

EUROPEAN PARLIAMENT

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*Committee on Legal Affairs
The Chairman*

12.6.2007

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Proposal for a Council decision on the signature, on behalf of the European Community, and on the provisional application of certain provisions of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis(COM(2006)0725 – 2006/0251(CNS))¹

Dear Mr Chairman,

By letter of 21 March 2007 you asked the Committee on Legal Affairs pursuant to Rule 35(2), to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The committee considered the above question at its meeting of 11 June 2007.

That letter points out that on 13 October 2005 Parliament approved the conclusion of an agreement with Switzerland on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, having regard to the opinion of the Legal Affairs Committee, which considered that the appropriate legal basis was the second paragraph of Article 300(3) of the EC Treaty.

¹ Not yet published in OJ.

As regards the proposals now under consideration, these relate to the conclusion of a Protocol to the agreement with Switzerland so as to allow the Principality of Liechtenstein to accede thereto.

The Civil Liberties Committee notes that the accession of Liechtenstein is provided for in the main agreement, namely in Article 16 of the Schengen Agreement with Switzerland.

The Committee further observes that the question concerning the assent of Parliament arises once again due to the fact that the Protocol extends the Joint/Mixed Committees by including Liechtenstein as a contracting party. That reason is strengthened by the fact that the Committee play a decision-making role with regard to the Protocol.

The Committee draws the attention of the Committee on Legal Affairs to the fact that the same legal arguments in support of including Article 300(3), second subparagraph (assent), as the appropriate legal basis instead of Article 300(3), first subparagraph (consultation), could apply to the conclusion of the Protocol in the same way as Parliament argued that they applied with regard to the conclusion of the main agreement with Switzerland.

Pertinent provisions of the EC Treaty

Article 300(3)

3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3), including cases where the agreement covers a field for which the procedure referred to in Article 251 or that referred to in Article 252 is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time-limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

*By way of derogation from the previous subparagraph, agreements referred to in Article 310, other **agreements establishing a specific institutional framework by organising cooperation procedures**, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained.*

Appraisal

The question to be determined is whether the agreement in question establishes *a specific institutional framework by organising cooperation procedures*.

It is noted, *in limine*, that it is settled case-law of the Court of Justice¹ that the choice of legal basis of Community acts is to be determined solely by reference to objective criteria that are amenable to judicial review, and in particular the aim and content of the act being proposed.

¹ See Case C-338/01 *Commission v. Council* [2004] ECR. I-7829, para. 54; Case C-211/01 *Commission v. Council* [2003] ECR. I-8913, para. 38; Case 62/88 *Greece v. Council* [1990] ECR I-01527, para. 62.

The proposals relate specifically to the signature of a Protocol on the accession of Liechtenstein to an agreement already concluded with the Swiss Confederation.

Whereas the Court of Justice has yet to interpret the concept of a "specific institutional framework" within the meaning of the second subparagraph of Article 300(3), the Legal Affairs Committee has held that the main Agreement required the assent of Parliament under the second subparagraph of Article 300(3) on the ground that it clearly established a "specific institutional framework" (the Joint/Mixed Committees provided for entail the creation of an organisational structure with a discretion to take decisions binding on the contracting parties, in particular with regard to the maintenance of the Agreement and dispute resolution).

It is further observed that protocols are generally concluded on the same legal basis as the main agreement.

Lastly, when the Protocol is concluded, the institutional framework will itself be formally modified, because the Joint/Mixed Committees will be extended through the inclusion of new Members - representing Liechtenstein. To that extent, it is considered that the proposals for Council decisions set out to modify the "*specific institutional framework*" provided for in the main Agreement, and that hence reference should be made to the second subparagraph of Article 300(3) of the EC Treaty.

Conclusion

In light of the foregoing, it is considered that the proposals for Council Decisions set out to modify the "*specific institutional framework*" provided for in the main Agreement, of which the proposed Protocol forms an integral part.

At its meeting of 11 June 2007 the Committee on Legal Affairs accordingly decided, unanimously¹, to recommend that the legal basis should be changed so as to refer to the second paragraph of Article 300(3) of the EC Treaty, which requires the assent and not merely consultation of Parliament.

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the final vote: Cristian Dumitrescu (acting chairman), Lidia Joanna Geringer de Oedenberg (vice-chairwoman), Manuel Medina Ortega (draftsman), Carlo Casini, Janelly Fourtou, Luis de Grandes Pascual, Kurt Lechner, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Hans-Peter Mayer, Michel Rocard, Aloyzas Sakalas, Gabriele Stauner, Diana Wallis, Jaroslav Zvěřina and Tadeusz Zwiefka.