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## **REPORT**

on amendment of Rule 121 of Parliament's Rules of Procedure on proceedings  
before the Court of Justice  
(2007/2266(REG))

Committee on Constitutional Affairs

Rapporteur: Costas Botopoulos

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## PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

### on amendment of Rule 121 of Parliament's Rules of Procedure on proceedings before the Court of Justice (2007/2266(REG))

*The European Parliament,*

- having regard to the letter from the chairman of the Committee on Legal Affairs of 26 September 2007,
  - having regard to Rules 201 and 202 of its Rules of Procedure,
  - having regard to the report of the Committee on Constitutional Affairs (A6-0324/2008),
1. Decides to amend its Rules of Procedure as shown below;
  2. Points out that the amendment will enter into force on the first day of the next part-session;
  3. Instructs its President to forward this decision to the Council and the Commission, for information.

#### **Amendment 1**

#### **Parliament's Rules of Procedure Rule 121 – paragraph 3a (new)**

*Present text*

*Amendment*

***3a. The President shall submit observations or intervene on behalf of Parliament in court proceedings after consulting the committee responsible.***

***Where the President intends to depart from the recommendation of the committee responsible, he shall inform the committee accordingly and shall refer the matter to the Conference of Presidents, stating his reasons.***

***Where the Conference of Presidents takes the view that Parliament should, exceptionally, not submit observations or intervene before the Court of Justice where the legal validity of an act of Parliament is being questioned, the***

*matter shall be submitted to plenary without delay.*

*In cases of urgency, the President may take precautionary action in order to comply with the time limits prescribed by the court concerned. In such cases, the procedure provided for in this paragraph shall be implemented at the earliest opportunity.*

*Interpretation:*

*Nothing in the Rules prevents the committee responsible from deciding on appropriate procedural arrangements for the timely transmission of its recommendation in cases of urgency.*

## EXPLANATORY STATEMENT

### BACKGROUND

1. By letter dated 26 September 2007, the Chairman of the Committee on Legal Affairs presented a proposal to the Chairman of the Committee on Constitutional Affairs concerning the interpretation of Rule 121 of Parliament's Rules of Procedure. In his letter, Mr Gargani sought clarification from the Committee on Constitutional Affairs as to whether this Rule, and in particular paragraph 3, refers only to actions brought by Parliament before the Court of Justice or whether it can be interpreted so as to also include observations and interventions by Parliament before the Court.
2. Rule 121, entitled 'Proceedings before the Court of Justice', reads as follows:
  1. *Parliament shall, within the time limits specified by the Treaties and the Statute of the Court of Justice for action by the institutions of the Union and by any natural or legal persons, examine Community legislation and the implementing measures to ensure that the Treaties, in particular where Parliament's rights are concerned, have been fully respected.*
  2. *The committee responsible shall report to Parliament, orally if necessary, where it suspects a breach of Community law.*
  3. *The President shall bring an action on behalf of Parliament in accordance with the recommendation of the committee responsible.*

*At the start of the following part-session, he may put to plenary the decision on maintaining the action. Should plenary rule against the action by a majority of the votes cast, he shall withdraw it.*

*Should the President bring an action contrary to the recommendation of the committee responsible, he shall put to plenary, at the start of the following part-session, the decision on maintaining the action".*

### SCOPE OF THE INTERPRETATION

3. Rule 121 is entitled 'Proceedings before the Court of Justice', while paragraph 3 refers expressly to 'actions' brought before the Court by the President on behalf of Parliament. Hence, Rule 121(3) applies when Parliament *initiates* judicial proceedings. In this case, the President acts upon a recommendation by the Committee on Legal Affairs. If the President decides not to follow such a recommendation, the matter has to be submitted to Plenary for a final decision, although he/she may take precautionary action.
4. When Parliament is a *defendant* in proceedings before the Court, it is evident that the President has to defend Parliament's position in accordance with article 19(4) of the Rules of Procedure, which expressly vests in him/her the power to represent Parliament in legal matters.
5. There are also other types of proceedings brought before the Court of Justice in the

course of which Parliament may have an interest to *intervene or submit observations* in accordance with the provisions of the Statute of the Court. This is notably the case in preliminary proceedings where the validity of a legislative act is being questioned and in particular where this act has been jointly adopted by the Parliament and the Council. According to current practice, in these cases the Committee on Legal Affairs is consulted on the appropriateness of presenting observations before the Court of Justice, while the President of Parliament takes the final decision under the powers conferred on him by Rule 19(4).

6. In the above mentioned letter, the Chairman of the Committee on Legal Affairs suggests interpreting Rule 121(3) so as to cover not only actions initiated by Parliament, but also observations and interventions in cases before the Court. In practice this would mean that in cases of disagreement between the President and the Committee on Legal Affairs, the President would have to refer to Plenary not only the decision on whether to maintain an action but also the decision on whether to lodge observations or intervene before the Court. In the view of the Committee on Legal Affairs, such an interpretation could be justified by the fact that in the English and German version of Rule 121 the general term 'proceedings' is used in the title (unlike the French and the other linguistic versions which refer to 'recours').

#### **CONSIDERATIONS OF THE RAPPORTEUR**

7. The Rapporteur believes that the confusion created by the different linguistic versions of the title of Rule 121 ('*proceedings*', '*Verfahren*', '*recours*', '*ricorsi*', etc.) does not concern paragraph 3 in which the term 'action' is translated in all languages uniformly ('*Klage*', '*recours*', '*ricorso*', etc.). Furthermore, it should be pointed out that article 121, by stipulating in its first two paragraphs that '*the Parliament shall ... examine Community legislation and the implementing measures to ensure that the Treaties, in particular where Parliament's rights are concerned, have been fully respected*' and that '*the committee responsible shall report to Parliament, orally if necessary, where it suspects a breach of Community law*', is pertinent to cases where Parliament decides to initiate proceedings before the Court, such as an action for annulment, in order to defend its prerogatives or ensure the compliance of community legislation with the Treaties.
8. For the above reasons, the Rapporteur considers that it would not be justifiable to extend the scope of the *terminus technicus* 'action' ('recours', 'Klage', 'ricorso', etc), which is used in article 121(3), merely by virtue of the wider meaning of the term used in some linguistic versions of the Rule's title. As it is clear that the scope of paragraph 3 is limited to 'actions' initiated by Parliament, it could not be interpreted widely so as to also include observations and interventions, which are qualitatively different actions.
9. It could be argued that there might still be a legitimate reason for establishing a specific procedure to decide whether Parliament should lodge observations or intervene before the Court in cases of disagreement between the President and the

committee responsible. It is generally understood that once Parliament has adopted a legal act, it has the responsibility to defend its validity before the Court of Justice. This principle is enshrined in a letter of 10 December 1997 by the Chairman of the Committee on Legal Affairs and Citizens' Rights, Mr Willy de Clercq, to the President of the European Parliament, Mr José Maria Gil-Robles, determining the criteria that should be followed by the European Parliament when deciding whether to submit observations in preliminary proceedings. The principle established thereby is that Parliament should lodge observations in preliminary proceedings when the legal validity of an act adopted by codecision is in question and not take action in proceedings concerning the interpretation of a legal act.

10. Nevertheless, the Rapporteur is aware of two cases where the Committee on Legal Affairs advised the President not to defend before the Court of Justice the validity of an act adopted by codecision. In both of these cases, the President decided to take an action contrary to the recommendation of the committee responsible:
  - In 1999, President José Maria Gil-Robles decided to submit observations before the Court of Justice in order to defend the legality of Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.
  - In 2005, President Josep Borrell-Fontelles decided to defend before the Court of Justice the validity of Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering.
11. In both cases the President's decision derived from the established practice of defending the validity of legal acts adopted by codecision in conformity with the criteria determined by the Committee on Legal Affairs. It should be noted that although paragraph 3 of article 121 was already in force in the second case, the President did not ask the Plenary to confirm his decision; this paragraph was correctly interpreted as referring only to 'actions' brought by the President on behalf of Parliament.
12. The Rapporteur is not in a position to evaluate the legal reasoning behind the decision of the committee responsible to advise the President not to submit observations in the above cases. He believes that, as a matter of principle, Parliament should defend the validity of its acts in cases brought before the Court of Justice in accordance with the presumption of legality and the principle of loyal cooperation vis-à-vis its co-legislator (the Council).
13. The Rapporteur, however, considers that there might be exceptional cases where the Parliament could be empowered to take a different view from that taken in the codecision procedure, provided that there has been an *important change of legal circumstances* (e.g. Treaty reform, entry into force of the EU Charter of Fundamental Rights, case-law) which may render an act incompatible with the Union's primary law. Such an act would remain in force as adopted under the previous legal framework, but

Parliament, lacking the right of initiative, would not be in a position to modify it in order to render it compatible with the new legal circumstances. It can be argued that, in that particular case, Parliament could have a legitimate reason to decide not to lodge observations or intervene before the Court.<sup>1</sup>

14. Bearing in mind that the Rules of Procedure do not currently provide for the internal procedure to be followed by Parliament when deciding upon the appropriateness of submitting observations or intervening before the Court, the Rapporteur is of the opinion that there are two questions on which the AFCO Committee has to take a stance. Firstly: is it better to resolve the issue by interpretation and therefore simply confirm that the President of the Parliament is entitled, according to the existing practice, to take a decision contrary to the recommendation of the committee responsible? And secondly: were it to be considered preferable to regulate the matter by complementing Rule 121, to which body and under which procedure should the right of decision be given?

#### CONCLUSIONS AND RECOMMENDATIONS

15. The Rapporteur would like to reiterate that in order to respect the principle of legality - and to safeguard its own credibility as a co-legislator - Parliament should only in exceptional circumstances, and only on the basis of due legal consideration, be enabled to decide, in the course of preliminary proceedings, to take a different stance from the one held during the codecision procedure.
16. It appears evident that Rule 121(3) in its present form applies only to 'actions' initiated by Parliament and does not cover 'observations' or 'interventions' in judicial procedures. Should the Rule remain in its current form, the Rapporteur would have to propose to the Committee the adoption of an explicit interpretation under which, for the submission of observations or interventions before the Court, the power to decide would always lie with the President of the Parliament.
17. For reasons of completeness and legal certainty, the Rapporteur considers that a new paragraph should be added to Rule 121 in order to incorporate in the Rules of Procedure the established practice of the President to submit observations or intervene before the Court on behalf of Parliament upon a recommendation of the Committee on Legal Affairs. The new paragraph shall also lay down the procedure to be followed when a divergence of views arises between the President and the committee responsible.
18. The Rapporteur considers that in case of disagreement the decision should be taken through a procedure ensuring enhanced democratic legitimacy. Due to the nature of the matter, he puts forward the idea that the decision should be initially referred to the Conference of Presidents, a body which reflects the *rappor de forces* of the whole

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<sup>1</sup> It is also worth noting that article 34 of Parliament's Rules of Procedure stipulates that "*during the examination of a legislative proposal, Parliament shall pay particular attention to respect for fundamental rights and in particular that the legislative act is in conformity with the European Union Charter of Fundamental Rights, the principles of subsidiarity and proportionality and the rule of law*".



Parliament whilst also being in a position to consider the matter on its legal merits after having heard the different views and taken into consideration the opinion of Parliament's legal service. If the Conference of Presidents concludes that Parliament should not lodge observations or intervene before the Court in order to defend the validity of a legal act adopted by codecision, the matter would have to be referred to Plenary. Members of Parliament should have at their disposal all relevant documents or information in order to be able to thoroughly examine the issue and take a decision.<sup>1</sup>

19. In exceptional cases where the Committee on Legal Affairs is not in a position to deliver its recommendation in time, the Rapporteur suggests that the President should be able to take precautionary action in order to comply with the deadlines required by the Court of Justice. This could, for instance, be the case in the recently introduced urgent preliminary ruling procedure in the freedom, security and justice area – applicable as from 1 March 2008 –, which provides for a shorter period for the submission of written observations. Hence, the aim of the last subparagraph of the new Rule 121(4) is to provide for a procedure for those cases where a decision has to be taken urgently, not only where the Court of Justice applies the expedited or urgent procedure, but also where the procedure provided for in the new Rule 121(4) cannot be applied for reasons related to the parliamentary calendar. In such cases, the President should be able to submit observations without prior consultation with the committee responsible. Nevertheless, the committee responsible can decide on appropriate procedural arrangements so as to transmit its recommendation in time. This possibility is clarified by means of an interpretation contained in the amendment adopted by the Committee on Constitutional Affairs.

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<sup>1</sup> The Rapporteur considers that in proceedings where Parliament exceptionally decides not to defend the validity of a legislative act adopted jointly by the Parliament and the Council, the decision should be taken if it secures the votes of a majority of the component Members of Parliament. This would be in line with voting requirements in place when Parliament rejects or amends the common position of the Council under Article 251 of the EC Treaty. However, given that applying the absolute majority requirement would not be possible under Article 198 of the EC Treaty, the Rapporteur suggests an exceptional procedure where the matter is initially referred to the Conference of Presidents, a body reflecting the majority opinion of the component Members of Parliament, whilst Plenary, as Parliament's supreme body, should take the final decision. It should be noted that where the Conference of Presidents decides to submit observations in order to defend the validity of an act, it acts on the basis of an earlier plenary decision taken in the codecision procedure. Hence, there is no need to refer the matter again to Plenary. But where the Conference of Presidents takes the view that Parliament should, exceptionally, not defend the legal validity of an act, the matter would have to be referred to Plenary, as only the House can overturn its previous decision.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	16.7.2008
<b>Result of final vote</b>	+: 17 -: 3 0: 0
<b>Members present for the final vote</b>	Enrique Barón Crespo, Richard Corbett, Hanne Dahl, Jean-Luc Dehaene, Andrew Duff, Maria da Assunção Esteves, Ingo Friedrich, Genowefa Grabowska, Sylvia-Yvonne Kaufmann, Jo Leinen, Íñigo Méndez de Vigo, Rihards Pīks
<b>Substitute(s) present for the final vote</b>	Graham Booth, Costas Botopoulos, Panayiotis Demetriou, Klaus Hänsch, Roger Helmer, Gérard Onesta, Georgios Papastamkos, Reinhard Rack