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REPORT

on the request for waiver of the immunity of Hannes Swoboda
(2009/2014(IMM))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for waiver of the immunity of Hannes Swoboda (2009/2014(IMM))

The European Parliament,

- having regard to the request for waiver of the immunity of Hannes Swoboda of 5 December 2008 from the Vienna Regional Criminal Court, forwarded on 20 January 2009 and announced in plenary sitting on 5 February 2009,
 - having heard Hannes Swoboda in accordance with Rule 7(3) of its Rules of Procedure,
 - having regard to Articles 9 and 10 of the Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities, 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 12 May 1964 and 10 July 1986¹ of the Court of Justice of the European Communities,
 - having regard to Article 57 of the Austrian Bundesverfassungsgesetz (Federal Constitutional Law),
 - having regard to Rules 6(2) and 7 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A6-0190/2009),
1. Decides not to waive the immunity of Hannes Swoboda;
 2. Instructs its President to forward this decision, and the report of the committee responsible, immediately to the appropriate authority of the Republic of Austria.

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

EXPLANATORY STATEMENT

I. The law

Articles 9 and 10 of the ***Protocol on the Privileges and Immunities of the European Communities of 8 April 1965*** read:

Article 9

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 10

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.

Article 57 of the ***Austrian Bundesverfassungsgesetz*** reads:

Article 57

(1) Members of the National Council may never be called to account for votes cast in the exercise of their office; where they have made verbal or written statements when discharging that duty, they may be called to account for them only by the National Council.

(2) Except where they are caught in the act of committing a crime, members of the National Council may not be arrested on account of a criminal offence unless the National Council has given its consent. Searches of the houses of members of the National Council shall likewise require the consent of the National Council.

(3) The above cases apart, no official action on account of a punishable offence may be taken against members of the National Council without the National Council's consent unless that offence is manifestly not connected with the political activity of the member in question. The authority concerned must, however, seek a decision from the National Council as to whether

such a connection exists, where this is so requested by the member in question or one third of the members of the appropriate standing committee. If a request has been made to that effect, all procedural steps must cease or be discontinued immediately.

(4) In all of the above cases the National Council shall be deemed to have given its consent if it has not acted within eight weeks on the necessary request from the authority competent to institute legal proceedings; to enable the National Council to take a decision in time, the President shall put the request to the vote at the latest on the last day but one of that period. Periods in which the National Council is not in session shall not be included in the eight-week period.

(5) If a member has been caught in the act of committing a crime, the authority concerned must notify the President of the National Council without delay that the member has been arrested. Where the National Council or, when it is not in session, the appropriate standing committee so requests, the member must be released from custody, or the legal proceedings as a whole must cease.

(6) The immunity of members ends on the day on which the newly elected National Council is convened; the immunity of persons holding office in the National Council beyond that date shall end on expiry of their term of office.

II. The facts

On 12 November 2008 a press release was published on the Austria Press Agency's Original Text Service (OTS) that reads as follows:

'Swoboda: Meeting between Klaus and Irish opponents of the EU Reform Treaty is scandalous

Subheading: "Czech EU Presidency has got off to a false start before it has even begun"

Vienna (SK) - The SPÖ Member of the European Parliament Hannes Swoboda has described the meeting between the Czech President Vaclav Klaus and the Irish opponent of the EU Reform Treaty Declan Ganley as "scandalous". "Not because Ganley is an opponent of the Lisbon Treaty, but because this man spreads many lies and moreover the funding of his activities is extremely opaque and dubious", Swoboda told the SPÖ press service on Wednesday. The Czech EU Presidency had got off to a false start even before it had begun. "These activities and the fact that the government is on the brink of collapse demonstrate the need to provide the EU with more stable institutions. The task of the Reform Treaty is precisely that", concluded Swoboda. (End) ps'

The Vienna Regional Criminal Court is requesting a waiver of Mr Swoboda's immunity pursuant to Article 10(a) of the Protocol (No 36) on the Privileges and Immunities of the European Communities (1965) and consent to proceedings against him under criminal and media law. The Regional Criminal Court provides the following justification for its request:

'In a private prosecution brought before the Vienna Regional Criminal Court on 21 November

2008, Declan Ganley called for Dr Hannes Swoboda to be sentenced for defamation in accordance with Article 111 of the Austrian Criminal Code on the grounds that he had made the following statement to the SPÖ press service, published in a release issued by the Austria Press Agency (APA) Original Text Service (OTS) on 12 November 2008: "Not because Ganley is an opponent of the Lisbon Treaty, but because this man spreads many lies and moreover the funding of his activities is extremely opaque and dubious".

The private plaintiff regards this claim as constituting defamation, since in this statement Dr Hannes Swoboda accused the plaintiff of lying. The significance of the statement was that the private plaintiff was described as a (notorious) liar. The allegation of mendacity constituted punishable defamation of character. The allegation of lying constituted an allegation as regards behaviour within the meaning of Article 111(1) of the Austrian Criminal Code. The allegation insinuated that the private plaintiff had consciously (consistently) made untrue statements. In the absence of specific details to support the allegation of lying, that allegation constituted defamation within the meaning of Article 111(1), option 1 of the Austrian Criminal Code. The allegation of being a liar or of notoriously lying and spreading many lies made the plaintiff contemptible in public esteem.

Dr Hannes Swoboda should be required to justify carrying out the actions described in Article 111(2) of the Austrian Criminal Code. The offending statement by Dr Hannes Swoboda was published in a press release issued by his party, as he had intended. It was precisely for this reason that Dr Hannes Swoboda had made the untenable and unlawful accusation to the press service and encouraged its dissemination, so that this allegation would be passed on and made accessible to a broad section of the public.

Inter alia, the private plaintiff requested that the Vienna Regional Criminal Court should secure a waiver of Dr Hannes Swoboda's immunity by means of a request to the President of the European Parliament. The accused had not made the offending statement during a session of Parliament but to the press, and the fact that he did not enjoy substantive immunity meant that he could be prosecuted.'

III. Assessment

Pursuant to Article 9 of the Protocol on Privileges and Immunities, Members of the European Parliament enjoy unlimited protection from legal proceedings '*in respect of opinions expressed [...] by them in the performance of their duties*'.

There can be no question of waiving immunity if the actions of which the Member is being accused were carried out in the performance of his duties or in direct connection with those duties. It follows that Parliament must defend a Member's immunity pursuant to Article 9 if the actions in question were carried out in performance of his duties or in direct connection with them.

Mr Swoboda's statements that refer to the private plaintiff, as reproduced in the press release of 12 November 2008, cannot be separated from their overall context. They are jointly and directly connected to the comments and opinions expressed by Mr Swoboda in relation to a meeting between the Czech President Vaclav Klaus and the private plaintiff, Mr Declan Ganley, a known opponent of the Lisbon Treaty, on the subject of the (then forthcoming)

Czech Presidency, the EU institutions and the tasks of the Lisbon Treaty.

In expressing his views on such fundamental European Union issues to his voters, he was performing his duties as a Member of the European Parliament. The fact that his statements also concerned, in particular, the attitude to the Lisbon Treaty of the President of the EU Member State that was shortly to take over the Council Presidency places those statements in the context of a legitimate political discussion.

This discussion must be seen in its context and cannot be divided up into individual components. It follows that Mr Swoboda enjoys the absolute protection afforded by Article 9 of the Protocol on Privileges and Immunities with regard to all the statements he made in this connection in performance of his duties.

It should be stressed that the committee is not expressing a view on the guilt or innocence of the Member concerned or on the advisability of bringing criminal proceedings on the grounds of the statements attributed to the Member. It is simply a question of whether the statement attributed to the Member was made ‘in the performance of his duties’.

However, Mr Swoboda also enjoys protection with regard to his statements as reproduced in the press release of 12 November 2008 on the basis of point (a) of the first paragraph of Article 10 of the Protocol, and his immunity should not be waived.

Firstly, it should be stressed that parliamentary immunity is not a privilege granted to individual Members of Parliament but the guarantee for the independence of Parliament and its Members from other institutions.

The committee has repeatedly stressed that parliamentary immunity is intended in particular to protect Members’ freedom of expression and freedom of political debate. The relevant committee in the European Parliament has always held as a fundamental principle that, in all cases where the actions or statements of which a Member is accused are an integral part of, or directly connected with, his political activity, immunity cannot be waived.

This includes, for example, expressions of opinion deemed to be part of a Member’s political activity made at demonstrations, at public meetings, in political publications, in the press, in a book, on television, by signing a political tract and even in a court of law.

In this light too, the remarks in question are linked to the Member’s political activity.

Furthermore, it can be assumed that the case involves ‘*fumus persecutionis*’, i.e. the suspicion that criminal proceedings by way of a private prosecution have been brought against Mr Swoboda with the intention of undermining the Member’s political activity.

IV. Conclusion

In the light of the above considerations and after examining the reasons for and against a waiver of immunity, the Committee on Legal Affairs decides not to waive Mr Swoboda’s immunity.

ANNEX

Auszug aus dem österreichischen Bundes-Verfassungsgesetz (B-VG):

Artikel 57. (1) Die Mitglieder des Nationalrates dürfen wegen der in Ausübung ihres Berufes geschehenen Abstimmungen niemals, wegen der in diesem Beruf gemachten mündlichen oder schriftlichen Äußerungen nur vom Nationalrat verantwortlich gemacht werden.

(2) Die Mitglieder des Nationalrates dürfen wegen einer strafbaren Handlung – den Fall der Ergreifung auf frischer Tat bei Verübung eines Verbrechens ausgenommen – nur mit Zustimmung des Nationalrates verhaftet werden. Desgleichen bedürfen Hausdurchsuchungen bei Mitgliedern des Nationalrates der Zustimmung des Nationalrates.

(3) Ansonsten dürfen Mitglieder des Nationalrates ohne Zustimmung des Nationalrates wegen einer strafbaren Handlung nur dann behördlich verfolgt werden, wenn diese offensichtlich in keinem Zusammenhang mit der politischen Tätigkeit des betreffenden Abgeordneten steht. Die Behörde hat jedoch eine Entscheidung des Nationalrates über das Vorliegen eines solchen Zusammenhanges einzuholen, wenn dies der betreffende Abgeordnete oder ein Drittel der Mitglieder des mit diesen Angelegenheiten betrauten ständigen Ausschusses verlangt. Im Falle eines solchen Verlangens hat jede behördliche Verfolgungshandlung sofort zu unterbleiben oder ist eine solche abzurechnen.

(4) Die Zustimmung des Nationalrates gilt in allen diesen Fällen als erteilt, wenn der Nationalrat über ein entsprechendes Ersuchen der zur Verfolgung berufenen Behörde nicht innerhalb von acht Wochen entschieden hat; zum Zweck der rechtzeitigen Beschlussfassung des Nationalrates hat der Präsident ein solches Ersuchen spätestens am vorletzten Tag dieser Frist zur Abstimmung zu stellen. Die tagungsfreie Zeit wird in diese Frist nicht eingerechnet.

(5) Im Falle der Ergreifung auf frischer Tat bei Verübung eines Verbrechens hat die Behörde dem Präsidenten des Nationalrates sogleich die geschehene Verhaftung bekanntzugeben. Wenn es der Nationalrat oder in der tagungsfreien Zeit der mit diesen Angelegenheiten betraute ständige Ausschuss verlangt, muss die Haft aufgehoben oder die Verfolgung überhaupt unterlassen werden.

(6) Die Immunität der Abgeordneten endet mit dem Tag des Zusammentrittes des neugewählten Nationalrates, bei Organen des Nationalrates, deren Funktion über diesen Zeitpunkt hinausgeht, mit dem Erlöschen dieser Funktion.

Auszug aus dem österreichischen Strafgesetzbuch: Üble Nachrede §111

(1) Wer einen anderen in einer für einen Dritten wahrnehmbaren Weise einer verächtlichen Eigenschaft oder Gesinnung zeiht oder eines unehrenhaften Verhaltens oder eines gegen die guten Sitten verstößenden Verhaltens beschuldigt das geeignet ist, ihn in der öffentlichen Meinung verächtlich zu machen oder herabzusetzen, ist mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen.

(2) Wer die Tat in einem Druckwerk, im Rundfunk oder sonst auf eine Weise begeht, wodurch die üble Nachrede einer breiten Öffentlichkeit zugänglich wird, ist mit Freiheitsstrafe bis zu einem

Jahr oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen,

(3) Der Täter ist nicht zu bestrafen, wenn die Behauptung als wahr erwiesen wird. Im Fall des Abs. 1 ist der Täter auch dann nicht zu bestrafen, wenn Umstände erwiesen werden, aus denen sich für den Täter hinreichende Gründe ergeben haben, die Behauptung für wahr zu halten.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	31.3.2009
Result of final vote	+: 9 -: 0 0: 0
Members present for the final vote	Carlo Casini, Monica Frassoni, Giuseppe Gargani, Klaus-Heiner Lehne, Manuel Medina Ortega, Hartmut Nassauer, Aloyzas Sakalas, Francesco Enrico Speroni, Diana Wallis