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REPORT

on the request for waiver of the immunity of Krzysztof Lisek
(2009/2244(IMM))

Committee on Legal Affairs

Rapporteur: Eva Lichtenberger

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for waiver of the immunity of Krzysztof Lisek (2009/2244(IMM))

The European Parliament,

- having regard to the request for waiver of the immunity of Krzysztof Lisek, forwarded by the Polish judicial authorities on 5 November 2009 and announced in plenary sitting on 14 December 2009,
 - having heard Krzysztof Lisek in accordance with Rule 7(3) of its Rules of Procedure,
 - having regard to Articles 8 and 9 of Protocol No 7 on the Privileges and Immunities of the European Union annexed to the Treaties,
 - having regard to the judgments of 12 May 1964 and 10 July 1986¹ of the Court of Justice of the European Union,
 - having regard to Article 151 of the Constitution of the Republic of Poland,
 - having regard to Rules 6(2) and 7 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A7-0301/2010),
- A. whereas criminal proceedings have been brought against Krzysztof Lisek, Member of the European Parliament, by the Polish judicial authorities, Mr Lisek being accused in the Koszalin Court of criminal offences under Article 296(1) and (3) of the Penal Code of 6 June 1997 published in the Journal of Laws of 1997, No 88, Item 553, as amended; Article 586 of the Commercial Companies Code of 15 September 2000 published in the Journal of Laws of 2000, No 94, Item 1037, as amended; Article 77(1) and (2) of the Accountancy Act of 29 September 1994 (consolidated text published in Journal of Laws 2002, No 76, Item 694), as amended),
- B. whereas, according to Article 9 of the Protocol on the Privileges and Immunities of the European Union, during the sessions of the European Parliament its Members enjoy in the territory of their own State the immunities accorded to members of their parliament; whereas immunity cannot be claimed when a Member is caught in the act of committing an offence; and whereas this does not prevent the European Parliament from exercising its right to waive the immunity of one of its Members,
- C. whereas the charges brought against Mr Lisek do not relate to opinions expressed or votes cast in the performance of his duties as a Member of the European Parliament,
- D. whereas, according to the Article 105 of the Constitution of the Republic of Poland, a member of the national Parliament (Sejm) shall not be subject to criminal liability without

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

the consent of the Parliament,

- E. whereas Article 105 goes on to provide that a member of the national parliament shall not be liable for activities performed within the scope of a deputy's mandate during the term thereof nor following expiry thereof,
- F. whereas Mr Lisek is essentially charged with offences in relation to his management and accounting activities as chairman of the board of the Polish Youth Card Association and Campus Sp. during a period prior to his election to the European Parliament; and whereas the offences with which Mr Lisek is charged have nothing to do with his activities as a Member of the European Parliament,
- G. whereas no cogent evidence has been adduced as to the existence of any *fumus persecutionis*,
- H. whereas it is therefore appropriate to waive his immunity,
 - 1. Decides to waive the immunity of Krzysztof Lisek;
 - 2. Instructs its President to forward this decision, and the report of the committee responsible, immediately to the appropriate authority of the Republic of Poland.

EXPLANATORY STATEMENT

I. FACTS

At the sitting of 14 December 2009 the President announced, under Rule 6(2) of the Rules of Procedure, that he had received a letter sent by the Polish judicial authorities on 5 November 2009 requesting the waiver of the parliamentary immunity of Krzysztof Lisek.

The President referred the request to the Committee on Legal Affairs under Rule 6(2).

The District prosecutor in Koszalin asked to the European Parliament to waive the immunity of its Member, Krzysztof Lisek, against whom legal proceedings are being taken in Case V Ds 24/09.

Krzysztof Lisek is accused in the proceedings pending in the Koszalin Court of criminal (legal) offences under:

- Article 296(1) and (3) of the Penal Code of 6 June 1997 published in the Journal of Laws of 1997, No 88, Item 553, as amended;
- Article 586 of the Commercial Companies Code of 15 September 2000 published in the Journal of Laws of 2000, No 94, Item 1037, as amended;
- Article 77(1) and (2) of the Accountancy Act of 29 September 1994 (consolidated text published in Journal of Laws 2002, No 76, Item 694, as amended).

The case against Krzysztof Lisek is that during a period extending from at least 31 December 2002 to 31 October 2006 in Gdańsk, while chairman of the board of the Polish Youth Card Association and, as such, responsible for managing the said Association's material assets and for safeguarding its material interests, he breached the obligations incumbent upon him in that.

During the period from 10 February 2005 to 22 November 2005 in Hawa, while chairman of the board of the Campus Sp., he failed to file for bankruptcy of Campus Sp. despite the fact that the company's debts exceeded the value of its assets and thereby fulfilled the conditions for declaration of bankruptcy.

During the period from 30 September 2004 to 31 December 2005 in Gdańsk, while chairman of the board of the Polish Youth Card Association, he unlawfully permitted the entry of inaccurate information in the accounting registers, annual balance sheet, financial report and supplementary data thereto of the Polish Youth Card Association for the years 2004 and 2005, through failure to enter in the accounting registers or to include in the annual balance sheet drawn up for the years 2004 and 2005, and in the financial report and supplementary data thereto for the years 2004 and 2005 of the said Association, loans made by the Polish Youth Card Association.

II. THE LAW

(a) Union law

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 measure 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.

The procedure in the European Parliament is governed by Articles 6 and 7 of the Rules of Procedure. The relevant provisions read as follows:

Rule 6 - Waiver of immunity:

1. *In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in performance of their duties.*
2. *Any request addressed to the President by a competent authority of a Member State that the immunity of a Member be waived shall be announced in Parliament and referred to the committee responsible.*

(...)

Rule 7 - Procedure on immunity:

1. *The committee responsible shall consider without delay and in the order in which they have been submitted requests for the waiver of immunity or requests for the defence of immunity and privileges.*
2. *The committee shall make a proposal for a decision which simply recommends the adoption or rejection of the request for the waiver of immunity or for the defence of immunity and privileges.*
3. *The committee may ask the authority concerned to provide any information or explanation which the committee deems necessary for it to form an opinion on whether immunity should be waived or defended. The Member concerned shall*

be given an opportunity to be heard; he may bring any documents or other written evidence he deems relevant. He may be represented by another Member.

(...)

- 6. In cases concerning the defence of immunity or privileges, the committee shall state whether the circumstances constitute an administrative or other restriction imposed on the free movement of Members travelling to or from the place of meeting of Parliament or an opinion expressed or a vote cast in the performance of the mandate or fall within aspects of Article 10 of the Protocol on Privileges and Immunities which are not a matter of national law, and shall make a proposal to invite the authority concerned to draw the necessary conclusions.*
- 7. The committee may offer a reasoned opinion about the competence of the authority in question and about 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.*

(...)

(b) National law

The Constitution of the Republic of Poland

Art. 105.

- 1. A Deputy shall not be held liable for activities performed within the scope of a Deputy's mandate during the term thereof nor following expiry thereof. Regarding such activities, a Deputy can only be held liable before the Sejm and, in a case where he has infringed the rights of third parties, he may only be proceeded against before a court with the consent of the Sejm.*
- 2. From the day of announcement of the results of the elections until the day of the expiry of his mandate, a Deputy shall not be subjected to criminal liability without the consent of the Sejm.*
- 3. Criminal proceedings instituted against a person before the day of his election as Deputy, shall be suspended at the request of the Sejm until the time of expiry of the mandate. In such instance, the statute of limitation with respect to criminal proceedings shall be extended for the equivalent time.*
- 4. A Deputy may consent to be brought to criminal liability. In such instance, the provisions of paras. 2 and 3 shall not apply.*
- 5. A Deputy shall be neither detained nor arrested without the consent of the Sejm, except for cases in flagrante delicto and in which his detention is necessary for securing the proper course of proceedings. Any such detention shall be immediately communicated to the Marshal of the Sejm, who may order an immediate release of the Deputy.*

6. *Detailed principles of and procedures for bringing Deputies to criminal liability shall be specified by statute.*

Article 296(1) and (3) of the Penal Code of 6 June 1997 published in the Journal of Laws of 1997, No 88, Item 553, as amended

1. Whosoever, while obligated by law, by the decision of a competent body or by contract to manage the property or business activity of a natural person, legal person or organisational unit lacking in legal personality, causes significant economic damage through exceeding the powers assigned to him or by failing to fulfil his obligations shall be subject to punishment by imprisonment of between three months and five years.

3. If the perpetrator of the crime specified in Paragraph 1 or 2 causes economic damage on a large scale, he shall be subject to punishment by imprisonment of between one year and 10 years.

Article 586 of the Commercial Companies Code of 15 September 2000 published in the Journal of Laws of 2000, No 94, Item 1037, as amended

*Whosoever, while serving as a member of a company's management board or as liquidator, fails to declare the bankruptcy of a trading company despite the existence of conditions legally warranting the company's bankruptcy,
- shall be subject to punishment by fine, limitation of freedom or imprisonment of up to one year.*

Article 77(1) and (2) of the Accountancy Act of 29 September 1994 (consolidated text published in Journal of Laws 2002, No 76, Item 694, as amended)

Whosoever illegally permits:

1) the failure to keep accounts, the keeping of accounts in a manner contravening the law or the inclusion of false data in accounts,

2) the failure to draw up a financial report, the drawing up of such a report in a manner contravening the law or the inclusion of false data in such a report

- shall be subject to punishment by fine, imprisonment of up to two years, or both.

III. GENERAL CONSIDERATIONS AND JUSTIFICATION FOR THE PROPOSED DECISION

In view of the above, the Koszalin District Prosecutor's request should be treated as a request for a decision of the European Parliament to waive the immunity of Mr Lisek so that he can be subjected to criminal liability, as is possible under Art. 105(2) of the Polish Constitution.

As far as the applicability of Article 8 of the Protocol is concerned, it should be noted that the charges brought against Mr Lisek do not refer to the opinions expressed or votes cast in the performance of his duties as a member of the European Parliament.

As for Article 9, given that the charges brought against Mr Lisek refer to facts committed in Poland, whose citizenship he enjoyed at the material time, the only applicable part is the one pursuant to which *‘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’*.

Following its established practice, the European Parliament could decide not to waive the immunity of one of its Members if a suspicion existed that the prosecution was based on an intention to prejudice the Member’s political activities (*fumus persecutionis*). There is no clear evidence to that effect in this case.

On the basis of the foregoing and the available documents, it has to be concluded that Mr Lisek’s immunity should be waived.

IV. CONCLUSION

On the basis of the above considerations and pursuant to Article 6(2) of the Rules of Procedure, after considering the reasons for and against waiving the Member’s immunity, the Committee on Legal Affairs recommends that the European Parliament should waive the parliamentary immunity of Krzysztof Lisek.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	27.10.2010
Result of final vote	+: 9 -: 0 0: 0
Members present for the final vote	Raffaele Baldassarre, Marielle Gallo, Antonio Masip Hidalgo, Bernhard Rapkay, Diana Wallis, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Piotr Borys, Eva Lichtenberger