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## Undue Assistance?

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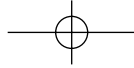
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*Published in:*  
European Law Review

*Publication date:*  
2009


*Document version*  
Publisher's PDF, also known as Version of record

*Citation for published version (APA):*  
Broberg, M. (2009). Undue Assistance? An analysis of the legal basis of Council Regulation 1257/96 concerning humanitarian aid. *European Law Review*, 34(5), 769-778.



# Undue assistance? An analysis of the legal basis of Regulation 1257/96 concerning humanitarian aid

Morten Broberg\*

 Developing countries; EC law; Humanitarian aid; International co-operation; Legal basis; Third countries

*In 1996, the Council of Ministers adopted Regulation 1257/96 concerning humanitarian aid, using Art.179 of the EC Treaty's Title XX on "Development Cooperation" as the measure's legal basis. This article considers whether Art.179 constitutes an adequate legal foundation for the Regulation and those activities which the Community carries out on the basis of it. First, it is examined whether Title XX of the EC Treaty covers only development co-operation or whether it also covers humanitarian assistance. Thereafter, it is considered whether Title XX on "Development Cooperation" may form the basis for assistance provided only to developing countries, or whether it may also form the basis for assistance to non-developing countries. It is concluded that Art.179 does not provide a sufficient legal basis for the Humanitarian Aid Regulation.*

## The EU humanitarian assistance regime

When flooding strikes Yorkshire in the United Kingdom or an earthquake hits central Italy, the European Community is ready to provide assistance to ease the burden of those in need.<sup>1</sup> Essentially, this is a consequence of the solidarity between European peoples and a reflection of the commonly held value that we all have a duty to help those who are suffering.<sup>2</sup> Also, in its external relations, the European Community has been ready to offer its assistance to those who become victim to natural disasters or man-made crises.<sup>3</sup> Indeed, it is arguable that developed states are, in certain circumstances, under a legal obligation to provide humanitarian assistance to third states.<sup>4</sup> Thus, according to the Community legislator,

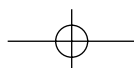
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<sup>1</sup> See, in particular, Regulation 2012/2002 establishing the European Union Solidarity Fund [2002] OJ L311/3.

<sup>2</sup> This is reflected in the preamble of both the EC Treaty and the EU Treaty.

<sup>3</sup> This accords well with Arts 2 and 3 of the EU Treaty, which lay down that the Union shall assert its identity on the international scene and that it shall ensure consistency of its external activities as a whole.

<sup>4</sup> Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press, 2008), p.64.



“people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances *have a right* to international humanitarian assistance where their own authorities prove unable to provide effective relief” (emphasis added).<sup>5</sup>

To the extent that international law imposes such an obligation<sup>6</sup> the European Community would be obligated to comply therewith.<sup>7</sup> That the Community must be ready to help those in need beyond its borders is also reflected in recital 7 to the EC Treaty as well as in Art.3(1)(r) and (s). Thus, arguably, helping those in need is an important objective of both the European Community and its Member States, and this is reflected in the fact that the European Union has become the largest humanitarian assistance donor in the world.<sup>8</sup> For example, in 2007 the European Commission through its humanitarian assistance budget provided assistance amounting to €768,529,834.<sup>9</sup> This aid reached an estimated 127 million beneficiaries in third countries, and in addition 19.5 million people benefited from actions in respect of disaster preparedness and improved response capacity to potential risks.<sup>10</sup>

Historically, the European Community's humanitarian assistance has been closely associated with its activities in the field of development co-operation.<sup>11</sup> Initially the provision of humanitarian assistance took place on an *ad hoc* basis,<sup>12</sup> but with the creation of the European Community Humanitarian Office (ECHO) in 1992, a much more streamlined approach was adopted. In particular, the creation led to a concentration under ECHO's aegis of activities that previously had been carried out by several different Commission services, such as humanitarian assistance, emergency food aid, and prevention and disaster preparation activities.<sup>13</sup>

<sup>5</sup> See recital 1 to Regulation 1257/96 concerning humanitarian aid [1996] OJ L163/1 (amended by Regulation 1882/2003 adapting to Decision 1999/468 the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Art.251 of the EC Treaty [2003] OJ L284/1). In what follows, Regulation 1257/96 will be referred to as the “Humanitarian Aid Regulation” or simply the “Regulation”.

<sup>6</sup> Admittedly, the existence of such international law obligation is open to doubt. See for example Peter MacAlister-Smith, *International Humanitarian Assistance—Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff Publishers, 1985), pp.55–56 and Curtis F.J. Doebler, *International Human Rights Law—Cases and Materials* (CD Publishing, 2005), Vol.1, p.139.

<sup>7</sup> See *Anklagemyndigheden (Public Prosecutor) v PM Poulsen and Diva Navigation (C-286/90)* [1992] E.C.R. I-6019 at [9]. If such an obligation were found to exist, the question would arise as to what extent the obligation would weigh respectively on the Member States and the Community.

<sup>8</sup> Report from the Commission, COM(2008)449 final, *Directorate General for Humanitarian Aid (ECHO): Annual Report 2007*, p.3.

<sup>9</sup> ECHO, *Annual Review 2007*, p.23.

<sup>10</sup> COM(2008)449 final, *Directorate General for Humanitarian Aid (ECHO): Annual Report 2007*, p.3. “European Union” humanitarian assistance in this context encompasses assistance provided by both the Member States and the European Community.

<sup>11</sup> See in this respect, Paul Hoebink, “European Development Aid in Transition” in Olufemi Babarinde and Gerrit Faber (eds), *The European Union and the Developing Countries—The Cotonou Agreement* (Leiden: Martinus Nijhoff Publishers, 2005), pp.130, 135 and 148.

<sup>12</sup> Before 1992 the Community's provision of humanitarian assistance to third countries was founded on a patchwork of legal bases. These included the Lomé (and Yaoundé) Conventions with regard to assistance to ACP countries (i.e. certain African, Caribbean and Pacific countries) and they included framework regulations and the general budget procedure.

<sup>13</sup> Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union*, 2008, p.160.

In 1996, the Council adopted Regulation 1257/96 concerning humanitarian aid.<sup>14</sup> According to Art.1 of the Regulation, the objective of the Community's humanitarian assistance is,

“to help people in third countries, particularly the most vulnerable among them, and as a priority those in developing countries, victims of natural disasters, man-made crises, such as wars and outbreaks of fighting, or exceptional situations or circumstances comparable to natural or man-made disasters”.<sup>15</sup>

In accordance with its stated objective, the Community has since provided humanitarian assistance to a very considerable number of people; primarily in developing countries but also to people in non-developing countries. For example, in 2008, six non-developing countries received humanitarian assistance from DG ECHO<sup>16</sup> and earlier recipients have included a number of countries that subsequently have become members of the European Union: the Czech Republic, Hungary, Poland, Slovakia, Bulgaria and Romania. Other noticeable recipients include Croatia, Bosnia-Herzegovina, Federal Republic of Yugoslavia, Russian Federation, Ukraine, Belarus, Turkey, Taiwan and China.<sup>17</sup>

The Humanitarian Aid Regulation's legal base is Art.179 of the EC Treaty's Title XX on “Development Cooperation”. The question that this article sets out to answer is whether Art.179 constitutes an adequate legal foundation for the Regulation and those activities which the Community carries out on this basis.<sup>18</sup>

In what follows, there will first be a general overview of the requirement of an adequate legal basis as has been developed in the case law of the Court of Justice. Thereafter, there is an examination of whether Title XX of the EC Treaty covers only development co-operation or whether it also covers humanitarian assistance. Following this, it will be considered whether Title XX on “Development Cooperation” may only form the basis for assistance provided to developing countries or whether it may also form the basis for assistance to non-developing countries. Finally, the extent to which Art.179 EC provides a sufficient legal basis for the Humanitarian Aid Regulation will be assessed.

### **The principle of conferred powers**

The first paragraph of Art.5 of the EC Treaty provides that:

“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”

<sup>14</sup> See fn.5 above.

<sup>15</sup> It may be observed in passing that by stating that developing States shall be given priority, the Humanitarian Aid Regulation arguably presupposes that the European Community is not under an indispensable obligation to provide humanitarian assistance to non-developing countries.

<sup>16</sup> Email of March 3, 2009 from DG ECHO to the author.

<sup>17</sup> See the decisions listed in ECHO's annual reviews and on [http://www.ec.europa.eu/echo/funding/decisions\\_en.htm](http://www.ec.europa.eu/echo/funding/decisions_en.htm) [Accessed August 3, 2009].

<sup>18</sup> When the Humanitarian Aid Regulation was evaluated in 1999, the question of legal basis does not appear to have been considered; see Communication from the Commission to the Council and the European Parliament, COM(1999)468 final, *Assessment and future of Community humanitarian activities* (Art.20 of Regulation 1257/96).

This principle of conferred powers essentially means that the Community can only act where the Treaty gives it the powers to do so. Community action that does not have a legal basis in the Treaty will be ultra vires and thus liable to annulment by the Court of Justice.<sup>19</sup> An act may also be liable to annulment where the Treaty actually vests the power in the Community to regulate the matter in question, but where the measure has been based on the wrong provision.<sup>20</sup>

The choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, such as the measure's aim and content.<sup>21</sup> It is therefore not sufficient that a legal basis has been used for the adoption of other Community measures which might, in certain cases, display similar characteristics.<sup>22</sup> Moreover, where different Treaty provisions are capable of constituting the legal basis for a legal measure, the measure must be founded on the most specific provision thereof.<sup>23</sup> If a measure pursues two aims, or if it has two components and one of the two aims or components is identifiable as the main one whereas the other is merely incidental, the Community legislator must found the measure on the legal basis required by the main or predominant aim or component, i.e. the measure's centre of gravity.<sup>24</sup> In this situation, there will be one legal measure having one legal basis, but pursuing more objectives.

Where the measure simultaneously pursues more objectives or has more components, and where these objectives or components are inseparably linked so that none is incidental to the other, meaning that various Treaty provisions are applicable, the Court of Justice has ruled that the measure must be founded on the various corresponding legal bases.<sup>25</sup> Thus, there will be one legal measure founded on more than one legal basis. Such recourse to a dual legal basis is only possible, however, where the procedures laid down for each legal basis are not incompatible with each other.<sup>26</sup>

### Development co-operation and humanitarian assistance

As noted above, the Humanitarian Aid Regulation is based on Art.179 of the EC Treaty<sup>27</sup> which is part of the EC Treaty's Title XX on "Development Cooperation". Article 179

<sup>19</sup> See for example *Germany v Parliament* (C-376/98) [2000] E.C.R. I-8419; [2000] 3 C.M.L.R. 1175 and *Accession of the Community to the European Human Rights Convention, Re* (Opinion 2/94) [1996] E.C.R. I-1759; [1996] 2 C.M.L.R. 265.

<sup>20</sup> See for example *Commission v Council* (45/86) [1987] E.C.R. 1493; [1988] 2 C.M.L.R. 131 at [12].

<sup>21</sup> *Commission v Council* ("Titanium dioxide") (C-300/89) [1991] E.C.R. I-2867; [1993] 3 C.M.L.R. 359 at [10], *Commission v Council* (C-338/01) [2004] E.C.R. I-4829 at [54] and *Cartagena Protocol on Biosafety, Re* (Opinion 2/00) [2001] E.C.R. I-9713; [2002] 1 C.M.L.R. 28 at [22].

<sup>22</sup> *United Kingdom v Council* (131/86) [1988] E.C.R. 905; [1988] 2 C.M.L.R. 364 at [29].

<sup>23</sup> *Commission v Council* (45/86) [1987] E.C.R. 1493; [1988] 2 C.M.L.R. 131 at [21], *Commission v Council* (C-338/01) [2004] E.C.R. I-4829 at [60] and *Commission v Council* (C-533/03) [2006] E.C.R. I-1025 at [45].

<sup>24</sup> *Spain v Council* (C-36/98) [2001] E.C.R. I-779 at [59], *Cartagena Protocol* (Opinion 2/00) at [23], *Commission v Council* (C-338/01) at [55] and *Commission v Council* (C-91/05) [2008] E.C.R. I-3651; [2008] 3 C.M.L.R. 5 at [73].

<sup>25</sup> *Cartagena Protocol* (Opinion 2/00) at [23], *Commission v Council* (C-211/01) [2003] E.C.R. I-8913 at [40] and *Commission v Council* (C-91/05) at [75].

<sup>26</sup> *Commission v Council* ("Titanium dioxide") (C-300/89) at [17]–[21], *Parliament v Council* (C-164/97 & C-165/97) [1999] E.C.R. I-1139 at [14], *Commission v Council* (C-338/01) at [57], *Commission v Council* (C-94/03) [2006] E.C.R. I-1 at [52] and *Commission v Parliament* (C-178/03) [2006] E.C.R. I-107 at [57].

<sup>27</sup> EC Treaty Art.179 (ex 130w).

EC vests in the Council in co-operation with the European Parliament the power to adopt the measures necessary to further the objectives referred to in Art.177 of the EC Treaty, which provides as follows:

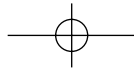
- “1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:
  - the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them;
  - the smooth and gradual integration of the developing countries into the world economy;
  - the campaign against poverty in the developing countries.
2. Community policy in this area shall 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.
3. The Community and 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.”

Hence, development co-operation is about the long-term, sustainable improvement of the living conditions in developing countries, as is reflected in Art.177 EC. In contrast, humanitarian assistance is about providing relief to those suffering, frequently as a consequence of an emergency situation. This difference between humanitarian assistance and development co-operation is clearly reflected in the Community’s activities in the two fields. Thus, the operational criteria are different where, in particular, the fundamental humanitarian assistance principles of neutrality and impartiality are not applied in the field of development co-operation. The difference is also reflected in the Community’s 2001, *Linking Relief, Rehabilitation and Development* Communication, where the Commission succinctly explains that humanitarian assistance addresses the immediate needs of individuals affected by crises and that this aid is provided mainly through non-governmental and international organisations. In contrast, development co-operation aims to support autonomous development policies and strategies and is provided mainly under co-operation programmes agreed with the partner country.<sup>28</sup>

The distinction between development co-operation and humanitarian assistance is also reflected in that different Directorates-General are responsible for the two areas and different financing systems apply.<sup>29</sup> Indeed, the Humanitarian Aid Regulation itself points to the distinction. Thus, in recitals 3 and 4 of the preamble, the Regulation emphasises that humanitarian assistance is aimed at problems related to emergencies and their immediate aftermath whilst being different from development and reconstruction work (albeit humanitarian assistance may be a prerequisite for the latter). This is also reflected

<sup>28</sup> Communication from the Commission to the Council and the European Parliament, COM(2001)153 final, *Linking Relief, Rehabilitation and Development—An Assessment* (April 23, 2001), p.3. See also Communication from the Commission to the European Parliament and the Council, COM(2007)317 final, *Towards a European Consensus on Humanitarian Aid* (June 13, 2007), p.3.

<sup>29</sup> The importance of the distinction between short-term relief and longer term development is reflected in the Court of Auditors, Special Report 3/2006 concerning the European Commission Humanitarian Aid Response to the Tsunami together with the Commission’s replies [2006] OJ C170/1, see in particular paras 7 and 44.



in the Community concept of “linking relief, rehabilitation and development” (LRRD) that, in the words of the European Consensus on Humanitarian Aid,

“strives to ensure that the exit and entry strategies of different aid actors/instruments join each other to cover the so-called ‘grey zone’ between humanitarian assistance and development cooperation programmes in such a way that there is no assistance gap”.<sup>30</sup>

That the European Community draws a clear distinction between development co-operation and humanitarian assistance can also be seen on ECHO's internet homepage:

“The European Community is unique in clearly differentiating humanitarian aid from other forms of external assistance. DG ECHO is the only publicly financed department in the world solely devoted to funding the delivery of humanitarian aid.”<sup>31</sup>

In view of the above, it appears arguable that Art.179 EC only provides a legal basis for development co-operation and not for humanitarian assistance.

Whilst there may be arguments against using Art.179 EC as the legal basis for humanitarian assistance, however, there also are solid arguments in favour of using the provision to this end. Most importantly, humanitarian assistance is often considered to be a component of development assistance—and that is also the case within the European Community.<sup>32</sup> Sometimes this is expressed in the way that there is a continuum between, on the one hand, the provision of relief to save and preserve life in emergencies or their immediate aftermath and, on the other hand, the furthering of sustainable economic and social development.<sup>33</sup> Indeed, the close relationship between humanitarian assistance and development co-operation has been explicitly acknowledged both in the Humanitarian Aid Regulation itself, where it is observed that humanitarian assistance may be a prerequisite for development or reconstruction work,<sup>34</sup> and by Louis Michel, the Commissioner responsible for humanitarian assistance and development, who has observed that good development operations may be a bulwark against future humanitarian crises.<sup>35</sup>

It follows that development co-operation and humanitarian assistance are not inherently distinct, but can also be closely interrelated. This in itself makes it less obvious that the Court of Justice will be ready to annul the Humanitarian Aid Regulation on the grounds of inappropriate legal basis. In addition, one would be mistaken to pretend that the Court of Justice is completely blind to the realities of the real world. By its very nature, the

<sup>30</sup> See COM(2007)317 final, *Towards a European Consensus on Humanitarian Aid* (June 13, 2007), p.14.

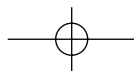
<sup>31</sup> Quotation taken from DG ECHO's homepage [http://www.ec.europa.eu/echo/funding/finances\\_en.htm](http://www.ec.europa.eu/echo/funding/finances_en.htm) [Accessed February 4, 2009].

<sup>32</sup> See for example Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, *The European Consensus on Humanitarian Aid* [2008] OJ C25/1 paras 75–78 and Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union*, 2008, p.64.

<sup>33</sup> See for example COM(2007)317 final, *Towards a European Consensus on Humanitarian Aid* (June 13, 2007), p.3 and Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union*, 2008, p.411.

<sup>34</sup> Recital 4 to the Humanitarian Aid Regulation.

<sup>35</sup> Louis Michel, *From relief to development—Managing the transition to recovery after a crisis* (European Commission), p.2, available at [http://www.ec.europa.eu/echo/files/media/publications/LRRD\\_en.pdf](http://www.ec.europa.eu/echo/files/media/publications/LRRD_en.pdf) [Accessed August 3, 2009].



provision of humanitarian assistance is a good thing and challenging the legal basis of the Humanitarian Aid Regulation more than a decade after its adoption is certainly not likely to generate much support from Community institutions, Member States or others. The most likely, and more nuanced, reality suggests the Court would, at least, retain the legal effect of the Regulation until a new measure could be adopted, as outlined further below.

### Article 179 EC and non-developing countries

The Humanitarian Aid Regulation provides for assistance to all third countries; developing as well as non-developing. Even though the European Court of Justice has shied away from defining “developing country” for the purposes of Title XX of the EC Treaty,<sup>36</sup> it is rather clear that, on several occasions, the European Community has offered humanitarian assistance to non-developing countries under the Regulation.<sup>37</sup> It follows that the Humanitarian Aid Regulation contains two components: one component providing for humanitarian assistance to developing countries based upon Art.179 EC concerning development co-operation; and another providing for humanitarian assistance to non-developing countries, but apparently also based upon Art.179 EC. The question therefore arises whether the Community has been justified in including humanitarian assistance to non-developing countries in a legal measure that has been based exclusively upon Art.179 EC.

First, it must be observed that the fact that the Humanitarian Aid Regulation has two components does not in itself mean that Art.179 is an inadequate legal basis. As observed above, if the non-developing country component is merely incidental to the developing country component, Art.179 EC may well be an adequate legal basis. In this respect, it will be remembered that the Regulation (in Art.1) defines its overall objective as the provision of “assistance, relief and protection operations . . . to help people in third countries”, thus its scope is clearly not restricted to developing countries only. Even though in quantitative terms the Regulation is applied much more frequently to developing countries, in qualitative terms the developing country and the non-developing country components are equivalent.<sup>38</sup> That the Regulation concerns assistance to both developing and non-developing countries is also reflected in Art.1, which lays down that assistance shall be given “as a priority to those in developing countries”. This prioritisation of developing countries<sup>39</sup> would not make any sense if the Regulation did not also apply to non-developing countries. The better view is, therefore, to consider humanitarian assistance to non-developing countries to be not merely incidental to the assistance provided to developing countries.<sup>40</sup>

<sup>36</sup> *Parliament v Council (Community guarantee to EIB)* (C-155/07) [2009] 1 C.M.L.R. 23 at [52]–[53].

<sup>37</sup> See above fn.17.

<sup>38</sup> In this respect, see also [72] of the Opinion of A.G. Kokott in *Parliament v Council (Community guarantee to EIB)* (C-155/07). A.G. Kokott at [77] observes that a purely quantitative criterion would not be suitable for determining the centre of gravity in the *Community guarantee to EIB-case*.

<sup>39</sup> This prioritisation was not part of the original proposal for the Regulation, see COM(95)201 final, *Proposal for a Council Regulation (EC) Concerning Humanitarian Aid* (SYN(95)0119, [1995] OJ C180/6).

<sup>40</sup> This conclusion is supported by the Community legislator’s approach *vis-à-vis* the so-called Human Rights Regulation as is explained below.



Having found that Art.179 EC does not provide a sufficient legal basis for the Humanitarian Aid Regulation's two components, it must be examined whether these components are inseparably linked so that neither is incidental to the other. As shown above, if the two components are inseparably linked, the Community legislator may adopt one single measure founded on the two components' corresponding legal bases. The Court of Justice only accepts the use of such dual legal basis if the procedures laid down for each legal basis are compatible with each other. Therefore the legal basis on which the Community may adopt rules regarding the provision of humanitarian assistance to non-developing countries, and whether this legal basis is compatible with Art.179 EC, must be examined.

If the Community were to adopt a legal measure providing for humanitarian assistance to non-developing countries today, the obvious choice would seem to be Art.181a EC concerning economic, financial and technical co-operation with third countries. Thus, in the *Community guarantee to EIB* case, the Court of Justice ruled that a legal measure applying to developing as well as non-developing countries should have been based on Arts 179 EC and 181a EC in combination.<sup>41</sup>

However, the Humanitarian Aid Regulation was adopted in 1996 whereas Art.181a EC was only introduced by the Treaty of Nice, i.e. in 2003. Article 181a was not, therefore, an option at the time when the Regulation was adopted. That Art.181a was only introduced into the EC Treaty after the adoption of the Humanitarian Aid Regulation does not in itself mean that no legal basis existed prior to introduction of Art.181a. The Community could have had recourse to Art.308 EC, vesting in the Community the powers to take the appropriate measures necessary to attain "one of the objectives of the Community".<sup>42</sup> However, due to the dynamic nature of the EC Treaty, with the introduction of Art.181a, the scope of Art.308 has been limited so as no longer to cover matters falling within the scope of Art.181a. To a considerable extent, this is a reflection of the *lex specialis* principle.

That the Community should have used both Art.179 EC and Art.308 EC when adopting the Humanitarian Aid Regulation finds strong support in the history behind the two so-called "human rights regulations". In 1997, the Commission put forward a proposal for one single "human rights regulation" that would provide an instrument for the Community's support for human rights and democratisation activities in developing and other third countries.<sup>43</sup> Precisely like the Humanitarian Aid Regulation, the proposed human rights regulation was intended to apply to both developing and non-developing countries; and it too was proposed to be based exclusively upon Art.179 EC. However, Art.179 EC was found to be inadequate for non-developing countries and so the proposed regulation was split into two: one relating to development co-operation and relying on Art.179 EC, and the other applying outside the field of development co-operation

<sup>41</sup> *Parliament v Council (Community guarantee to EIB)* (C-155/07) at [43].

<sup>42</sup> See in support of this, *Parliament v Council (Community guarantee to EIB)* (C-155/07) at [43].

<sup>43</sup> COM(97)357 final, *Proposal for a Council Regulation on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms* ([1997] OJ C282/14).

relying on Art.308.<sup>44</sup> In substantive terms, however, the two regulations were identical.<sup>45</sup> Moreover, the line taken *vis-à-vis* the human rights regulations is also applied under the Community's new simplified "external relations architecture"<sup>46</sup> thereby strengthening the argument that the Humanitarian Aid Regulation is anomalous.

According to the case law of the Court of Justice, however, recourse to a dual legal basis for a legal measure is only possible where the procedures laid down for each legal basis are compatible with each other.<sup>47</sup> Article 179 EC refers to the procedure laid down in Art.251 EC, meaning that the measure may be adopted by a qualified majority within the Council and that the European Parliament is given a material participation in the adoption. In contrast, Art.308 EC requires unanimity in the Council, but merely gives the Parliament a right to be consulted. Thus, if the measure were to be adopted on the basis of Art.179 EC, this would encroach on the right which Art.308 EC gives each Member State to reject the proposed measure.<sup>48</sup> If, however, the measure were to be adopted on the basis of Art.308 EC it would impinge on the Parliament's right of participation and thus on a fundamental democratic principle.<sup>49</sup> Consequently, the two procedures appear to be incompatible with one another and so the Humanitarian Aid Regulation should have been split into two separate measures; precisely as was done with respect to the human rights regulation.

It follows from the above examination that to the extent that the Humanitarian Aid Regulation applies to non-developing countries, it lacks the necessary legal basis.

<sup>44</sup> See COM(99)206 final, *Re-examined proposal for a Council Regulation (EC) laying down the requirements for the implementation of 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* and COM(99)207 final, *Amended proposal for a Council Regulation (EC) laying down the requirements for the implementation of Community operations, other than those of development cooperation, which within the framework of Community cooperation policy, 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*.

<sup>45</sup> Regulation 975/1999 on laying down the requirements for the implementation of 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 [1999] OJ L120/1 and Regulation 976/1999 on laying down the requirements for the implementation of Community operations, other than those of development co-operation, which within the framework of Community Cooperation Policy, 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 [1999] OJ L120/8. The two regulations have since been repealed; on the history behind them, see Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union*, 2008, pp.141–143 and Piet Eeckhout, *External Relations of the European Union—Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004), p.469.

<sup>46</sup> COM(2004)101/2, *Building Our Common Future* and COM(2004)487, *Financial Perspectives 2007–2013*. See also Communication from the Commission to the Council and the European Parliament, COM(2005)292 final, *Annual Report 2005 on the European Community's Development Policy and the Implementation of External Assistance in 2004*, p.10 and Communication from the Commission to the Council and the European Parliament, COM(2007)349 final, *Annual Report 2007 on the European Community's Development Policy and the Implementation of External Assistance in 2006*, s.4.

<sup>47</sup> See further fnn.25 and 26 above where references to case law are given.

<sup>48</sup> See *Commission v Council* (C-338/01) at [58] and *Commission v Council* (C-94/03) at [53] *a contrario*.  
<sup>49</sup> *Commission v Council* (C-94/03) at [54] and *Parliament v Council (Community guarantee to EIB)* (C-155/07) at [78].

### Conclusion and perspectives

The above examination leads to two conclusions: the *first* being somewhat restrained; namely that Art.179 EC provides an appropriate legal basis for humanitarian assistance *vis-à-vis* developing countries. The *second* conclusion is more significant since it is likely that the Court of Justice will hold Art.179 EC to constitute an inappropriate legal basis for humanitarian assistance to non-developing countries. It is therefore argued that the Community legislator should have split the Humanitarian Aid Regulation into two; one aimed at developing countries and based on Art.179 EC and the other aimed at non-developing countries and based on Art.308 EC.

However, the significance of the second conclusion is curtailed by the fact that, in practice, it appears rather unlikely that somebody would challenge the Humanitarian Aid Regulation's legality.<sup>50</sup> Such a challenge is likely only to concern the legal basis while not affecting the Regulation's substantive rules and it is difficult to see anybody benefiting from this. If the legal basis of the Regulation were to be challenged and the Court of Justice reached the same conclusion as the one put forward in this article, it is likely that, for reasons of legal certainty, the Court would annul the Regulation but simultaneously maintain its effects until a new regulation has entered into force. Whereas the present author does not encourage an amendment of the Regulation solely to rectify the problem regarding its legal basis, it is nevertheless respectfully submitted that when the Regulation is going to be amended, the legal deficiency should also be remedied. Following the introduction of Art.181a EC in 2003, the better solution appears to be the adoption of a single new regulation on the joint basis of Arts 179 EC and 181a EC, rather than the splitting of the Regulation into two.<sup>51</sup>

Perhaps an even better solution would be to await the fate of the Lisbon Treaty since the adoption of this Treaty will mean the introduction of a specific legal basis for the Community's activities in the field of humanitarian assistance.<sup>52</sup> If a future Humanitarian Aid Regulation were to be adopted on the basis of this provision, the legal problems identified in this article would seem to vanish. There would be no question as to whether development co-operation also covers humanitarian assistance and there would be no need to distinguish between developing and non-developing countries. Arguably, the inclusion of a specific legal basis for humanitarian assistance in the Lisbon Treaty may be construed as an indication that the drafters found it relevant to strengthen the Treaty basis in this field.

<sup>50</sup>For an example of this approach, see *Parliament v Council (Community guarantee to EIB)* (C-155/07).

<sup>51</sup>See the ruling of the Court of Justice in *Parliament v Council (Community guarantee to EIB)* (C-155/07).

<sup>52</sup>See Art.214 of the consolidated version of the Treaty on the functioning of the European Union (Art.188J of the Lisbon Treaty).