Legal Service note, 2 February 2017

In the note delivered to the Members of the JURI committee, the Commission tries to explain the connection between the proposal and the development activities. The Commission’s legal service points out to two important developments at the international level; the adoption of the Sustainable Development Goals and the revision of the Official Development Assistance (ODA) Directives in the field of peace and security. According to the Commission, the SDGs as well as the ODA directives give useful indications on whether and under which conditions it is possible to finance the military of partner countries. (Commission Legal Service note, paragraph 7, 2 February 2017)

However, the Commission does not follow these indications. The proposed Regulation is not compatible with the Official Development Assistance (ODA) Directives. Both informally and formally, the Commission has refused to align the proposal with the scope of Official Development Assistance. The actions meant to be financed under this proposal do not follow nor comply with the OECD Development Assistance Committee principles for evaluation of development assistance (DAC Criteria) nor can be their developmental effectiveness measured.

It is also worth noting that the Commission’s interpretation of the applicable legal basis seems to be volatile. When the Commission’s Legal Service did its assessment of the Legal framework concerning the draft Joint Communication “capacity-building in support of security and development”, it considered that training and provision of equipment in the context of capacity building in the security sector could not be pursued under Articles 209

and 212 TFEU because the centre of gravity of such a measure is CFSP. (Commission Legal Service opinion, paragraph 22, 26 March 2015)

Conclusion and recommendation

The proposed Regulation pursues objectives that fall within the scope of the Common Foreign and Security Policy (CFSP) rather than that of the development policy. The link between the aim of the proposal and the development policy is indirect and secondary to CFSP objectives.

Furthermore, the link between the proposed Regulation and development activities was not strengthened in the committee procedure. On the contrary, the report adopted in the Committee on Foreign Affairs (AFET), 11 July 2017, steers the proposal further away from the Union's development cooperation policy.

There is no doubt about the interplay of development and security, or the importance of capacity building and cooperation with the security sector actors, in particular in fragile and conflict-affected third countries. However, the choice of legal basis must be based on Treaty provisions and the true centre of gravity of proposed actions, not on the political expediency.

The Committee on Legal Affairs should therefore conclude that **the Article 209(1) and Article 212(2) TFEU do not constitute the correct legal basis** for the proposed Regulation of the European Parliament and of the Council amending Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace.