

Committee on Legal Affairs
The Chairman

310354 24.06.2010

Ref. D(2010)32838

Mr Jerzy BUZEK
President of the European Parliament
PHS 11B014
Brussels

Subject: Recommendation under Rule 128(3) to challenge the validity of Council Decision 2010/252/EU

Dear President,

On 11 May 2010, the Chairman of the Committee on Civil Liberties, Justice and Home Affairs, Juan Fernando López Aguilar, wrote to me requesting that the Committee on Legal Affairs recommend a challenge to the validity of Council Decision 2010/252/EU¹ (the Decision) "on procedural grounds" whilst at the same time inviting "the Court to preserve the effects of the measure until a new legislative act has been adopted".

The Decision was adopted on the basis of Article 12(5) of the Schengen Borders Code which provides for "additional measures governing surveillance" to be adopted under a comitology procedure². Since 10 April 2008, the regulatory procedure with scrutiny (hereinafter, "RPS") applies³.

As argued by Parliament's Legal Service, the content of the Decision does not fall within the concept of "additional measures governing surveillance" and therefore should not have been adopted on the basis of Article 12(5) of the Schengen Borders Code. Seizing a ship, questioning persons on board, modifying the ship's course or conducting it to a third country or to the host Member State⁴ are actions which go beyond the scope of the legal basis provided for in Article 12(5) of the Schengen Borders Code. The Decision is therefore *ultra vires* and should not have been adopted as an implementing measure, but rather by way of legislation adopted by Parliament and the Council.

Parliament should therefore challenge the Decision's validity before the Court of Justice. As the committee responsible for the subject-matter of the Decision does not take issue with its

¹ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20, 4.5.2010.

² Regulation No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, OJ L 105/1, 13.4.2006.

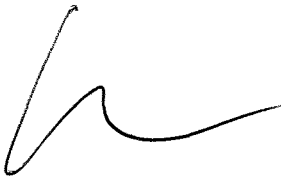
³ Regulation No 296/2008 of the European Parliament and of the Council amending [the Schengen Borders Code] as regards the implementing powers conferred on the Commission; OJ L 97/60, 9.4.2008.

⁴ Article 2(4) of Annex (Part I).

content and for reasons of legal certainty, it would be appropriate to invite the Court, should it annul the Decision wholly or in part, to maintain its effects until a new legislative act has been adopted.

At its meeting of 23 June 2010, the Committee on Legal Affairs adopted the present recommendation unanimously (by 9 votes in favour and no abstention)⁵.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'K. Lehne', written in a cursive style.

Klaus-Heiner LEHNE

cc: Fernando LOPEZ AGUILAR, Chair of the Civil Liberties, Justice and Home Affairs Committee

⁵ Sebastian Valentin Bodu, Gerald Häfner, Vytautas Landsbergis, Klaus-Heiner Lehne, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Zbigniew Ziobro, Tadeusz Zwiefka