



COUNCIL OF  
THE EUROPEAN UNION

Brussels, 30 August 2010 (03.09)  
(OR. fr)

12964/10

LIMITE

JUR 348  
INST 302

### OPINION OF THE LEGAL SERVICE (\*)

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Subject: Draft Framework Agreement between the European Parliament and the Commission

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### INTRODUCTION

1. On 4 March 2010 at the request of Coreper, the Council Legal Service submitted written comments on the European Parliament's Resolution of 9 February 2010 on a future Framework Agreement between the European Parliament and the Commission for the legislative term 2009-2014.<sup>1</sup> It concluded that "*once the Framework Agreement has been concluded between the European Parliament and the Commission, the text should be closely scrutinised. If the wording should meet the calls made by the Parliament in its Resolution of 9 February 2010 in ways which would undermine the institutional balance established by the Treaties, the Legal Service is of the opinion that the Council should bring proceedings for annulment before the Court of Justice*".

- (\*) **This document contains legal advice which is protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents and which the Council of the European Union has not released to the public. The Council retains all its rights in law as regards any unauthorised publication.**

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<sup>1</sup> Opinion of the Legal Service of 4 March 2010, 7149/10 JUR 122 INST 65.

2. Since then, negotiations have started between the European Parliament and the Commission on the text of the Framework Agreement. On 23 June 2010 at the request of the Presidency, the Legal Adviser to the Council submitted to members of Coreper and the chief negotiators of the European Parliament and the Commission the Legal Service's critical comments based on the preliminary draft Framework Agreement as it stood on 19 May 2010, the only text which the Legal Service had been able unofficially to examine. The Legal Adviser to the Council then delivered the opinion<sup>2</sup> that "*this text is not an impartial interpretation*" of the Treaty.
3. On 30 June 2010 on behalf of the Council, the Chairman of Coreper wrote to Mr LEHNE, Member of the European Parliament, and to Mr SEFCOVIC, Vice-President of the Commission, that "*the draft "Framework Agreement", at least in the formulation it had in its 19 May version, which is the only one we know (although unofficially), does not respect the spirit of the Treaties. Actually, we think that some of the provisions of this draft seek to modify the institutional balance between the Institutions, giving prerogatives to the EP which are not provided for in the Treaties, and affecting the autonomy of decision of the Commission*"; he concluded that "*this 'framework agreement', in its present formulation, could not be accepted by the Council*".<sup>3</sup>
4. It has in the meantime become clear that, at the time this letter was sent, negotiations had resulted in an "*agreed text after closure of negotiations on 29 June 2010*". That is the text, finally forwarded to the Chairman of Coreper on 26 July 2010,<sup>4</sup> on which the Legal Service has based the present opinion.

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<sup>2</sup> See the speaking note distributed at the Coreper II lunch on 23 June 2010.

<sup>3</sup> See 11666/10.

<sup>4</sup> See 12717/10.

## ANALYSIS

5. Compliance with the founding Treaties of the Union, in the terms in which they have been ratified by the Member States, is the fundamental principle governing the existence and the functioning of the Union. The Treaties define exhaustively the respective powers conferred on the Institutions (Article 13(2) TEU). Those powers may not be modified by the Institutions themselves either unilaterally or by agreement between them. But the agreed text has the effect of:
- a. modifying the balance established by the Treaties between the Institutions;
  - b. according powers to the Parliament not conferred by the Treaties;
  - c. limiting the autonomy of the Commission and its President.

**A. The agreed text has the effect of modifying the balance established by the Treaties between the Institutions**

6. Under Article 295 TFEU, "*The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature*". Firstly, the agreed text was negotiated between two institutions to the exclusion of the Council and in the absence of the consultation with each other referred to in the said Article. Secondly, it has the effect of modifying in favour of the Parliament the institutional balance defined by the Treaties.<sup>5</sup> Points 1 and 10 of the agreed text refer to the idea of a "*new special partnership*" between the European Parliament and the Commission, an idea not provided for by the Treaties. That "partnership" is in reality designed to establish privileged relations between two institutions to the exclusion of the Council, despite the fact that Article 13(2) TEU lays down that all the institutions shall practice mutual sincere cooperation.

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<sup>5</sup> There is a clear lack of balance between the number of commitments made by the Commission to the European Parliament and the number of commitments made in turn by the latter.

7. Point E of the preamble and point 8 of the agreed text are designed to recognise "*the basic principle of equal treatment for Parliament and the Council*". Such a principle is not provided for by the Treaties, which are on the contrary based on the principle that the Institutions should act only within the limits of the powers conferred on them in the Treaties (see Article 13(2) TEU).<sup>6</sup> Although it is true that the Treaties enshrine equality between the two arms of the budgetary and legislative authority, it is also true that in other areas the respective roles of the Parliament and the Council differ.<sup>7</sup> Consequently, the European Parliament cannot claim a general principle of equal treatment with the Council as a basis for imposing on the Commission new obligations over and above those in the Treaties. Nor can the European Parliament and the Commission argue, on the ground that the Treaties are silent on this issue, that both of them are free to organise relations between them by common agreement, by "*supplementing*" to this end the arrangements specific to the powers conferred upon them, as expressly and exhaustively fixed by the Treaties.
8. Point 41b of the draft is designed to enable the Parliament and the Commission to reach prior agreement on amendment of the Interinstitutional Agreement on better law-making despite the fact that negotiation and conclusion of the Agreement also involved the Council. The principle of sincere cooperation obliges them not to prejudge the outcome of any negotiations on amending this Agreement. Similarly, the second paragraph of (new) point 26 of the agreed text provides that the Parliament and the Commission will, in the context of discussions by the Interinstitutional Working Party on Regulatory Agencies (to which the Council also belongs), aim at a common approach on the role of decentralised agencies and common guidelines for the creation and operation of future agencies. This, however, prejudices action by the legislator, in accordance with the legislative procedures specified by the respective legal bases applicable.

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<sup>6</sup> On the implications of this principle, see point 7 of the aforementioned opinion of the Legal Service of 4 March 2010.

<sup>7</sup> Examples of this are the implementation of Union acts (Article 291 TFEU), the conclusion of international agreements (Article 218 TFEU) or control of implementation of the EU budget (Article 319 TFEU).

B. The agreed text has the effect of according powers to the Parliament not conferred upon it by the Treaties

9. Point 18 of the agreed text refers to an Annex 2 containing detailed provisions for the "*forwarding of confidential information to the European Parliament*". Firstly, the Council has not been consulted, despite the fact that protection of classified information is a matter of common interest. Secondly, some of these provisions and in particular the possibility of access to classified information for unauthorised Members of the European Parliament are not in accordance with the texts applicable and are likely to undermine confidence in the system of management of classified information that has been agreed at Union level.
  
10. Points 9 and 19 to 25, as well as Annex 3, of the agreed text, which contain provisions on the Common Foreign and Security Policy, international agreements and enlargement, raise problems, particularly since they have the effect of according the European Parliament prerogatives which are not provided for in Article 218 TFEU. More especially, this involves the obligations imposed on the Commission by Annex 3 to take due account of the Parliament's comments in the entire process of negotiation and to provide it with a whole series of documents (in particular the draft negotiating directives, draft amendments to negotiating directives, draft negotiating texts or any relevant documents received from third parties, subject to the originator's consent) relating to international negotiations. Such obligations, combined with the obligation on the Commission to take account of the European Parliament's views and inform it of the way it has incorporated them in the texts negotiated, are not provided for by the Treaty.
  
11. Point 21 of the draft Agreement provides in particular that the Commission will facilitate the participation of Members of the European Parliament as observers in all relevant meetings under its responsibility before and after international negotiation sessions. This provision would mean participation by the European Parliament in the Union's internal coordination meetings, thereby modifying the procedure laid down in Article 218(4) TFEU, whereby "*The Council may address directives to the negotiator and designate a special committee in consultation with*

*which the negotiations must be conducted"*. According to this Article, the Council is the only Institution competent to decide which committee will be consulted and who will participate. Application of the present provision of the draft Agreement would directly undermine the Council's prerogatives.<sup>8</sup>

12. Point 36c, second paragraph, is designed to give the Parliament right of access to information concerning infringement proceedings against Member States. Such a right of access for Parliament to privileged information on all points concerning dossiers under investigation, whether on a case-by-case basis or in general, is not provided for by Article 258 TFEU.<sup>9</sup> Despite the care taken in drafting it, any application of such a provision would be detrimental to the legitimate interests and rights of the Member States concerned.
13. Some of the provisions of point 13a of the agreed text and Annex 1 thereto are designed to accord the European Parliament a role in the implementation of EU legislation, a role which is not conferred in any way by the Treaties. They provide in particular that the Commission should supply the Parliament with full information on its meetings with national experts and that it may if requested invite the Parliament's experts to such meetings. It must be remembered that the European Parliament has no competence regarding implementation of EU legislation.<sup>10</sup> These provisions, however, would mean participation by the Parliament in meetings of the committees set up to assist the Commission in the exercise of the implementing powers conferred upon it by the legislator,<sup>11</sup> which would go beyond the text of the Treaties. Even though the participation of European Parliament experts in the meetings of committees set up under the committee

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<sup>8</sup> The procedures currently in force for attendance by members of the European Parliament at international conferences as observers should continue to apply: see on this point the opinion of 26 May 2010 in which the Legal Service concludes that "(...) *the entry into force of the Treaty of Lisbon has not altered the legal framework for attendance by members of the European Parliament at international conferences as observers. The institutions' practice in this regard may therefore continue under the terms and conditions set out in the note of 19 October 1998 from the Working Party on General Affairs to Coreper (11759/98)*" (10145/10).

<sup>9</sup> See in this connection point 18 of the aforementioned opinion of the Legal Service of 4 March 2010.

<sup>10</sup> See in this connection the opinion of the Legal Service of 2 February 2006 (5923/06).

<sup>11</sup> The procedures for the exercise of implementing powers conferred on the Commission are currently the subject of Council Decision 1999/468/EC, as amended by Decision 2006/512/EC (consolidated version in OJ C 255, 21.10.2006). In future, they are to form the subject of regulations as referred to in Article 291 TFEU.

procedure would seem to be excluded by the third paragraph of Annex 1, the possibility of such persons participating in Commission meetings with national experts on the "*implementation*" of EU legislation would amount to according the European Parliament - as these are in effect implementing powers - a prerogative which is not conferred upon it by the Treaties.

14. Point 26 of the agreed text, whereby nominees for the post of Executive Director of regulatory agencies should come to parliamentary committee hearings, is not in compliance with the provisions of substantive law in force and the procedures laid down by the legal bases applicable in accordance with the Treaties. In fact, the legislative acts setting up regulatory agencies make exhaustive procedural provision for nominations for the posts in question and the European Parliament is not involved in such procedure.

**C. The agreed text has the effect of limiting the autonomy of the Commission and its President**

15. The first, fourth and fifth paragraphs of point 14 of the agreed text make the Commission, when acting in the context of its power of initiative, subject to time constraints which go beyond the provisions of Article 225 TFEU - as well as modifying the balance of powers between Parliament and Council - and oblige the Commission to ensure "*close and early cooperation*" with the Parliament in the context of citizens' initiatives, which is not provided for by Article 11(4) TEU. In fact:

- a) the time constraints imposed on the Commission by these points modify the balance of powers between the Parliament and the Council in that the former is accorded a right that is different from that which Article 241 TFEU confers on the Council; moreover, these constraints affect the Commission's autonomy and power of legislative initiative, one of the key principles of the Treaty;<sup>12</sup>

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<sup>12</sup> See point 13 of the aforementioned opinion of the Legal Service of 4 March 2010.

- b) in the case of citizens' initiatives, it must be remembered that the European Parliament's role is defined by the first paragraph of Article 24 TFEU and concerns only the establishing of conditions for presenting such an initiative. Any other involvement of the Parliament in the procedure for specific initiatives would therefore go beyond the provisions of the Treaties and detract from the Commission's autonomy and power of initiative.
16. Points 3, 4 and 5 of the agreed text are designed to influence the autonomy of the President of the Commission in his decisions concerning the resignation of a member of the Commission and the reallocation of responsibilities within the Commission, as provided for in Article 17(6) TEU and Articles 246 and 248 TFEU. The exercise of those powers is not made subject by the Treaties to any of the formalities or conditions in the agreed text.<sup>13</sup>
17. Application of points 31 to 33 of the agreed text, which deal with the way legislative procedures operate and amendments of the Parliament are taken into account, would detract from the autonomy of the Commission.<sup>14</sup>
18. Point 36b of the agreed text provides for participation by the European Parliament ("*after having given Parliament the opportunity to express its views*") in the adoption of non-binding provisions ("*soft law*"). The Commission would therefore have to consult the Parliament before adopting the acts referred to in this point, despite the fact that there is no provision for that in the Treaties. However, as already decided by the Court: "*the Treaty alone may [...] empower an Institution to amend a decision-making procedure established by the Treaty*".<sup>15</sup>

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<sup>13</sup> Similar provisions were already contained in the 2005 Framework Agreement and the Legal Service's analysis at the time remains valid. See 7830/05, point 7.

<sup>14</sup> The Legal Service's analysis in 2005 of the corresponding points in the 2005 Framework Agreement apply *mutatis mutandis*: see 7830/05 point 8.

<sup>15</sup> Judgment of 6 May 2008, C-133/06, Parliament/Council, paragraph 55



## CONCLUSIONS

19. The Legal Service is of the opinion that:

- a) the text agreed by the European Parliament and Commission negotiators on 29 June 2010 has the effect, on several points, of modifying the balance between the Institutions that was established by the Treaties and according the Parliament powers which are not conferred upon it by the Treaties;<sup>16</sup>
- b) the content of this text, were it to be concluded by the European Parliament and the Commission, should not therefore be accepted by the Council, given that it does not comply fully with the provisions of the Treaties;
- c) the Council should, by statement published in the Official Journal, reserve the right to submit to the Court of Justice any act or action of the Parliament or the Commission which refers to the Agreement and would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties. The Council should in particular reject the provisions on international agreements, infringement proceedings against Member States and transmission of classified information to the European Parliament.

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<sup>16</sup> The fact that point D of the texts's preamble affirms that the Framework Agreement should be interpreted in conformity with the institutional framework as organised by the Treaties (which is only stating the obvious) does not affect the remarks elaborated in the present opinion.