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REPORT

on the request for waiver of the immunity of Ana Gomes
(2014/2045(IMM))

Committee on Legal Affairs

Rapporteur: Heidi Hautala

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for waiver of the immunity of Ana Gomes (2014/2045(IMM))

The European Parliament,

- having regard to the request for waiver of the immunity of Ana Gomes, forwarded on 18 June 2014 by the Deputy Attorney General of the Portuguese Republic in connection with criminal proceedings pending before the second section of the Lisbon Department of Investigation and Criminal Proceedings (ref. NUIPC 8773/13.4TDLSB), and announced in plenary on 3 July 2014,
 - having heard Ana Gomes in accordance with Rule 9(5) of its Rules of Procedure,
 - having regard to Article 8 of Protocol No 7 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, 10 July 1986, 15 and 21 October 2008, 19 March 2010, 6 September 2011 and 17 January 2013¹,
 - having regard to Rules 5(2), 6(1) and 9 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A8-0025/2014),
- A. whereas the Deputy Attorney General of the Portuguese Republic has forwarded the request for the waiver of the parliamentary immunity of Ana Gomes, made by a public prosecutor of the Lisbon Department of Investigation and Criminal Proceedings in connection with allegedly defamatory statements made by Ms Gomes during a television debate; whereas the request has been made so that criminal proceedings may be instituted against Ms Gomes and the latter may be questioned in the context of those proceedings;
- B. whereas, according to Article 8 of the Protocol on the Privileges and Immunities of the European Union, Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties;
- C. whereas Rule 6 of its Rules of Procedure stipulates that, in the exercise of its powers in respect of privileges and immunities, Parliament acts to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the

¹ Judgment in *Wagner v Fohrmann and Krier*, Case 101/63, EU:C:1964:28; judgment in *Wybot v Faure and others*, Case 149/85, EU:C:1986:310; judgment in *Mote v Parliament*, T-345/05, EU:T:2008:440; judgment in *Marra v De Gregorio and Clemente*, C-200/07 and C-201/07, EU:C:2008:579; judgment in *Gollnisch v Parliament*, T-42/06, EU:T:2010:102; judgment in *Patriciello*, C-163/10, EU:C:2011:543; judgment in *Gollnisch v Parliament*, T-346/11 and T-347/11, EU:T:2013:23.

performance of their duties;

- D. whereas the Court of Justice has recognised that a statement made by a Member beyond the precincts of the European Parliament may constitute an opinion expressed in the performance of their duties as referred to in Article 8 of the Protocol, taking the view that it is not the place where a statement is made that matters, but the nature and content of the statement;
 - E. whereas in modern democracies political debate takes place not only in Parliament but also through communications media, ranging from press statements to the Internet;
 - F. whereas in the television broadcast in question, Ana Gomes spoke as a Member of the European Parliament to discuss matters in which she had taken an interest at European level, as shown, *inter alia*, by the questions for written answer to the Commission that she tabled to plenary;
 - G. whereas in drawing attention to the decision of the Portuguese Government on the privatisation of the naval shipyards of Viana do Castelo – a decision which also led to an investigation by the European Commission on infringement of the EU rules on state aid –, she was fulfilling her mandate as a Member of the European Parliament;
1. Decides not to waive the immunity of Ana Gomes;
 2. Instructs its President to forward this decision and the report of the committee responsible immediately to the competent authority of the Portuguese Republic and to Ana Gomes.

EXPLANATORY STATEMENT

1. Context

On 29 November 2013, during the television programme TVI24 – Cara a Cara, Ana Gomes, Member of the European Parliament, made the following statements when commenting on the sub-concession for the exclusive operation of the naval shipyards of Viana do Castelo (*Estaleiros Navais de Viana do Castelo*):

'This is criminal, there is no other word for it, it is criminal. This Minister of Defence is incompetent, if not downright malicious. There needs to be an investigation to find out what dealings his legal practice has with Martifer, which really has its tentacles in all the political parties (...) Why didn't the Government give the go-ahead for the asphalt ship orders? Why didn't the Government answer the European Commission? Why did the Government cancel the Navy contracts? Because the Government wants to stifle the shipyards, it wants to get rid of the workers, it wants to do Martifer a favour, that's all... that's the truth, it wants to do Martifer a favour... what they are doing in Viana do Castelo is an outrage...'

José Pedro Correia Aguiar-Branco, Minister of National Defence in the Portuguese Government, filed a complaint with the Lisbon Department of Investigation and Criminal Proceedings against Ms Gomes for the allegedly defamatory nature of the statements in question. A complaint was also filed by the legal practice JPAB – José Pedro Aguiar Branco & Associados – Sociedade de Advogados, RL, which was mentioned by Ms Gomes in her declaration.

At the plenary sitting of 3 July 2014, the President announced, under Rule 9(1) of the Rules of Procedure, that he had received a letter from the Deputy Attorney-general of the Portuguese Republic (*Vice Procurador-geral da República*) concerning the waiver of the parliamentary immunity of Ms Ana Gomes in connection with the abovementioned criminal proceedings. The President referred the request to the Committee on Legal Affairs under Rule 9(1).

On 25 September 2014 the Committee heard Ms Gomes in accordance with Rule 9(5) of the Rules of Procedure.

2. Law and procedure on the immunity of Members of the European Parliament

Articles 8 and 9 of the Protocol (No 7) on the Privileges and Immunities of the European Union read as follows:

Article 8

Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.

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 other Member States, immunity from any measures or 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.

Rules 5, 6 and 9 of the Rules of Procedure of the European Parliament read as follows:

Rule 5 - Privileges and immunities

- 1. Members shall enjoy privileges and immunities in accordance with the Protocol on the Privileges and Immunities of the European Union.*
- 2. Parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members. (...)*

Rule 6 - Waiver of immunity:

1. In the exercise of its power in respect of privileges and immunities, Parliament acts to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in performance of their duties. Any request for waiver of immunity shall be evaluated in accordance with Articles 7, 8 and 9 of the Protocol on the Privileges and Immunities of the European Union and with the principles referred to in this Rule. (...)

Rule 9 - Procedures on immunity

- 1. Any request addressed to the President by a competent authority of a Member State that the immunity of a Member be waived, or by a Member or a former Member that privileges and immunities be defended, shall be announced in Parliament and referred to the committee responsible. (...)*
- 2. The committee shall consider without delay, but having regard to their relative complexity, requests for the waiver of immunity or requests for the defence of privileges and immunities.*
- 3. The committee shall make a proposal for a reasoned decision which recommends the adoption or rejection of the request for the waiver of immunity or for the defence of immunity and privileges.*
- 4. The committee may ask the authority concerned to provide any information or explanation which the committee deems necessary in order for it to form an opinion on*

whether immunity should be waived or defended.

5. The Member concerned shall be given an opportunity to be heard, may present any documents or other written evidence deemed by that Member to be relevant and may be represented by another Member.

The Member shall not be present during debates on the request for waiver or defence of his or her immunity, except for the hearing itself.

The chair of the committee shall invite the Member to be heard, indicating a date and time. The Member may renounce the right to be heard.

If the Member fails to attend the hearing pursuant to that invitation, he or she shall be deemed to have renounced the right to be heard, unless he or she has asked to be excused from being heard on the date and at the time proposed, giving reasons. The chair of the committee shall rule on whether such a request to be excused is to be accepted in view of the reasons given, and no appeals shall be permitted on this point.

*If the chair of the committee grants the request to be excused, he or she shall invite the Member to be heard at a new date and time. If the Member fails to comply with the second invitation to be heard, the procedure shall continue without the Member having been heard. No further requests to be excused, or to be heard, may then be accepted.
(...)*

7. The committee may offer a reasoned opinion as to the competence of the authority in question and the admissibility of the request, but shall not, under any circumstances, pronounce on the guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution, even if, in considering the request, it acquires detailed knowledge of the facts of the case. (...)

3. Justification for the proposed decision

On the basis of the aforementioned facts, the present case qualifies for the application of Article 8 of the Protocol No 7 on the Privileges and Immunities of the European Union. For the purpose of that provision, ‘opinion’ must be understood in a wide sense so as to include remarks and statements that, by their content, correspond to assertions amounting to subjective appraisal¹. The complaint of the Minister of Defence was, indeed, prompted by the statements made by Ms Gomes during a television debate.

In order to enjoy immunity under Article 8 of the Protocol, an opinion must have been expressed by a Member of the European Parliament ‘in the performance of [his or her] duties’, thus entailing the requirement of a link between the opinion expressed and the parliamentary duties².

¹ Judgment in *Patriciello*, C-163/10, EU:C:2011:543, paragraph 32.

² Judgment in *Patriciello* EU:C:2011:543, paragraph 33.

As the Court of Justice has held, the scope of the absolute immunity referred to in Article 8 must be determined solely pursuant to EU law¹. The Court has also been adamant that immunity under Article 8 must be ‘*considered as an absolute immunity barring any judicial proceedings in respect of an opinion expressed or a vote cast in the exercise of parliamentary duties*’².

In the Court’s view, Article 8 of the Protocol must be interpreted to the effect that, although parliamentary immunity essentially covers statements made within the precincts of the European Parliament, it is not impossible that a statement made beyond those precincts may also amount to an opinion expressed in the performance of parliamentary duties. Whether or not it is such an opinion must therefore be determined having regard to its character and content, not to the place where it was made³. This is all the more true in modern democracies where political debates take place not only in Parliament but also through communications media, ranging from press statements to the Internet. The Court, however, has made it clear that the connection between the opinion expressed and parliamentary duties must be direct and obvious⁴.

The principle on which the parliamentary immunity provided for by Article 8 of the Protocol is based is the freedom of Members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority⁵. Inevitably, in certain cases, someone may regard the opinions expressed by a Member of the European Parliament as excessive, annoying or offensive. However, in an open and democratic society, the importance of uninhibited dialogue on topics of public interest is such that, as a matter of principle, Members’ offensive or even extreme opinions cannot be censored, provided that they are directly and obviously linked to the performance of their parliamentary duties (and, as such, compatible with the tone generally encountered in political debates⁶).

This is particularly true in the case in point. Ms Gomes’s criticism of the Portuguese Government’s decision not only concerned matters of genuine public interest – the privatisation of important naval shipyards – but was also directly and obviously connected with the performance of her duties as a Member of the European Parliament. Indeed, she had taken an interest at European level in the matter, as shown, *inter alia*, by the questions for written answer that she had tabled – jointly or individually – in accordance with Parliament’s Rules of Procedure⁷. Furthermore, when heard by the Committee, Ms Gomes provided evidence of her extensive correspondence with Commissioners Almunia and Tajani on the issue.

¹ Judgment in *Marra*, C-200/07 and C-201/07, EU:C:2008:579, paragraph 26.

² Judgment in *Marra*, EU:C:2008:579, paragraph 27.

³ Judgment in *Patriciello* EU:C:2011:543, paragraph 30.

⁴ Judgment in *Patriciello* EU:C:2011:543, paragraph 35.

⁵ *A. v the United Kingdom*, No. 35373/97, § 75, ECHR, 2002-X.

⁶ See European Parliament decision of 2 April 2014 on the request for defence of the immunity and privileges of Mario Borghezio (P7_TA(2014)0257).

⁷ See questions for written answer to the Commission E-005164/2013 of 8.5.2013 and E-013757/2013 of 4.12.2013.

As confirmed by the documents made available to the Committee, the matter was all the more important at European level since the Portuguese Government's decision had prompted an investigation of the European Commission for infringement of the EU rules on State aid¹.

The existence of a direct and obvious link between the opinion expressed by Ms Gomes and her duties as a Member of the European Parliament is, therefore, undisputable. Prosecuting Ms Gomes for the statements in question would amount to preventing her from fulfilling her parliamentary mandate freely and would be patently contrary to the *rationale* of Article 8 of the Protocol.

4. Conclusion

On the basis of the above considerations and pursuant to Rule 9(3) of the Rules of Procedure, the Committee on Legal Affairs recommends that the European Parliament should not waive the parliamentary immunity of Ms Ana Gomes.

¹ See the Commission's decision to initiate the procedure laid down in Article 108(2) TFEU, OJ C 95, 3.4.2013, p. 118.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	10.11.2014
Result of final vote	+: 21 -: 0 0: 0
Members present for the final vote	Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Kostas Chrysogonos, Therese Comodini Cachia, Mady Delvaux, Laura Ferrara, Dietmar Köster, Gilles Lebreton, António Marinho e Pinto, Emil Radev, Julia Reda, Evelyn Regner, Pavel Svoboda, Tadeusz Zwiefka
Substitutes present for the final vote	Daniel Buda, Angel Dzhambazki, Jytte Guteland, Heidi Hautala, Sylvia-Yvonne Kaufmann, Viktor Uspaskich
Substitutes under Rule 200(2) present for the final vote	Edouard Martin