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REPORT

on the request for waiver of the immunity of Béla Kovács
(2014/2044(IMM))

Committee on Legal Affairs

Rapporteur: Tadeusz Zwiefka

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for waiver of the immunity of Béla Kovács (2014/2044(IMM))

The European Parliament,

- having regard to the request for waiver of the immunity of Béla Kovács in connection with an investigation to be carried out by the Central Chief Prosecution Office of Hungary, forwarded on 12 May 2014 by Dr Péter Polt, the Prosecutor-General of Hungary, and announced in plenary on 3 July 2014; having regard to the further explanations provided by Dr Polt in his letters of 16 October 2014 and 23 March 2015 and to the exchange of views held with Dr Polt at the meeting of the Committee on Legal Affairs on 14 July 2015,
 - having heard Mr Kovács in accordance with Rule 9(5) of its Rules of Procedure,
 - having regard to Article 9 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 Article 4(2) of the Fundamental Law of Hungary, Sections 10(2) and 12(1) of Act LVII of 2004 on the Status of the Hungarian Members of the European Parliament, and Section 74(1) and (3) of Act XXXVI of 2012 on the National Assembly of Hungary,
 - 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 (A8-0291/2015),
- A. whereas the Prosecutor-General of Hungary has requested the waiver of the immunity of a Member of the European Parliament, Béla Kovács, in order that investigations can be carried out, on the basis of reasonable suspicions, to determine whether a charge will lie against him with regard to the offence of espionage against the institutions of the European Union under Section 261/A of Act C of 2012 on the Hungarian Criminal Code; whereas, according to that Section, any person who conducts intelligence activities for a non-European Union country against the European Parliament, the European Commission or the Council of the European Union shall be punishable in

¹ Judgment of the Court of Justice of 12 May 1964 in Case 101/63, *Wagner v Fohrmann and Krier*, ECLI:EU:C:1964:28; judgment of the Court of Justice of 10 July 1986 in Case 149/85, *Wybot v Faure and others*, ECLI:EU:C:1986:310; judgment of the General Court of 15 October 2008 in Case T-345/05, *Mote v Parliament*, ECLI:EU:T:2008:440; judgment of the Court of Justice of 21 October 2008 in Joined Cases C-200/07 and C-201/07, *Marra v De Gregorio and Clemente*, ECLI:EU:C:2008:579; judgment of the General Court of 19 March 2010 in Case T-42/06, *Gollnisch v Parliament*, ECLI:EU:T:2010:102; judgment of the Court of Justice of 6 September 2011 in Case C-163/10, *Patriciello*, ECLI:EU:C:2011:543; judgment of the General Court of 17 January 2013 in Joined Cases T-346/11 and T-347/11, *Gollnisch v Parliament*, ECLI:EU:T:2013:23.

accordance with Section 261; whereas, under paragraph (1) of Section 261, any person who conducts intelligence activities for a foreign power or foreign organisation against Hungary is guilty of a felony punishable by imprisonment for between two and eight years;

- B. whereas, according to Article 9 of the Protocol on the Privileges and Immunities of the European Union, Members of the European Parliament must enjoy, on the territory of their own Member State, the immunities accorded to members of that Member State's parliament;
- C. whereas, according to Article 4(2) of the Fundamental Law of Hungary, national Members of Parliament are entitled to immunity; whereas, according to Section 10(2) of Act LVII of 2004 on the Status of the Hungarian Members of the European Parliament, Members of the European Parliament are entitled to immunity equal to the immunity of Members of the Hungarian Parliament; whereas, under Section 74(1) of Act XXXVI of 2012 on the National Assembly, a criminal procedure can only be instituted or conducted and a coercive measure under criminal procedure applied against a Member with the prior consent of the National Assembly; whereas according to Section 74(3) of the same Act, the request for waiver of immunity is to be made by the Prosecutor-General in order to launch the investigation;
- D. whereas in Case Bf.I.2782/2002, the Hungarian Supreme Court declared that parliamentary immunity is limited to the criminal procedure and does not extend to measures not regulated by the Code of Criminal Procedure aiming at the prevention, detection or demonstration of a crime;
- E. whereas, according to Section 261/A of Act C of 2012 on the Hungarian Criminal Code, the criminal offence for which investigations can be carried out against Béla Kovács is punishable as of 1 January 2014;
- F. whereas, accordingly, the investigation and any subsequent indictment for which the waiver of immunity is sought are limited to events having occurred after 1 January 2014;
- G. whereas, according to the case-law of the Hungarian Supreme Court, the gathering of evidence pursuant to Act CXXV of 1995 on National Security Services prior to that date was lawful and did not require a waiver of immunity;
- H. whereas the criminal investigation will be carried out by the Central Chief Prosecution Office of Investigation; whereas under Article 29(1) of the Fundamental Law of Hungary, the Prosecutor-General and the Prosecution Service are independent, carry out their constitutional tasks independently from external organisations, and proceed in compliance with the presumption of innocence;
- I. whereas the waiver of the immunity of Béla Kovács should be subject to the conditions indicated in Rule 9(6) of the Rules of Procedure;
- J. whereas, in this case, Parliament has found no evidence of *fumus persecutionis*, that is to say, a sufficiently serious and precise suspicion that the request for waiver of immunity was made in connection with proceedings brought with the intention of

causing political damage to the Member concerned;

1. Decides to waive the immunity of Béla Kovács;
2. Instructs its President to forward this decision and the report of its committee responsible immediately to the competent authority of Hungary and to Béla Kovács.

EXPLANATORY STATEMENT

1. Background

At the 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 Prosecutor General of Hungary, Dr Polt, requesting that the immunity of Béla Kovács be waived.

The President referred the request to the Committee on Legal Affairs under Rule 9(1).

In view of the fact that the European Parliament was unable to accept the classified annex to Dr Polt's initial letter, further explanations were provided by Dr Polt in his letters of 16 October 2014 and 23 March 2015 and an exchange of views was held with him at the meeting of the Committee on Legal Affairs held on 14 July 2015.

The request for the waiver of the immunity of Béla Kovács is made in order that investigations can be carried out, on the basis of reasonable suspicions, to see whether a charge will lie against him with regard to the offence of espionage against the institutions of the European Union under Section 261/A of Act C of 2012 on the Hungarian Criminal Code. According to that Section, any person who conducts intelligence activities for a non-European Union third country against the European Parliament, the European Commission or the Council of the European Union shall be punishable in accordance with Section 261; paragraph (1) of which provides that any person who conducts intelligence activities for a foreign power or foreign organisation against Hungary is guilty of a felony punishable by a term of imprisonment of between two and eight years.

According to Section 261/A of Act C of 2012 on the Hungarian Criminal Code, the criminal offence for which investigations can be carried out against Béla Kovács is punishable as of 1 January 2014.

According to the information provided by the Prosecutor General, Mr Kovács' covert contacts with Russian intelligence officers were first detected in 2010 by the Hungarian Constitution Protection Office in the course of its investigation into the activities of certain foreign nationals. According to the case-law of the Hungary Supreme Court, this gathering of evidence pursuant to Act CXXV of 1995 on National Security Services prior to 1 January 2014 was lawful and did not require the waiver of immunity.

The Prosecutor has made it clear that the investigation and any subsequent indictment for which the waiver of immunity is sought are limited to events having occurred after 1 January 2014.

It is further noted that the criminal investigation will be carried out by the Central Chief Prosecution Office of Investigation and that, under Article 29(1) of the Fundamental Law of Hungary, the Prosecutor-General and the Prosecution Service are independent, carry out their constitutional tasks independently from external organisations and proceed in compliance with the presumption of innocence.

Mr Kovács submits that, since Section 261/A of Act C of 2012 has been in force only since 1 January 2014, he could not be charged for acts committed prior to that date because of Article 49 of the Charter of Fundamental Rights of the EU, which, reflecting the general principle *nullum crimen sine lege*, provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Mr Kovács further claims that his activities in 2014 do not fall within Section 261/A.

Mr Kovács further argues that the surveillance conducted against him was unlawful, that there was a violation of the presumption of innocence, that Section 118(5) of Act CLXXXVI of 2013 criminalising espionage against the institutions of the EU was passed specifically in order to make Mr Kovács' behaviour punishable and that the classification of the whole case is unlawful and unreasonable.

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

Article 9 of the Protocol (No 7) on the Privileges and Immunities of the European Union 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 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.

Given that the waiver of immunity is being sought for Hungary, the Hungarian law on parliamentary immunity applies pursuant to Article 9, first paragraph, point a. Under Article 4(2) of the Fundamental Law of Hungary, Members of Parliament are entitled to immunity. According to Section 10(2) of Act LVII of 2004 on the Status of the Hungarian Members of the European Parliament, Members of the European Parliament are entitled to immunity equal to the immunity of Members of the Hungarian Parliament and Section 74(1) of Act XXXVI of 2012 on the National Assembly provides that a criminal procedure can only be instituted or conducted and a coercive measure under criminal procedure can only be applied against a Member with the prior consent of the National Assembly. Lastly, according to Section 74(3), the request for waiver of immunity is to be made by the Prosecutor-General.

Rules 6(1) and 9 of the Rules of Procedure of the European Parliament read as follows:

Rule 6
Waiver of immunity

1. 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 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.

The Member or former Member may be represented by another Member. The request may not be made by another Member without the agreement of the Member concerned.

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 privileges and immunities.

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, this case qualifies for the application of Article 9 of Protocol No 7 on the Privileges and Immunities of the European Union.

Pursuant to that provision, Members enjoy, in the territory of their own State, the immunities accorded to members of the Parliament of that State.

In order to decide whether or not to waive a Member's parliamentary immunity, the European Parliament applies its own consistent principles. One of these principles is that immunity is usually waived when the offence falls within Article 9 of Protocol No 7, provided that there is no *fumus persecutionis*, i.e. a sufficiently serious and precise suspicion that the matter is being raised with the intention of causing political damage to the Member concerned.

After exchanges of letters with the national authorities, the hearing of the Member concerned, the circulation of written submissions, an exhaustive debate in the competent committee and an additional requested exchange of views with the Prosecutor General, it is considered that there is no *fumus persecutionis* in this case.

More specifically as regards the argument based on the principle *nullum crimen sine lege*, it appears clearly from the statements of the Prosecutor General that the investigation and any subsequent indictment for which the waiver of immunity is sought are limited to events having occurred after 1 January 2014, the date on which Section 261/A of Act C of 2012 on the Hungarian Criminal Code entered into effect. Moreover, under Article 29(1) of the Fundamental Law of Hungary, the Prosecutor-General and the Prosecution Service are independent, carry out their constitutional tasks independently from external organisations and proceed in compliance with the presumption of innocence. Lastly, it is not for Parliament

to adjudge in immunity proceedings whether Mr Kovács' claim that his activities in 2014 do not fall within Section 261/A is justified.

Likewise, Mr Kovács' other arguments alleging *fumus persecutionis* seem unfounded or to go beyond the compass of a procedure for the waiver of parliamentary immunity.

First, in the light of the aforementioned case-law of the Hungarian Supreme Court according to which parliamentary immunity is limited to the criminal procedure and does not extend to measures not regulated by the Code of Criminal Procedure aiming at the prevention, detection or demonstration of a crime, his claim that the surveillance conducted against him was unlawful has no bearing on the procedure for waiver of his immunity, particularly since his alleged covert contacts with Russian intelligence officers were first detected by the Hungarian Constitution Protection Office in the course of its investigation into the activities of certain foreign nationals, not of Mr Kovács himself.

Secondly, the claims that there was a violation of the presumption of innocence, that Section 118(5) of Act CLXXXVI of 2013 criminalising espionage against the institutions of the EU was passed specifically in order to make Mr Kovács' behaviour punishable and that the classification of the whole case is unlawful and unreasonable do not square with the request for waiver of immunity which has been made in order that investigations may be carried out, on the basis of reasonable suspicions, to see whether a charge will lie against him.

On a proper analysis, these claims constitute only objections or defences to hypothetical criminal proceedings, which have not yet been brought and may never be brought. Indeed, Mr Kovács himself concedes that he is officially not a suspect. The fact, once again, that the Prosecutor-General is constitutionally independent and proceeds in compliance with the presumption of innocence is sufficient to allay any fears of *fumus persecutionis*.

Lastly, it is emphasised that waiver of immunity does not entail in any way a judgement as to the Member's guilt or innocence.

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 waive the parliamentary immunity of Mr Béla Kovács.

RESULT OF FINAL VOTE IN COMMITTEE RESPONSIBLE

Date adopted	12.10.2015
Result of final vote	+ : 14 - : 2 0 : 2
Members present for the final vote	Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Kostas Chrysogonos, Mady Delvaux, Laura Ferrara, Dietmar Köster, Gilles Lebreton, António Marinho e Pinto, Julia Reda, Evelyn Regner, Pavel Svoboda, József Szájer, Tadeusz Zwiefka
Substitutes present for the final vote	Heidi Hautala, Virginie Rozière
Substitutes under Rule 200(2) present for the final vote	Birgit Collin-Langen, Péter Niedermüller