EUROPEAN PARLIAMENT

2004 *2009*

Committee on Legal Affairs
The Chairman

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

Subject: Legal basis of the proposal for a Council decision on the conclusion on behalf of the European Union of the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the latter's association with the implementation, application and development of the Schengen *Acquis* (13054/2004 – COM(2004)0593 – 2004/0199(CNS) – C6-0241/2004)[1]

Dear Mr Chairman,

By letter of 27 January 2005 your predecessor, Mr Jean-Louis Bourlanges, 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 proposal is based on Articles 62, 63(3), 66, and 95, in conjunction with Article 300(2), first subparagraph, second sentence, and Article 300(3), first subparagraph, of the EC Treaty. In this particular case, Parliament need only be consulted.

The Committee considered the above question at its meetings of 3 February and 31 March 2005.

The agreement in question relates to Switzerland's involvement in implementing, applying, and developing the Schengen *acquis*. Switzerland is obliged under the agreement to accept and enforce the Schengen *acquis* as it stands now and may stand in the future. Article 3 establishes a Mixed Committee, consisting of Swiss Government representatives and members of the Council and Commission, which has the power to take decisions in certain areas.

[1] Not yet published in OJ.

The key question is whether a mixed committee of this kind should be considered to establish 'a specific institutional framework by organising cooperation procedures' within the meaning of Article 300(3), second subparagraph, of the EC Treaty, in which case Parliament would have to give its assent.

It is clear from the case law of the Court of Justice of the European Communities (CJEC) that the choice of legal basis is not left to the discretion of the Community legislative authority, but rather must be founded on objective considerations admitting of judicial review. Not least among such considerations are the aim and substance of an act[1].

Given the purpose and content of the proposal for a Council decision on the conclusion of the above-mentioned agreement with Switzerland, the Mixed Committee can be regarded as a 'specific institutional framework'.

A mixed committee of the type concerned serves to establish an organisational structure with a discretionary power to take decisions binding on the parties to the agreement, especially as regards its continuation and the settlement of disputes.

It follows that the correct legal basis has not been invoked, as the proposal for a Council decision should have referred to the second subparagraph of Article 300(3) of the EC Treaty, which provides for the assent procedure, instead of the first, which provides merely for consultation.

At its meeting of 31 March 2005, in the light of the foregoing and on a proposal from Mr Manuel Medina Ortega, the draftsman responsible for legal bases, the Committee on Legal Affairs accordingly decided, unanimously[2], to recommend that the legal basis of the proposal for a Council decision should be Article 300(3), second subparagraph, of the EC Treaty and not the first subparagraph of Article 300(3).

The committee therefore believes that Parliament should ask to be consulted again on the conclusion of the above agreement.

Yours sincerely,

Giuseppe Gargani

[1] See in particular the CJEC judgment of 23 February 1999 in Case C-42/97 *Parliament v Council* [1999] ECR I-869, point 36.

[2] The following were present for the final vote: Andrzej Jan Szejna (acting chairman), Manuel Medina Ortega (draftsman, for Nicola Zingaretti), Alexander Nuno Alvaro (for Antonio Di Pietro), Maria Berger, Marek Aleksander Czarnecki, Bert Doorn, Piia-Noora Kauppi, Kurt Lechner (for Antonio López-Istúriz White), Klaus-Heiner Lehne, Alain Lipietz, Antonio Masip Hidalgo, Aloyzas Sakalas, and Jaroslav Zvěřina.