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OPINION OF THE LEGAL SERVICE

Subject : Proposal for a joint action based on Article K.3(2)(b) on an early warning system for synthetic drugs - Legal basis (Doc. 7071/97 CORDROGUE 10)

I. INTRODUCTION

At the meeting of the "Horizontal Drugs Group" on 2 April 1997, the Council Legal Service was invited to clarify a number of questions relating to the above-mentioned proposal.

A. Questions relating to the legal basis

1. Is Article K.3(2)(b) TEU the appropriate legal basis for the measures foreseen in the proposed joint action?

2. Is it legally possible that a joint action adopted on that basis obliges the Member States to harmonize their legislation with regard to certain synthetic drugs?

3. Is it correct that in the preamble of the draft joint action reference is made only to Article K.1(4) and not to Article K.1(7) and/or (9) TEU ?

B. Questions relating to Articles 4 and 5 of the draft

4. What are the legally viable options for organizing the exchange of information and the risk assessment as provided for under Articles 4 and 5 of the draft? Is it legally possible for the Council to establish, under Article K.3(2)(b) TEU, an expert committee chaired by the Commission whose task it is to carry out that risk assessment? Alternatively, would it be possible to confer this task to the European Monitoring Center for Drugs and Drug Addiction?

The present note responds to this request.

II. LEGAL ANALYSIS

A. Legal basis

1. Is Article K.3(2)(b) TEU the appropriate legal basis for the measures foreseen in the proposed joint action?

1.1 From Article K.1,*("... without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest ..."),* Article M *("nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them")* and Article L (c) TEU, it is to be concluded that the possibilities of action foreseen under Title VI of the TEU are supplementary to those provided for under the TEC(1). Hence, if an action can be taken on the basis of the TEC, it would be incompatible with the system of the Treaties if the Council would circumvent the decision-making procedures governing the TEC by taking recourse to action based on Title VI of the TEU. Consequently, it needs to be examined first whether there are provisions in the EC Treaty which give the Community the competence to adopt the measures foreseen in the present draft joint action.

1.2 According to well-established case-law of the Court of Justice of the European Communities, *"the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued, but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure".*(2) The same standards should be applied to assess the appropriateness of the choice between a Community legal basis and Article K.3 of the TEU.

1.3 The aim of the draft joint action, as it is stated clearly in its title and its Article 1, is to establish *"the structures of a rapid information system on new synthetic drugs"*, whose purpose is *"to signal rapidly new trends in traffic and use of such drugs in the Member States and to examine the risks of the developments with a view to the possible submission of such drugs to control in all Member States."* From the fourth preambular paragraph of the draft joint action, it follows that it is intended to provide a follow-up to the Member States' obligation under Article 5 of the Joint Action of 17 December 1996 concerning the approximation of the laws and practices of the Member States to combat

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(1) See the opinion of the Legal Service of 11 October 1994, Doc. 5437/95, the principles of which are applicable mutatis mutandis on Article VI TEU.

(2) Judgement of 26 March 1987, Case 45/86, *Commission v. Council*, ECR 1493 para 11; Judgement of 28 June 1994, Case C-187/93, *Commission v. Council*, ECR 2857, para 17 .

drug addiction and to prevent and combat illegal drug trafficking[3], which provides that the Member States *"shall endeavour to draft convergent legislation to the extent necessary to make up legal ground or fill legal vacuums as regards synthetic drugs. In particular they shall promote the establishment of a rapid information system to enable such drugs to be identified as substances liable to be prohibited as soon as they appear anywhere in a Member State"*.

1.4 The scope of the proposed joint action is defined in Article 2 of the draft. It concerns *"synthetic drugs which do not fall within the scope of the schedules to the Convention on Psychotropic Substances (Vienna 1971)[4], but which have comparable psychotropic effect. It relates to end products as distinct from precursors"*, which are subject to a Community regime, *"and in particular amphetamine type stimulants"*.

1.5 The content of the proposed joint action falls into three distinct parts.

- Articles 3 and 4 establish the structures for the collection and exchange of information on new synthetic drugs. According to Article 3, Member States shall designate a "*national correspondent*" for the collection of such information and notify the Commission thereof, which shall draw up a list of the national correspondents and communicate it to the Member States. Article 4 provides that the national correspondents communicate information relating to the traffic and use of new synthetic drugs to the Commission, which distributes it to the other Member States, the European Monitoring Centre for Drugs and Drugs Addiction, the Europol Drugs Unit and the European Medicine Agency.

- Article 5 concerns the risk assessment of new synthetic drugs. It provides for the establishment of an expert Committee, chaired by the Commission, whose task it is *"to assess the possible risks, including the health and social risks and possible side-effects of prohibition, caused by the traffic and use of the synthetic drugs"*. The Committee shall be composed of experts from the Member States; representatives of the European Monitoring Centre for Drugs and Drugs Addiction, the Europol Drugs Unit and the European Medicine Agency may be invited to participate as observers. Upon completion of the risk assessment, the Committee *"shall submit a report on its findings and, where appropriate, recommendations shall be adopted by the majority of its members"*.

- Finally, Article 6, entitled "Follow-up of the risk assessment", provides that *"if*

(3) Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking, OJ No. L 342, 31.12.96, p.6.

(4) Convention on Psychotropic Substances, done at Vienna on 21 February 1971.

the Committee so recommends, the Commission, acting in accordance with Article K.3(2) and without prejudice to the rights of the Member States, shall submit a proposal for a Joint Action to the Council, addressing the Member States to bring the new synthetic drugs under the control system in their national legislation on narcotic drugs and psychotropic substances".

1.6 It can therefore be concluded that the purpose and normative content of the proposed joint action is limited to the setting up of the structures for the exchange of information on new synthetic drugs and the assessment of the risks thereof.

1.7 This conclusion is not altered by the fact that this exchange of information and risk assessment is done *"with a view to the possible submission of such drugs to control in all Member States"* (see Article 1 of the draft). Even if an eventual harmonization of the laws of the Member States may be the final result of assessments made on the basis of the proposed instrument, that instrument in itself does not contain any obligation to that effect. From the case law of the ECJ(5), it must be concluded that the intended objective (or "end result") of a certain measure is not decisive for the choice of the legal basis of an act. The aim and content of every legal act must be assessed on its own merits, regardless of the fact that it might be part of a series of measures whose overall objective is to reach a certain end result and which, it their turn, may have to be adopted on a different legal basis.

In fact, Article 6 of the present draft joint action leaves it completely open if a new synthetic drug is to be made subject to control in the Member States. It merely states that the Commission, *"if the Committee so recommends"*, shall submit an initiative for a subsequent, separate joint action to be adopted by the Council under Article K.3(2) *"addressing the Member States to bring the new synthetic drugs under the control system in their national legislation"*. Hence, the function of this Article is limited to the mere announcement that the Commission might be requested to submit a proposal to the Council on a given subject, i.e. that Member States might be addressed, by future joint actions, to take legislative measures in respect of synthetic drugs; apart from that, it lacks any normative content. These future possible joint actions shall be adopted on their own merits and according to the appropriate legal basis.

1.8 It is therefore to be examined whether any provision in the TEC confers the necessary competence to the Council to adopt the measures envisaged in the proposed joint action. According to the Legal Service, Article 213 TEC seems to be particularly relevant in this respect. This Article reads as follows:

"The Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks

(5) See above under footnote 2, especially Case 45/86.

entrusted to it."

1.9 According to the case law of the ECJ[6], *"that provision vests in the Commission general competence to collect any information needed (for the performance of the tasks entrusted to it)"*. However, information gathering is an over-arching function, as information of a particular kind may be relevant for more than one sector of activity. From this fact and the position of Article 213 in the scheme of the Treaty among the 'General and Final Provisions', it can be concluded that Article 213 can constitute an autonomous legal basis for a Council measure regulating the Commission's right to collect information[7].

1.10 In the present case, reference is to be made to Article 129(2) TEC, which provides that *"Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1[8]. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination."* According to the third subparagraph of that provision, *"health protection requirements shall form a constituent part of the Community's other policies."*

1.11 It is obvious that the Commission is likely to perform its tasks not only in the area of health protection, but in all other Community policy areas of which health protection requirements form a constituent part more effectively if it has access to accurate information. Hence, the provisions relating to the collection and exchange of information (Articles 3 and 4 of the present draft) are covered by the scope of Article 213.

1.12 It might be questioned whether this is also the case in respect of the provision on risk assessment (Article 5 of the draft). However, the Legal Service holds the view that the results of that risk assessment are in fact part of the information the Commission needs in order to effectively perform its tasks described above. As long as the risk assessment is not made a procedural requirement in the context of the harmonization of the laws and regulations of the Member States, it can be seen as a method to assist the Commission in the collection of information and may thus be construed as being covered by the terms of Article 213, even if the assessment would be bearing on health implications only.

1.13 In the light of the above considerations and in line with its position recently taken on the proposal for a Council Regulation establishing a European Monitoring Center for Racism

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(6) Judgement of 9 November 1995, Case C-426/93, *Germany/Council*, ECR I-3723, points 19 and 22.

(7) See the Opinion of Advocate General Jacobs delivered on 15 June 1995 in the above-mentioned case, ECR I-3726, points 23 to 25.

(8) Pursuant to Article 129(1) sub(2), *"Community action shall be directed towards the prevention of diseases, in particular the major health scourges, <u>including drug dependence</u>, by promoting research into their causes and their transmission, ..."*.

and Xenophobia [9], the Legal Service concludes that the joint action, as it presently stands, can be adopted on the basis of Article 213 TEC[10]. If this way were to be followed, the Legal service would be of the opinion that Article 6 should be reviewed and could be transformed into a declaration [11].

1.14 In the course of the discussion, it has been argued that, the assessment of the health risks being an important aspect of the overall risk assessment, the appropriate legal basis for the respective measures would be Article 129 TEC.

1.15 Pursuant to Article 129(1) TEC, the Community shall *"contribute towards ensuring a high level of human health protection by encouraging cooperation between the Member States and, if necessary, lending support to their action. Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including drug dependence, by promoting research into their causes and their transmission, as well as health information and education."*

1.16 In order to contribute to the achievement of the objectives referred to in Article 129, the Council may adopt two types of measures (Article 129 paragraph 4): incentive measures, excluding any harmonization of the laws and regulations of the Member States, and recommendations, which, pursuant to Article 189 TEC, have no binding force.

1.17 The prevention of drug dependence and research of the health-related aspects thereof is certainly an important purpose of the collection and analysis of information relating to synthetic drugs. However, it has been shown above that information gathering is an over-arching function, as information of this kind may be relevant for more than one sector of Community activity.

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(9) Opinion of 24 March 1997, Doc. 6542/97 JUR 81 EMCR 5.

(10) Article 213 TEC does not provide for an exclusive right of initiative on the part of the Commission or for the involvement of other Community institutions. Legal acts based on this Article can, on the initiative of any Member State, be adopted by the Council acting by a (simple) majority of its members (Article 148 paragraph 1 TEC).

(11) See paragraph 7 of the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, OJ N° C 166, 17.6.1993, p.1, which provides that "*Provisions without legislative character should be avoided (wishes, political statements)*".

1.18 As to the nature the measures envisaged in the present proposal, the collection of information and the risk assessment exercice constitute neither "incentive measures" in the sense of Article 129 - which, according to the Legal Service, comprise in the first place measures lending financial support to activities carried out be the Member States -, nor are they intended to be mere recommendations of a non-binding nature.

1.19 In the light of the foregoing, it must be concluded that, given the objective of the provisions of the present joint action and the absence of any provision which in itself would oblige Member States to harmonize their legislation or by which Member States undertake to do so, Article 213 gives the Community the competence to adopt the provisions which are contained in the present draft joint action, and this Article would constitute the appropriate legal basis for the adoption of the proposed measures. The answer to the first question must therefore be negative.

2. Is it legally possible that a joint action adopted on the basis of Article K.3 (2)(b) TEU obliges the Member States to harmonize their legislation with regard to certain synthetic drugs?

2.1 Notwithstanding the answer to the first question, the Legal Service considers it useful to clarify some aspects of this second question.

Pursuant to Article K.3(2)(b) TEU, the Council may, in the areas referred to in Article K.1(1) to (9), *"adopt joint actions in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged."*

2.2 The Legal Service is of the opinion that neither the wording of this provision, nor its position in the system of the TEU, nor its objective precludes the adoption of a joint action aimed at harmonizing the national legislation of the Member States, as long as the principle of subsidiarity laid down in Articles B and K.3(2)(b) TEU is respected. In the present context, there could be little doubt that an efficient combating of drug addiction and illicit drug trafficking can be better attained by joint action aiming at harmonizing legislation on the control of synthetic drugs than by the Member States acting individually.

2.3 There is no doubt that a joint action adopted under Article K.3(2) has a legally binding effect[(12)]. However, the concrete legal obligations following from a joint action depend on the wording thereof. Therefore, it is impossible to define in general the scope and nature of the obligations which a joint action aimed at harmonizing certain aspects of national legislation may impose on Member States.

(12) See the opinions of the Legal Service of 22 October 1993, Doc. 9500/93 JUR 131, and of 16 December 1994, Doc. 12264/94 JUR 295 ASIM 237.

2.4 Already Article 5 of the Joint Action of 17 December 1996[13], although it does not use the word "harmonization", aims at nothing else than a harmonization of legislation of the Member States regarding synthetic drugs[14]. In fact, the Legal Service is of the opinion that there are no legal obstacles preventing the Council from elaborating this obligation by means of one or more joint actions, to the effect that particular new synthetic drugs are brought under the scope of application of the existing laws of the Member States on the control of psychotropic substances.

2.5 The argument that since Article 129 of the TEC precludes the Council from adopting measures pertaining to the harmonisation of legislation of the Member States, also, or even *a fortiori*, no harmonization of legislation could be envisaged in the areas which are referred to in Article K.1(4) TEU, cannot be held legally valid. The Council is free to adopt any measures it deems appropriate to attain the objectives of the Union in the fields covered by Article K.1 TEU. The only limitation to which it is bound is to respect the competences of the Communities. In adopting measures on the basis of Article K.3 of the TEU envisaging a harmonized approach to the control of certain new psychotropic substances, the Council would in no way prejudice the powers of the Communities.

3. Is it correct that in the preamble of the draft joint action reference is made only to Article K.1(4) and not to Article K.1(7) and/or (9)?

In the light of the response to the first question, there is no point in treating this question, as the measures envisaged by the draft as it presently stands could not be adopted in the form of a joint action.

(13) See above.

(14) *("Member States shall endeavour to draft convergent legislation to the extent necessary to make up legal ground or fill legal vacuums as regards synthetic drugs. In particular they shall promote the establishment of a rapid information system to enable such drugs to be identified as substances liable to be prohibited as soon as they appear anywhere in a Member State".).*

B. Questions relating to Articles 4 and 5 of the draft joint action

4. **What are the legally viable options for organizing the exchange of information and the risk assessment as provided for under Articles 4 and 5 of the draft? Is it legally possible for the Council to establish, under Article K.3(2)(b) TEU, an expert committee chaired by the Commission whose task is to carry out that risk assessment? Alternatively, would it be possible to confer this task to the European Monitoring Center for Drugs and Drug Addiction?**

4.1 As regards the collection and exchange of information (Article 4), Article 213 TEC does not impose any legal restrictions on the discretionary power of the Council in respect of the organizational structures it may wish to introduce to help the Commission in the collection of that information. There is therefore no legal obstacle to make use of already existing structures, as for instance the European Network for the Exchange of Information on Drugs and Drug Addiction (REITOX) set up under Article 5 of Council Regulation 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)[(15)], as long as the relevant information is eventually collected by the Commission, as Article 213 TEC requires.

4.2 As regards the risk assessment (Article 5), the draft joint action proposes to set up a Committee consisting of experts from the Member States, which is to be convened and chaired by the Commission. The meetings of the Committee are also attended by representatives of the EMCDDA, the Europol Drugs Unit and the European Medicine Agency, in an observer capacity. It has to be noted that the Committee as proposed A.is a purely advisory one without any decision making power of its own.

The Legal Service holds the view that there are no legal obstacles for the Council to establish, by a joint action under Article K.3(2)(b) TEU and for the purpose of preparing a decision by the Council to be taken within its competence pursuant to Title VI of the TEU or for the implementation of decisions which the Council may have taken in that field, an expert committee like the one provided in Article 5 of the present draft. In fact, there are precedents of joint actions adopted by the Council on the basis of Article K.3(2) point (b) in which committees of representatives of Member States, chaired by the Commission, have been established, with powers which are not even limited to purely advisory ones[(16)].
Equally, there is no legal obstacle for the Council to establish such a Committee by a

(15) OJ No. L 36, 12.2.93, p. 1.

(16) See for instance Joint Action 96/636/JHA of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on a programme of incentives and exchanges for legal practitioners ('GROTIUS'), OJ No. L 287, 8.11.96, p. 3, and Joint Action 96/637/JHA of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on a programme of training, exchanges and cooperation in the field of identity documents ('SHERLOCK'), OJ No. L 287, 8.11.96, p.7.

legal act adopted on the basis of Article 213, it being understood that its role is limited to help the Commission in its tasks in the gathering of information.

4.3 As regards the third part of the question, Article 1 of the Regulation 302/93 as it stands would allow the EMCDDA to carry out the risk assessment envisaged under Article 5(1) to (4) of the proposed joint action and to issue a report on its result. Pursuant to Article 1 of this Regulation, the Centre's objective is *"to provide the Community and its Member States with objective, reliable and comparable information at European level concerning drugs and drug addiction and their consequences."* In order to achieve this objective, the Centre may not only collect, register and analyse information, but also carry out surveys and *"organize meetings of experts and whenever necessary set up ad hoc working parties for the purpose"* (Article 2). As it has been shown above, in the proposed joint action as it stands, the report on the risk assessment may be considered as part of the information provided to the Commission for the efficient fulfilment of its tasks.

However, the adoption of recommendations to the Commission or the Council to initiate legislative measures would go beyond the sphere of information and the processing thereof, to which the existing mandate of the EMCDDA is restricted according to Article 1(4) of Council Regulation 302/93.

III. CONCLUSIONS

A. Legal basis

1. Given the objective of the draft joint action as presently drafted and the absence of any provision which would oblige Member States to harmonize their legislation or by which Member States undertake to do so, Article 213 TEC constitutes the sufficient and appropriate legal basis for the adoption of the proposed measures.

2. Neither the wording of Article K.3(2)(b), nor its position in the system of the TEU, nor its objective precludes the adoption of a joint action aimed at harmonizing the national legislation in the Member States on that basis, as long as the principle of subsidiarity laid down in Article K.3(2)(b) TEU is respected. However, the concrete legal obligations following from such a joint action can only be determined in the light of its specific wording.

3. As it follows from the response to the first question that the measures envisaged by the draft as it presently stands could not be adopted in the form of a joint action based on Article K.3 TEU, there is no point in answering the third question concerning references to matters listed in Article K.1 TEU.

B. Questions relating to Articles 4 and 5 of the draft joint action

4. As regards the collection and exchange of information (Article 4 of the draft), Article 213 TEC does not impose any legal restrictions on the discretionary power of the Council in respect of the organizational structures it may wish to introduce which may help the Commission in the collection of that information.

There are no legal obstacles for the Council to establish, by a joint action under Article K.3(2)(b) TEU and for the purpose of preparing a decision by the Council to be taken within its competence pursuant to Title VI of the TEU or for the implementation of decisions which the Council may have taken in that field, an expert committee like the one provided in Article 5 of the present draft.

Article 1 of the Regulation 302/93 as it stands would allow the EMCDDA to carry out the risk assessment envisaged under Article 5(1) to (4) of the proposed joint action and to issue a report on its result. However, the adoption of recommendations to the Commission or the Council to initiate legislative measures would go beyond the sphere of information and the processing thereof, to which the existing mandate of the EMCDDA is restricted according to Article 1(4) of Council Regulation 302/93.