

Legal Service

SJ-0061/10
EP/KB/AC/jc
D(2010)10579

Brussels, 03 -03- 2010

LEGAL OPINION

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Re : LIBE - Right to interpretation and translation in criminal proceedings - draft Resolution of the Council and the Member State Governments - Article 82(2) TFEU - Article 296, third paragraph, TFEU - duty to refrain from adopting acts not provided for in the legal basis

EXECUTIVE SUMMARY

When considering the proposed directive on the rights to interpretation and to translation in criminal proceeding, the European Parliament and the Council are obliged to refrain from adopting acts not provided for in Article 82 TFEU.

As Article 82(2) TFEU does not provide for the adoption of either resolutions of the Council and the Governments of the Member States or of Council recommendations, the Council should refrain from adopting such acts.

The purpose of the preamble to a legislative act is to indicate the reasons for its substantive provisions.

The inclusion in the preamble of the proposed directive of non-legislative provisions such as those expressed in the draft resolution of the Council and of the Governments of the Member States, would contradict both the purpose of the prohibition of Article 296, third paragraph, TFEU and the case-law on the proper scope of the recitals.

I. INTRODUCTION

1. By letter of 27 January 2010 (annexed), Mr Juan Fernando LÓPEZ AGUILAR, Chairman of the Committee on Civil Liberties, Justice and Home Affairs, requested a legal opinion on a number of questions related to the proposal that the Council adopt a Resolution jointly with the Governments of the Member States¹ along with the proposed directive on the rights to interpretation and to translation in criminal proceedings.²

II. ANALYSIS

A. The first question

"Does the Legal Service confirm that the Council cannot adopt the draft Resolution as a resolution?"

2. The proposal for a directive is based on Article 82(2) TFEU.³ This provides for the adoption of directives by the European Parliament and of the Council, in accordance with the ordinary legislative procedure, establishing minimum rules to facilitate the mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal matters having a cross-border dimension. These directives can concern, inter alia, the rights of individuals in criminal procedure.
3. The possibility of adopting an act such as the resolution at issue depends on the possible application of Article 296, third paragraph, TFEU, which reads as follows:

"[when] considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question".

4. This is a new Treaty provision whose *ratio legis* does not appear explicitly from the remainder of the Treaties. On one reading, it could be said to be intended to avoid the legal uncertainty which might arise if one of the institutions were able to adopt acts acting individually, in an area where the legislative power may only be exercised jointly, or where a binding act were to be accompanied by one or more acts whose legal status is uncertain, such as the draft resolution of the Council and the Governments of the Member States at issue in the present case.

¹ Swedish Presidency proposal for a Resolution of the Council and of the Governments of the Member States meeting within the Council fostering the implementation by Member States of the right to interpretation and to translation in criminal proceedings - CSL 14793/09 (DROIPEN 133 - COPEN 205) of 23 October 2009.

² 2010/0801(COD) - PE-CONS 1/10 (DROIPEN 6 - COPEN 22 - CODES 41) of 22 January 2010.

³ The abbreviation "TEU" used after a Treaty article refers to the Treaty on European Union in the version in force after 1 December 2009, while "TFEU" refers to the Treaty on the Functioning of the European Union.

5. The equivalent provision of the Treaty establishing a Constitution for Europe, Article I-33(2), was explained as being designed principally to avoid the impression that the Union legislates through a multiplicity of non-standard instruments,⁴ though Article 296, paragraph 3, TFEU prohibits the *consideration*, during the legislative process, of acts not provided for, as well as the adoption of such acts.
6. In any case, a resolution adopted jointly by the Council and the Governments of the Member States is clearly not an act "*provided for by the relevant legislative procedure*", i.e. for in Article 82(2) TFEU. Even on a literal reading of Article 296, third paragraph, TFEU, the adoption of such a resolution would be prohibited.
7. As regards the scope of this provision *ratione personae*, in the view of the Legal Service, the prohibition applies to both branches of the European Union legislature, Parliament and the Council, whether they act individually or jointly. Any other interpretation would defeat the purpose of the prohibition adumbrated above.

B. The second question

"Does the Legal Service think that the option of adopting the draft Resolution as a recommendation according to Article 292 TFEU without involving the European Parliament would be lawful?"

8. No. The prohibition imposed by Article 296, third paragraph, TFEU, applies equally to a recommendation, as this is equally "*an act not provided for*" in Article 82(2) TFEU. It should be noted that, while they do not create rights which individuals may rely on in national courts, recommendations may nonetheless have legal effects.⁵
9. Although Article 292 TFEU grants the Council a general power to adopt recommendations, the exercise of this power is precluded by Article 296, third paragraph, TFEU, which applies as a more specific provision in the present circumstances, that is, "*when [Parliament and the Council are] considering draft legislative acts*".

C. The third question

"Would inserting the content of the draft Resolution into the recitals of the Directive represent good law making?"

10. In general terms, it is not for the Legal Service to provide opinions on whether a given draft text is "good law making" or not. What it can do is to say whether a given draft text is in conformity with the relevant EU law or not.

⁴ See CONV 571/03 of the Praesidium of the European Convention of 26 February 2003.

⁵ Case C-322/88 *Grimaldi* [1989] ECR 4407.

11. As far as recitals in legislative acts are concerned, it should be recalled that legal acts, such as regulations, directives and decisions, must state the reasons on which they are based and refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.⁶
12. As stated by the Court of Justice, the *raison d'être* for this obligation is to enable the persons concerned to ascertain the circumstances in which the enacting institution exercised its powers as regards the act in question, in order that they may defend their interests and that the European Union judicature may exercise its power of review.⁷
13. In order to satisfy that requirement, European Union measures must include a statement of the facts and law which led the institutions to adopt them.⁸ Recitals should not reproduce or even paraphrase the provisions of the act nor consist, in whole or in part, of a mere reference to the reasons given for another act.⁹
14. Moreover, the Union institutions have rules on better law-making which have established a number of criteria which should be applied in the drafting of the Union's acts,¹⁰ though these do not *per se* constitute criteria for the validity of an act.
15. Consequently, the inclusion of the above-mentioned draft resolution in a draft legislative act dealing with the same matter would contradict both the purpose of provision established in Article 296, third paragraph, TFEU and the case-law on the proper scope of the recitals.
16. Finally, while a breach of the rules of procedure of an institution is not necessarily a matter which leads to the nullity of the act adopted,¹¹ it may be noted in the context of "good law-making" that Article 7(5) of the Council's Rules of Procedure¹² corresponds, *mutatis mutandis*, to the wording of the new Article 296, third paragraph, TFEU.
17. Therefore, in considering the possibility of including in a draft legislative act the content of a draft resolution provisionally adopted by the Council and the

⁶ Article 296, second paragraph, TFEU.

⁷ See Case 24/62 *Germany v Commission* [1963] ECR 63 and, more recently, Cases C-298/00 P *Italy v Commission* [2004] ECR I-4087, and C-11/00, *Commission v European Central Bank* [2003] I-7147.

⁸ See Case 45/86 *Commission v Council, Generalized tariff preferences*, [1987] ECR 1493.

⁹ See Case 230/78 *Eridania v Ministry of Agriculture and Forestry* [1979] ECR 2749 and Case 73/74 *Papiers Peints de Belgique v Commission* [1975] ECR 1514.

¹⁰ See the Interinstitutional Agreement between European Parliament, Council and Commission on better law-making of 16 December 2003 (OJ C 321 of 31 December 2003, p.1) and the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions.

¹¹ Case C-69/89 *Nakajima All Precision v Council* [1991] ECR I- 2069, paragraph 50.

¹² OJ L 325 of 11 December 2009, p. 35. Article 7(5) reads as follows: "*Where legislative proposals or initiatives are submitted to it the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions, conclusions or declarations other than those accompanying the adoption of the act and intended for entry in the Council minutes.*"

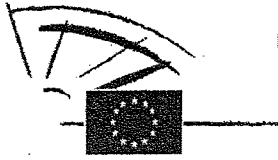
Governments of the Member States which deals with the same matter, each branch of the legislature should also respect the general principle of *patere legem quam ipse fecisti*.

(signed)
Kieran BRADLEY

(signed)
Antonio CAIOLA

(signed)
Approved: Ezio PERILLO, Director

Annex: Letter from Mr Juan Fernando LÓPEZ AGUILAR of 27 January 2010



ΕΥΡΩΠΕΪΚΟ ΠΑΡΛΑΜΕΝΤ ΠΑΡΛΑΜΕΝΤΟ ΕΥΡΩΠΕΟ EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
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Committee on Civil Liberties, Justice and Home Affairs
The Chairman

IPOL-COM-LIBE D(2010)4188

Mr. Christian Pennera
Jurisconsult
Legal Service
KAD 06A007
European Parliament

301071 27.01.2010

Dear Mr. Pennera,

Last October the JHA Council reached political agreement on the amended versions of:

- the European Commission proposal (COM(2009)338) for a Framework decision on the right to interpretation and translation in criminal proceedings,
- a Council Resolution providing for further measures on training for interpreters and translators, accreditation/certification of interpreters and translators as well as their registration (14793/09),
- a Council Resolution on a "Roadmap" for strengthening procedural rights of suspected and accused persons in criminal proceedings.

Due to the entry into force of the Lisbon Treaty, the draft Framework Decision and the draft Resolution attached to it were not formally adopted. The Roadmap was however adopted and afterwards incorporated in the Stockholm Programme.

In December 2009 a group of 13 Member States (BE, DE, ES, EE, FR, HU, IT, LU, AT, PT, RO, FI and SE) tabled an initiative for the adoption of a Directive on the rights to interpretation and translation in criminal proceedings. This is based on the text agreed at JHA Council level in October 2009 and takes no account of amendments proposed by the European Parliament in its draft report. The text has not yet been formally received due to administrative problems at the Council General Secretariat level.

The issue we need to address is how to treat the draft Resolution attached to the draft Framework Decision:

- i) At first the Council General Secretariat announced that it would not be part of the ordinary legislative procedure and would be adopted by the Council as an accompaniment to the Directive. Later however we were informed that Article 7(5) of the (new) Council rules of

procedure, adopted on 30th November 2009, prevents the Council from adopting a Resolution in the same field as the proposed Directive since it states "where legislative proposals or initiatives are submitted to it, the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions, conclusions or declarations other than those accompanying the adoption of the act and intended for entry in the Council minutes." The Council Legal Service has apparently confirmed that this Article 7(5) of the new rules of procedure prevents the Council from adopting the Resolution since it is not an act intended to entry in the Council minutes.

ii) On the request of the Council General Secretariat, the Council Legal Service has confirmed the soundness of a second option, which is to insert the content of the Resolution as recitals in the draft Directive, in so far as such contents relate to the operative Articles of the text.

iii) The Council General Secretariat has suggested a third option, that the Council adopts (all or some of) the contents of the Resolution in the form of a Recommendation on the basis of Article 292 TFEU. The latter possibility would exclude (formal) involvement of the European Parliament, but it could provide a solution in case it concerns content which is not related to the Articles, or if it is impossible to reach an agreement on the text to be inserted in the recitals.

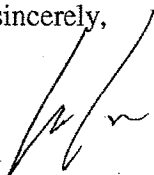
Taking all that into consideration, it would be very helpful if the Legal Service could reply to the following questions:

1. Does the Legal Service confirm that the Council cannot adopt the draft Resolution as a resolution?
2. Does the Legal Service think that the option of adopting the draft Resolution as a recommendation according to Article 292 TFEU without involving the European Parliament would be lawful?
3. Would inserting the content of the draft Resolution into the recitals of the Directive represent good law making?

The LIBE Committee would be grateful if you could provide for at least an informal opinion at the LIBE meeting taking place on 4th February 2010.

Thank you very much in advance

Yours sincerely,



Juan Fernando LOPEZ AGUILAR