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REPORT

on the request for waiver of the immunity of Elmar Brok
(2010/2283(IMM))

Committee on Legal Affairs

Rapporteur: Francesco Enrico Speroni

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for waiver of the immunity of Elmar Brok (2010/2283(IMM))

The European Parliament,

- having regard to the request for waiver of the immunity of Elmar Brok, forwarded by the German authorities on 28 September 2010 and announced in plenary sitting on 22 November 2010,
 - having heard Elmar Brok in accordance with Rule 7(3) of its Rules of Procedure,
 - having regard to Articles 8 and 9 of the Protocol on the Privileges and Immunities of the European Union, and Article 6(2) of the Act of 20 September 1976 concerning the election of the members of the European Parliament by direct universal suffrage,
 - having regard to the judgments of the Court of Justice of the European Union of 12 May 1964 and 10 July 1986¹,
 - having regard to Article 46 of the German Basic Law (*Grundgesetz*),
 - having regard to the German Fiscal Code (*Abgabenordnung*), in particular Section 370 thereof,
 - having regard to Rules 6(2) and 7 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A7-0047/2011),
- A. whereas the facts set out in the explanatory statement constitute a clear case of *fumus persecutionis*;
- B. whereas criminal charges have been brought against a well-known political figure in respect of a sum and in circumstances which would, in the case of an ordinary citizen, have attracted merely administrative proceedings;
- C. whereas, moreover, the public prosecutor not only sought to withhold knowledge of the charge from Mr Brok on spurious and highly derogatory grounds for no due cause, but also made sure that the case received great publicity in the media, thus inflicting the maximum amount of damage on the Member concerned;
- D. whereas it is therefore plain that the case is one of *fumus persecutionis* in that it appears that the proceedings were brought with the sole aim of damaging the reputation of the Member concerned;
- E. whereas it would therefore be completely inappropriate to waive the Member's immunity,

¹ See Case 101/63 *Wagner v Fohrmann and Krier* [1964] ECR 195 and Case 149/85 *Wybot v Faure* [1986] ECR 2391.

1. Decides not to waive the immunity of Elmar Brok;
2. Instructs its President to forward this decision and the report of its competent committee immediately to the appropriate authorities of the Federal Republic of Germany.

EXPLANATORY STATEMENT

At the sitting of 22 November 2010 the President announced, under Rule 6(2) of the Rules of Procedure, that he had received a letter sent by the German authorities on 28 September 2010 requesting the waiver of the parliamentary immunity of Mr Elmar Brok. The President referred the request to the Committee on Legal Affairs under Rule 6(2).

The request for waiver is set out in a letter from the Public Prosecutor of Bielefeld in which it is claimed that Mr Brok failed to include in his income tax declaration for 2005 a fee of EUR 5 000 for a speech he had given in Munich on 28 October 2005 at the 'Europa Forum' held by the HypoVereinsbank Group, for which tax was due on an amount of EUR 2 900. The Public Prosecutor considers that this omission may constitute an offence under section 370, 1(2) of the German Fiscal Code.

The letter from the Public Prosecutor concludes with the following paragraph: 'I have refrained from informing the Member of the intention to make him the subject of an investigation, because it is not possible at this stage to exclude the possibility that he has received additional income from similar sources of which the relevant tax authorities are as yet unaware, and notifying him of my intention to launch an investigation might enable him to suppress incriminating evidence and jeopardise the process of ascertaining the truth of the matter.'

The Law

The relevant provision of primary Union law is Article 9 of Protocol (No 7) on the privileges and immunities of the European Union, which reads as follows:

Article 9

During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

Since the offence which Mr Brok, a German Member of the European Parliament, is alleged to have committed took place on the territory of the Federal Republic of Germany, Mr Brok enjoys the immunity accorded to Members of the Bundestag, as set out in Article 46 of the

Basic Law of the Federal Republic of Germany (*Grundgesetz*)¹.

Article 46 of the Basic Law of the Federal Republic of Germany lays down the scope of parliamentary immunities. Paragraph 1 thereof stipulates that ‘at no time may a Member be subjected to court proceedings or disciplinary action, or otherwise called to account outside the Bundestag for a vote cast or for any speech or debate in the Bundestag or in any of its committees’ (*Indemnität*). Paragraphs (2) and (4) of Article 46 lay down rules on parliamentary immunity. The law further stipulates that a Member ‘may not be called to account or arrested for a punishable offence without permission of the Bundestag’.

The fact that point (a) of the first subparagraph of Article 9 of the Protocol refers to the immunities accorded to members of the national parliaments does not preclude the European Parliament from creating rules of its own, a kind of case law whose effect is to develop a coherent concept of European parliamentary immunity which is by definition separate from the national parliaments’ respective practices.

Through the application of these principles, a consistent line has emerged in Parliament’s decisions, which has become a fundamental criterion when considering the action to be taken in response to individual requests for immunity: in every case in which the acts of which the Member of the European Parliament is accused fall within the scope of his political activities, immunity is not waived. This criterion is applied in conjunction with other considerations which may militate for or against waiver of immunity, particularly in the case of *fumus persecutionis*, in other words a suspicion that the criminal proceedings have been brought simply to damage the Member of Parliament as a politician.

By the same token, as the Court of First Instance held in Case T-345/05 *Mote v. European Parliament* [2008] ECR II-2849, ‘The objective of Article 10 of the Protocol is ... to safeguard the independence of Members by ensuring that pressure, in the form of threats of arrest or legal proceedings, is not brought to bear on them during the sessions of the Parliament.’ (paragraph 50)

The facts

According to the letter from the German Public Prosecutor, Mr Brok failed to include a fee of

¹ Article 46
(Immunities)

- (1) At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or for any speech or debate in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults.
- (2) A Member may not be called to account or arrested for a punishable offence without permission of the Bundestag, unless he is apprehended while committing the offence or in the course of the following day.
- (3) The permission of the Bundestag shall also be required for any other restriction of a Member’s freedom of the person or for the initiation of proceedings against a Member under Article 18.
- (4) Any criminal proceedings or any proceedings under Article 18 against a Member and any detention or other restriction of the freedom of his person shall be suspended at the demand of the Bundestag.

EUR 5 000 for a speech (for which tax was due on EUR 2 900) in his income tax declaration for 2005 and this omission may constitute an offence under Section 370, 1(2) of the German Fiscal Code (*Abgabenordnung*). Section 370, 1(2) reads as follows in the official English translation¹:

Section 370

Tax evasion

(1) A penalty of up to five years imprisonment or a monetary fine shall be imposed on whoever

- 1. ...*
- 2. fails to inform the revenue authorities of facts of substantial significance for taxation when obliged to do so, or*
- 3. ...*

and as a result understates taxes or derives unwarranted tax advantages for himself or for another person.

The offence of tax evasion within the meaning of Section 370 requires *mens rea*, that is to say it is punishable only where the taxpayer knew of the tax evasion and intended to evade tax (see Section 15 of the German Penal Code² and Section 369, 2 of the Fiscal Code³). In this case, there was manifestly no intention to evade tax since, as appears from the letter from the Public Prosecutor, the amount in question was paid transparently into the Member's current account after having been invoiced by him to the company Speakers' Agency. It follows also that that amount also appears in the books of that company.

Furthermore, it is a matter of common knowledge and was confirmed by Mr Brok's lawyer at his hearing that the accidental omission to declare such comparatively minor sums as that involved in this case is dealt with normally under an administrative procedure. It is quite common for small sums of unpaid tax to be turned up as a result of routine inspections of bank accounts and recovered by administrative procedures. Indeed, when Mr Brok was apprised of the fact that he was accused of tax evasion, he paid the amount due, had his accounts for 2001 to 2008 audited by a tax adviser and regularised certain other minor irregularities found.

¹ Übersetzung der Abgabenordnung durch den Sprachendienst des Bundesministeriums der Finanzen. Translation provided by the Language Service of the Federal Ministry of Finance. © 2010 juris GmbH, Saarbrücken.

² 'Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability'.

³ 'Tax crimes shall be subject to the general provisions of criminal law unless otherwise provided for by the tax laws provisions on crime'.

The fact that this omission was dealt with in such a manner, whereby Mr Brok was not even directly informed of the charges laid against him, is completely exceptional. Indeed, that the State Prosecutor stated in his letter to Parliament that ‘I have refrained from informing the Member of the intention to make him the subject of an investigation, because it is not possible at this stage to exclude the possibility that he has received additional income from similar sources of which the relevant tax authorities are as yet unaware, and notifying him of my intention to launch an investigation might enable him to suppress incriminating evidence and jeopardise the process of ascertaining the truth of the matter’ is more than exceptional, it is pernicious and designed to injure the Member by casting unfounded aspersions.

Indeed this, in conjunction with the fact that the Public Prosecutor has not even quantified the precise amount of tax owed - also by way of non payment of interest -, makes the case for the existence of a *fumus persecutionis* even stronger.

This is not the way in which a normal citizen would be treated in such circumstances. Mr Brok testified to the committee that his wife had been dealing with his tax returns for 40 years without any problem whatsoever. No public prosecutor could reasonably infer intention to evade tax from one isolated omission in such circumstances.

The case is also exceptional in that the prosecutor’s spokesperson spoke to the media, in particular, to the local television station before Mr Brok had even had the opportunity of being heard in the competent committee of the European Parliament. The accidental omission to declare EUR 5 000 on the part of any other citizen would not have resulted in such action. Moreover, it amounts to an invasion of the member’s privacy. In Parliament, as is well known, requests for waiver of immunity are dealt with behind closed doors, yet the Public Prosecutor who made the request in this case actually granted an interview to the local television station.

A further exceptional feature of this case is that Mr Brok’s lawyers have sought disclosure of the documents in the case, which is normal, but one page of the documents has been deliberately omitted.

Mr Brok is a well-known political figure. Criminal charges have been brought against him in respect of a sum and in circumstances which would, in the case of an ordinary citizen, have attracted merely administrative proceedings. Moreover, the public prosecutor not only sought to withhold knowledge of the charge from Mr Brok on spurious and highly derogatory grounds for no due cause, but made sure that the case received great publicity in the media, this inflicting the maximum amount of damage on the Member concerned. It is therefore plain that the case is one of *fumus persecutionis* in that it appears that the proceedings were brought with the sole aim of damaging the reputation of the Member concerned. In these

circumstances, it would be completely inappropriate to waive the Member's immunity.

CONCLUSION

In the light of the foregoing considerations, and pursuant to Rule 7(1) and (2) of the Rules of Procedure, after having considered the arguments for and against waiving immunity, the Committee on Legal Affairs recommends that the European Parliament reject the request to waive the parliamentary immunity of Mr Elmar Brok.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	28.2.2011
Result of final vote	+: 15 -: 0 0: 0
Members present for the final vote	Raffaele Baldassarre, Sebastian Valentin Bodu, Françoise Castex, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Piotr Borys, Sergio Gaetano Cofferati, Sajjad Karim