



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C** CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



THE IMMUNITY OF MEMBERS OF THE EUROPEAN PARLIAMENT

In-depth analysis for the JURI Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

THE IMMUNITY OF MEMBERS OF THE
EUROPEAN PARLIAMENT

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this in-depth analysis examines the immunity of Members of the European Parliament. It describes the scope of their immunity, as clarified by the Court of Justice of the European Union, together with the procedures followed by Parliament in cases of waiver or defence of parliamentary immunities. Lastly, it looks at the practice of the competent committee in order to infer the general principles underlying its decisions.

DOCUMENT REQUESTED BY THE COMMITTEE ON LEGAL AFFAIRS

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LIST OF ABBREVIATIONS

- 1976 Act** Act concerning the election of the representatives of the European Parliament by direct universal suffrage, done on 20 September 1976
- CFREU** Charter of Fundamental Rights of the European Union
- CJEU** Court of Justice of the European Union
- ECHR** Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms
- ECtHR** European Court of Human Rights
- JURI** Committee on Legal Affairs
- PPI** Protocol on the Privileges and Immunities of the European Union
- RoP** Rules of Procedure of the European Parliament
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Members of the European Parliament are granted a special regime of immunities: they enjoy absolute immunity for the votes cast and opinions expressed in the performance of their duties, and protection from prosecutions and restrictions of their personal freedom during the sessions of the Parliament. While absolute immunity derives exclusively from EU law, and is therefore uniform for all Members, the scope of personal immunity partly depends on the rules applicable to national Members of Parliament.

Immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members. Since the application of parliamentary immunity may constitute an infringement of citizens' fundamental rights (such as access to justice and equality before the law), its scope is limited by the need to strike a fair balance with the protection of such rights.

Absolute immunity for opinions and votes (also called parliamentary privilege, *irresponsabilité*, *Verantwortungsfreiheit* or *Abstimmungs- und Redefreiheit*, *insindacabilità*) ensures enhanced protection for MEPs' freedom of expression. It prevents any type of judicial proceedings being brought against Members for votes or opinions expressed in the performance of their duties in the course of the mandate. It continues to apply even after the end of the mandate, and may not be waived or renounced.

As clarified by the Court of Justice, absolute immunity is in essence intended to apply to votes and opinions expressed in the premises of the European Parliament. However, it is not impossible that an opinion expressed outside the European Parliament may amount to an exercise of a Member's duties, provided that it is an assertion amounting to a subjective appraisal which presents a direct and obvious link with a general interest of concern to citizens. The final decision as to whether such an opinion is expressed in the exercise of the Member's duties pertains to the exclusive jurisdiction of the national courts.

Personal immunity (also called *inviolabilité*, *Unverletzlichkeit* or *Unverfolgbarkeit*, *improcedibilità*) safeguards MEPs' independence, protecting them from pressure in the form of threats of arrest or legal proceedings. Its scope depends on national rules, as well as on EU law: in particular, when Members are on the territory of their own Member State, they are entitled to the same protection that domestic law grants to Members of the national Parliament. It is only when Members are in another Member State, or are travelling to or from the place of meeting of the European Parliament, that they are covered by an immunity whose scope is defined exclusively by EU law.

Personal immunity applies only for the duration of the Member's mandate, but it also covers acts committed before its commencement. It extends to any proceedings, if punitive in nature, but does not apply to Members caught *in flagrante delicto*. Personal immunity may be waived by the European Parliament.

The Rules of Procedure of the European Parliament, the case-law of the Court of Justice, and the practice of the Committee on Legal Affairs clarify how cases of immunity are dealt with and which general principles apply in such cases.

1. INTRODUCTION

KEY FINDINGS

- Members of the European Parliament enjoy a double system of immunity: absolute immunity for the opinions expressed and votes cast in the exercise of their duties, and personal immunity from arrest and detention during the sessions of the European Parliament.
- Parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members.
- The scope of MEPs' immunities depends on the need to balance Member's freedom of expression and the protection of the independence of Parliament with the fundamental rights of others (in particular, the right to access to justice) and the rule of law.

1.1. Parliamentary immunities – an overview

The European Union enjoys in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Union (Article 343, TFEU). In accordance with Articles 8 and 9 of that Protocol (hereinafter PPI), Members of the European Parliament enjoy a specific regime of immunities, whose scope and manner of application is further clarified by the Rules of Procedure of the European Parliament (RoP) and the case-law of the Court of Justice of the European Union (CJEU).

Members of the European Parliament, in common with members of national Parliaments in most EU Member States, enjoy a double system of immunity: absolute immunity for the opinions expressed and votes cast in the exercise of their duties, and personal immunity from arrest and detention during the sessions of the European Parliament. However, while absolute immunity is based exclusively on EU law, and is therefore uniform for all Members, the scope of personal immunity depends, in most cases, on the rules applicable to national Members of Parliament.

Articles 8 and 9, PPI, which have the status of EU primary law, provide as follows:

Article 8

Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.

Article 9

During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

These provisions are further clarified in EU secondary law, in particular, in Rules 5 to 9 of the European Parliament's Rules of Procedure and in Annex VI thereto.

The RoP make it clear that parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members (Rule 5) and that Parliament, in the exercise of its powers in respect of privileges and immunities, acts to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties (Rule 6). In addition, Rules 7 to 9 describe the procedures that Parliament follows when dealing with requests to defend or to waive a Member's immunity, as well as the special procedure applicable in cases where urgent action is necessary.¹

In addition, Annex VI to the RoP specifies that the committee responsible for privileges and immunities, as well as for verification of Members' credentials, is the Committee on Legal Affairs.²

The Court of Justice of the European Union³ has confirmed the need to distinguish between the immunity based on "Article 8 of the Protocol, which establishes absolute immunity, the content of which is determined solely by European law and which cannot be waived by the Parliament," and the one based on Article 9 of the Protocol, which "refers to the national rules of the Member State of origin of the Member of the Parliament as regards the terms and scope of the immunity established in favour of that Member" and which "can, if necessary, be waived by the Parliament." Thus, in this analysis the two types of immunity will be examined separately.

1.1.1. Absolute immunity for opinions and votes (Article 8, PPI)

The immunity provided for in Article 8 serves to protect the freedom of expression and independence of Members of the European Parliament, as has been expressly recognised by the Court of Justice of the European Union.⁴ This rule provides for an absolute immunity barring any judicial proceedings in respect of an opinion expressed or a vote cast in the exercise of parliamentary duties.⁵ Thus, this form of immunity clearly falls under the category of **substantive** or **functional immunity**, also known as **non-liability** or **parliamentary privilege** (*irresponsabilité* in French, *Verantwortungsfreiheit* or *Abstimmungs- und Redefreiheit* in German, *insindacabilità* in Italian).

In practice, Members of the European Parliament enjoy an enhanced protection of their freedom of expression with regard to opinions expressed in the exercise of their functions:

¹ The text of the relevant rules of procedure is examined in Chapter 4 and included in Annex I to the present analysis.

² See Rules of Procedure of the European Parliament, 8th parliamentary term, Annex VI, Section XVI, point 10.

³ See CJEU, Bruno Gollnisch v European Parliament, T-346/11 and T-347/11, EU:T:2013:23, at para. 51.

⁴ CJEU, Alfonso Luigi Marra v Eduardo De Gregorio and v Antonio Clemente, C-200/07 and C-201/07, EU:C:2007:356 [hereinafter "*Marra case*"], para. 27.

⁵ Ibid.

this immunity therefore aims at protecting the integrity of political discourse and, thus, is of paramount importance for the proper functioning of representative democracy.⁶ Indeed, as underlined by Advocate General Poiares Maduro, "taking measures against a Member in respect of an opinion he has expressed or a vote he has cast in his capacity as an MEP would offend against the institution of Parliament itself, since it would undermine its place as the forum *par excellence* of open debate and democratic deliberation."⁷ This form of immunity, while limited in scope (it covers only votes and opinions expressed in the exercise of the Member's functions), is unlimited in time: as long as the vote or opinion is connected to the Member's mandate, it may not be the subject of any legal proceedings, even once the person steps down from the mandate. Moreover, this immunity depends exclusively on EU law, and its contents and scope of application must be established on the basis of EU law alone.⁸

Absolute immunity of Members of the European Parliament cannot be waived, nor can it be renounced by the Member concerned. Thus, it is not subject to the procedure for waiver of immunity laid out in the RoP.⁹ Absolute immunity is, in essence, intended to apply to statements made by Members within the precincts of the European Parliament; however, it is not impossible that statements expressed outside the Parliament may also amount to an exercise of a Member's duties.¹⁰ In the latter case, doubts may sometimes arise as to whether the opinion was expressed "in the performance of their duties;" the case-law of the Court of Justice and the practice of the Legal Affairs Committee have therefore clarified how this sentence is to be interpreted, and whose is the power to make a final determination on this matter.

1.1.2. Immunity from prosecution, arrest and detention (Article 9, PPI)

According to the Court of Justice,¹¹ the objective of Article 9 of the Protocol is to safeguard the independence of Members by ensuring that pressure, in the form of threats of arrest or legal proceedings, is not brought to bear on them during the sessions of the Parliament. It is therefore clear that this immunity falls under the category of **personal immunity**, also referred to as immunity *ratione personae*, or **inviolability** (*inviolabilité* in French, *Unverletzlichkeit* or *Unverfolgbarkeit* in German, *improcedibilità* or *inviolabilità* in Italian).

The scope of MEPs' personal immunity varies depending on whether they are in the territory of their own Member State, or in the territory of any other Member State. Members who are in the territory of another Member State, or are travelling to or from the place of meeting of the European Parliament, enjoy an immunity which is regulated directly by EU law: they are therefore protected from any measure of detention and from legal proceedings, in accordance with Article 9(1)(b) and (2) PPI. In contradistinction, when a Member is in the territory of his own Member State, the scope of his immunity depends on national law:¹² MEPs from different Member States enjoy very different regimes of personal

⁶ See Lenaerts, K., "The principle of democracy in the case law of the European Court of Justice", in *International and Comparative Law Quarterly*, 2013, 62(2), 271-315, at 291.

⁷ Opinion of Advocate General Poiares Maduro in the *Marra* case, 26 June 2008, para. 12.

⁸ CJEU, *Patriciello*, C-163/10, EU:C:2011:543 [hereinafter "*Patriciello* case"], para. 25.

⁹ CJEU, *Marra* case, para. 44.

¹⁰ CJEU, *Patriciello* case, cited above, at paras 29-30.

¹¹ CJEU, *Ashley Neil Mote v European Parliament*, T-345/05, EU:T:2008:440, para. 50.

¹² For an analysis of the scope of such immunity, through a review of the relevant national provisions in all Member States, see European Parliament, Policy Department C, *Handbook on the incompatibilities and immunity of the Members of the European Parliament*, 2014, PE 493.029 available at www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493029/IPOL-JURI_ET%282014%29493029_EN.pdf. Also see Hardt, S., *Parliamentary immunity*, Intersentia, Cambridge, 2013.

immunity (from full protection from arrest, detention and prosecution, to no protection at all).

As a general rule, personal immunity, when applicable, only protects Members as long as they are in office; its aim is to ensure that the exercise of their mandate is not hindered by politically motivated accusations or convictions. Personal immunity is not limited to acts committed in the exercise of the functions, but extends to any act committed by the Member. However, such immunity is temporary: once the Member no longer performs the function, he/she may be subjected to prosecution and detention even for acts committed while in office, since this type of immunity is meant to protect the person, not the function, from politically motivated prosecutions. Moreover, as is explicitly stated in Article 9(3) PPI, and regardless of national laws, personal immunity never extends to cover cases in which a Member is caught in the act of committing the crime (*in flagrante delicto*), since in such cases the risk of a politically motivated prosecution is very limited if not absent. Additionally, the European Parliament has the right to waive the immunity and it generally does so save if, after examining the circumstances of the case, it finds that there are reasons to believe that the prosecution is politically motivated (so called *fumus persecutionis*: see below, at 4.2.3).¹³

1.1.3. Relationship with the privilege provided for by Article 7, PPI

A final clarification is necessary before we proceed to examine, in detail, the scope of parliamentary immunity. In addition to the immunity provided for in Articles 8 and 9, PPI, MEPs are also entitled to a special protection of their freedom of movement under Article 7 of the Protocol. In particular, Article 7(1) provides that: *No administrative or other restriction shall be imposed on the free movement of Members of the European Parliament travelling to or from the place of meeting of the European Parliament.*

In the past, the question has arisen as to the relationship between this privilege and the immunities granted by Articles 8 and 9 PPI, in particular since the latter also provides for a special regime of protection of Members who are travelling to and from the place of meeting of the European Parliament. The Court of Justice finally resolved this issue, finding that the scope of application of Articles 7 and 9 PPI is not the same.¹⁴ Indeed, Article 7 refers to administrative or other restrictions to the freedom of movement of MEPs; those restrictions do not include restrictions arising out of legal proceedings, since the latter fall within the scope of Article 9, or of Article 8 in the specific area of opinions expressed and votes cast.¹⁵ Thus, the privilege provided for by Article 7 PPI does not apply to restrictions to the freedom of movement of MEPs imposed by courts in the course of legal proceedings (such as bail or detention);¹⁶ and Members who do not enjoy personal immunity under Article 9 (for instance, because it has been waived, because the circumstances of the case are such that it does not apply, or because their national law does not provide for it) may not invoke the privilege under Article 7.

¹³ For a statistical analysis of decisions taken during the various legislatures (up until the 6th), see European Parliament, OPPD, *Non-labile? Inviolabile? Untouchabile? The challenge of parliamentary immunities*, 2012, p. 33.

¹⁴ CJEU, Judgment in the Mote case, cited above, para. 47.

¹⁵ *Ibid.*, at para. 49.

¹⁶ Also see CJEU, Rt. Hon. Lord Bruce of Donington v Eric Gordon Aspden, case 208/80, EU:C:1981:194, at para. 14, arguing that the effect of Article 7(1) PPI "is to prohibit Member States from imposing *inter alia* by their practices in matters of taxation administrative restrictions on the free movement of Members of the Parliament."

1.2. Immunities and fundamental rights: finding the right balance

The exercise of parliamentary immunity may in some specific cases conflict with rights protected by the Charter of Fundamental Rights of the EU and the European Convention on Human Rights (ECHR), in particular the **right of access to a court** and the right of **freedom of expression**.

In *Castells vs. Spain*¹⁷ and *Jerusalem vs. Austria*¹⁸, two cases concerning **freedom of expression** under Article 10 of the ECHR, the European Court of Human Rights (ECtHR) recalled that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court (*Castells v. Spain*, para. 42).

*A. v. United Kingdom*¹⁹, the first case brought before the ECtHR on the conflict between Article 6 (**right to a fair trial**) of the ECHR and parliamentary immunity, can also be regarded as an important confirmation of the principle of freedom of speech and political debate. The Court concluded that the parliamentary immunity enjoyed by the MP in this case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. The ECtHR stated that, "in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to a court (para. 87)." The Court emphasised, however, that in the UK no immunity attaches to statements made outside of Parliament²⁰ or to an MP's press statements, even if their contents are repeated subsequently in the parliamentary debate itself. The Court also stressed that, in the UK, victims of defamation do not remain completely without redress, since deliberately misleading statements may be punishable by Parliament as contempt.

In a subsequent case, the Court underlined the need to assess the existence of **a clear connection** between the Member's opinions and a parliamentary activity: thus, for instance, ironic or derisive letters accompanied by toys personally addressed to a prosecutor cannot be construed as falling within the scope of parliamentary functions, but are more consistent with a personal quarrel and, thus, should not be covered by absolute immunity.²¹

The question whether parliamentary privilege extends to **the press** was further examined by the Strasbourg Court in *Belpietro v. Italy*.²² The case concerned the obligation of an editor of a newspaper to control what is published, in order to prevent the publication of defamatory articles in particular. This duty does not disappear when it concerns an article written by a member of parliament, as otherwise, according to the Court, this would amount to an absolute freedom of the press to publish any statement of members of parliament in the exercise of their parliamentary mandate, regardless of its defamatory or insulting character.

¹⁷ ECtHR *Castells vs. Spain* (no. 11798/85), 23 April 1992.

¹⁸ ECtHR *Jerusalem vs. Austria* (no. 26958/95), 27 February 2001.

¹⁹ ECtHR *A. v. United Kingdom* (no. 35373/97), 17 December 2002.

²⁰ See also *Kart v. Turkey*, (no. 8917/05), 3 December 2009.

²¹ ECtHR *Cordova v. Italy* (no. 40877/98) and (no 45649/99), 30 January 2003. For a commentary, see Kloth, M, *Immunities and the right of access to court under Article 6 of the European Convention on Human Rights*, Martinus Nijhoff Publisher, Leiden, 2010, p. 186 ff.

²² ECtHR *Belpietro v. Italy* (no. 43612/10), judgement of 24 September 2013.

Moreover, the European Commission for democracy through law (the so-called Venice Commission), an advisory body to the Council of Europe, recently adopted a report on the scope and lifting of parliamentary immunity.²³ The Venice Commission reviewed the existing national rules on absolute and personal immunity of Members of Parliaments, assessing them in the light of the need to protect the rule of law, and proposed several guidelines and criteria for regulating and lifting parliamentary immunity. Accordingly, it argued that, while national rules on absolute immunity are, as a general rule, well-justified, at least as long as they do not extend to private statements of Members of Parliament, existing domestic rules on personal immunity might need to be reformed so as to limit chances of misuse which might infringe the rule of law, obstruct the course of justice and undermine democracy. Interestingly, the Venice Commission suggested that the rules on immunity applicable in the European Parliament, as well as in the Parliamentary Assembly of the Council of Europe, could be a source of inspiration for national reforms, since they reflect a common European consensus on the issue.²⁴

²³ Venice Commission, Report on the scope and lifting of parliamentary immunities, Strasbourg 14 May 2014, CDL-AD(2014)011-e, available online at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282014%29011-e>.

²⁴ Ibid., para. 201.

2. ABSOLUTE IMMUNITY FOR OPINIONS AND VOTES

KEY FINDINGS

- Absolute immunity for opinions and votes ensures enhanced protection to **MEPs' freedom of expression**.
- Absolute immunity prevents **any type of judicial proceeding** being brought against Members for votes or opinions expressed in the performance of their duties during the mandate. It continues to apply **even after the end of the mandate**. It may **not be waived** or renounced.
- Absolute immunity is limited to opinions expressed in the exercise of a Member's duties. Thus, it is in essence intended to apply to statements made **within the precincts of the European Parliament**. In addition, it may cover statements made outside the premises of the Parliament, but only insofar as they are **assertions amounting to subjective appraisal** which present **a direct and obvious link with a general interest of concern to citizens**.

According to Article 8, PPI: *Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.*

This immunity for votes and opinions ensures that Members of the European Parliament enjoy an enhanced protection of their freedom of expression. It protects MEPs in their capacity as democratically elected representatives of the people, as well as Parliament as the place of political discussion. As clarified by the Court of Justice, the scope of this immunity must be established on the basis of EU law alone:²⁵ national laws protecting the immunity of national parliamentarians are irrelevant for this purpose.

Absolute immunity protects Members of the European Parliament from any type of proceedings (civil, criminal or administrative) for votes or opinions expressed in the exercise of their duties; moreover, in contrast to the constitutional traditions of some Member States,²⁶ it also applies in the case of opinions expressed with defamatory intent. Thus, votes and opinions expressed by MEPs in the performance of their duties are subject only to the conventions of parliamentary etiquette, whose application is the responsibility of Parliament alone.²⁷ However, as clarified by Advocate General Jääskinen, this parliamentary immunity includes "not only rights but also responsibilities:" although MEPs benefit, in the exercise of their functions, from substantive immunity, they are still subject to the rules of conduct laid down by the institution, and thus, may be subjected to disciplinary measures, insofar as these are provided for in the RoP.²⁸

²⁵ See CJEU, Judgment, *Marra* case, para. 26.

²⁶ See in particular Article 46(1) of the German Basic Law, which excludes defamatory statements from the absolute immunity it grants to members of the Bundestag, and Article 61(2) of the Greek Constitution, which allows prosecution of members of Parliament for libel.

²⁷ Also see ECtHR, *A. v. UK*, cited above, at para. 86: the Strasbourg Court took into account the rules on parliamentary discipline to assess the compatibility of absolute immunity with the ECHR (and in particular, with the right to a fair trial), considering them as a way of providing some form of redress to victims of defamation.

²⁸ Opinion of Advocate General Jääskinen in the *Patriciello* case, 9 June 2011, para. 57-59.

2.1. Duration of the non-liability

According to European Parliament's reports, absolute immunity begins from the time of publication of the results of the elections to the European Parliament; thus, MEPs are granted this form of protection regardless of whether their credentials have (yet) been verified.²⁹ However, this interpretation is not unanimously shared by scholars, as some argue that absolute immunity begins after the opening of the first session following the election.³⁰

MEPs enjoy absolute immunity for votes and opinions expressed in the performance of their duties even after the end of their mandate: opinions expressed during the mandate, and constituting an exercise of the functions related to it, cannot be the subject of legal proceedings even once the MEP has stepped down from his functions.

2.2. Scope of the non-liability

One of the most complex issues relating to the application of absolute immunity is defining its scope of application. Indeed, MEPs are exempted from liability for the votes they cast and the opinions they express "in the performance of their duties;" while votes can always be considered as an act related to the Member's mandate, the question arises as to when an opinion must be deemed to have been expressed in the performance of duties.

As Advocate General Poiares Maduro has clarified, the choice to limit absolute immunity to opinions expressed in the exercise of the functions, which is common to virtually all legal orders, is due to the need to prevent the creation of two classes of citizens - Members of Parliament, on the one hand, who are not amenable to the courts for the statements they make, and ordinary citizens, on the other, who may be subject to the limitations imposed on free speech by civil and criminal law. Indeed, this choice serves to ensure a balance between the **freedom of expression** of Members of Parliament, which is essential for their ability to perform their duties, and the right of citizens to **access to justice**, which is compromised whenever they feel aggrieved by a statement made by a Member of Parliament;³¹ a narrow interpretation of parliamentary immunity is therefore necessary to protect the very foundations of **the rule of law**.³² Thus, the question of which opinions are covered by parliamentary privilege is one which is essential for the correct functioning of democracy and the rule of law.

²⁹ See Report on the request for upholding of the immunity and privileges of Mr Francesco Musotto, 20 June 2003, A5-0248/2003. Mr Musotto had been elected as an MEP in the elections of 10 to 13 June 1999, and charges had been brought against him with reference to an opinion expressed on 16 June 1999. Also see Bruno, A., di Gesù, J., "Lo status del parlamentare europeo," in Caretti, P., Morisi, M. and Tarli Barbieri, G. (ed.), *Lo status di membro del Parlamento in prospettiva comparata*, 2012, at page 4, available online at http://www.consiglio.regione.campania.it/cms/CM_PORTALE_CRC/servlet/Docs?dir=docs_biblio&file=BiblioContenuto_2745.pdf.

³⁰ Article 3 of the 1976 Act states that the term of office of each representative begins and ends at the same time as the five-year period for which he is elected (paragraph 3) and that that period begins 'at the opening of the first session following each election' (paragraph 2). It could thus be concluded that, with respect to elected representatives who were not Members of the previous Parliament, parliamentary immunity is effective from the date of opening of the first session following their election. See Caveró Gómez, M., "La inmunidad de los diputados en el Parlamento Europeo," *Revista de las Cortes Generales*, Separata No 20, 1990, pp. 16 and 17.

³¹ See Opinion of Advocate General Poiares Maduro in the *Marra* case, para. 31.

³² See Lenaerts, K., cited above, at p. 291; ECtHR, *Cordova v Italy*, cited above, para. 59.

2.2.1. A spatial criterion...

Initially, scholars tended to agree that, while MEPs' absolute immunity covered opinions expressed in the precincts of the Parliament, be it during plenaries or in meetings of parliamentary bodies (such as committees or political groups), it did not extend to opinions expressed outside the context of Parliament and its bodies. Thus, for instance, it was usually argued that speeches at party congresses or in election campaigns would not be covered by any immunity.³³ In practice, this resulted in the immunity being limited to the opinions expressed within the precincts of the European Parliament, in accordance with the constitutional traditions of several Member States.³⁴

This restrictive interpretation, however, has been gradually expanded, so as to cover even opinions expressed outside the precincts of the European Parliament. Indeed, as clarified by Advocate General Poiares Maduro, historically parliamentary privilege was limited to speech in Parliament because, at the time, political discourse was concentrated within Parliament. In modern democracies, political discourse and debate on matters of public relevance takes place in a much broader forum, which includes printed and electronic media and the internet. Members of Parliaments are now expected to engage in dialogue with the civil society and present their ideas not only on the floor of Parliament, but also in the *fora* that civil society provides; consequently, the criterion determining which statements were made in the exercise of a Member's duties cannot be spatial, since the spatial criterion would be too narrow.³⁵ Subsequently, Advocate General Jääskinen elaborated further on this point: while agreeing that "the limitation of the scope of absolute immunity only to the place or seat of the Parliament no longer corresponds to the contemporary reality of political debate and cannot therefore succeed as an exclusive criterion," he also stressed "the importance of parliamentary premises as a privileged place of political debate."³⁶

This interpretation has been subsequently endorsed by the Court of Justice itself: in its decision in the case concerning Mr Patriciello, the Court ruled that "statements made by a Member of the European Parliament are not to lose this immunity merely because they were made outside the precincts of the European Parliament." Thus, the Court found that, while absolute immunity "is in essence intended to apply to statements made by those members within the very precincts of the European Parliament," it is not impossible that a statement made beyond those precincts may amount to an opinion expressed in the performance of their duties, because "whether or not it is such an opinion depends, not on the place where the statement was made, but rather on its character and content."³⁷ The Court then moved to identify the criterion to be used to ascertain whether a statement made by an MEP outside the European Parliament is covered by absolute immunity.

³³ See European Parliament, Policy Department C, *Parliamentary immunity in the European Parliament*, 2007, PE 360.487/REV2, at 8; also see Senén Hernández, M., "Inviolabilidad e inmunidad en el Parlamento Europeo", in *Revista de las Cortes Generales*, 1986, vol. 9, 319-333, at 322.

³⁴ Passaglia, P., "Introduzione," in Passaglia, P. (ed.), *L'insindacabilità delle opinioni espresse dai parlamentari*, available at http://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_Insindacabilita_032014.pdf. Also see, for a comparison of the constitutional traditions of the Member States, Policy Department C, *Handbook on the incompatibilities and immunity of the MEPs*, cited above.

³⁵ See Opinion of Advocate General Poiares Maduro in the *Marra* case, paras 33 to 35.

³⁶ In his Opinion, he therefore argued that opinions expressed by MEPs in the premises of the Parliament should not be treated in the same way as their speeches in other *fora* of political debate. See Opinion of Advocate General Jääskinen in the *Patriciello* case, para. 68-70.

³⁷ CJEU, Judgment in the *Patriciello* case, cited above, at paras 28 to 30.

2.2.2. ... and an analysis of the "nature and contents" of the speech

It should now be clear that opinions expressed by MEPs beyond the precincts of the European Parliament may, in some cases, be considered as an exercise of parliamentary duties, and therefore be covered by absolute immunity. The criterion to be used to determine whether such opinions are covered by absolute immunity is one based on their character and content:³⁸ it is therefore essential to examine the content of the opinion in order to evaluate whether it was expressed "in the performance of duties."

According to the opinion of Advocate General Poiares Maduro, absolute immunity is to be interpreted broadly and offer wide protection, so as to secure a safe space for public discourse to take place.³⁹ However, this rule is subject to two qualifications, which limit the application of the absolute immunity principle ensuring a fair balance between the privileges of MEPs, as elected representatives of the people, and the rights of ordinary citizens, and in particular their right to access to justice.

First, the opinion at issue must be about a genuine matter of public interest. Only a statement on an issue of general concern will be covered by absolute immunity; opinions expressed in the context of cases or disputes with other individuals that concern a MEP personally but have no wider significance for the general public are not protected. Indeed, if parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members, as clarified by Rule 5(2) RoP, it can only cover opinions that are relevant for such independence. This interpretation follows the case-law of the European Court of Human Rights, and requires a clear focus on the nature of the subject-matter of the opinion. Even a possibly offensive or inaccurate statement may be protected, but only if it is linked to the expression of a particular point of view in discussing a matter of public interest.

Secondly, a distinction must be drawn between factual allegations against particular individuals and opinions. Article 8 of the Protocol expressly refers to "opinions", i.e., value judgments, which cannot be proven right or wrong: thus, when an MEP makes a value judgment about an issue of general importance, no matter how upsetting or offensive some people may find it, this should fall within the scope of application of the absolute immunity principle. On the contrary, Article 8 cannot cover factual allegations against other individuals: the person about whom the statement was made must be able to take recourse to courts to clear his name and the speaker should be called upon to prove the truth of his allegations, irrespective of whether he is a Member of Parliament.⁴⁰

Since the Court of Justice did not address this point in its decision in the *Marra* case, the issue arose again in the *Patriciello* case. Advocate General Jääskinen, in his Opinion, while moving from an analysis of the two criteria identified above (the distinction between factual allegations and value judgments, and the notion of genuine public interest), proposed a slightly different approach, suggesting the need to use an "organic" rather than "functional" link.⁴¹ Indeed, after criticising the "functional" link and arguing that the concept of "opinion" should also include statements of facts, the Advocate General proposed that the Court

³⁸ CJEU, Judgment in the *Patriciello* case, cited above, para. 30.

³⁹ See Opinion of Advocate General Poiares Maduro, cited above, para. 37.

⁴⁰ See Opinion of Advocate General Poiares Maduro, cited above, paras 35 to 40. The Advocate General also cites the case-law of the ECtHR, in particular, its judgment in the case *Patrono, Cascini and Stefanelli v Italy*, in which the Court emphasised that the defendant had not expressed general political opinions on the relationship between the judiciary and the executive, but had attributed to the claimant specific acts of wrongful conduct and had suggested that they were criminally liable.

⁴¹ See Opinion of Advocate General Jääskinen, cited above, at para. 74.

should introduce a criterion specific to the nature of the duties of an MEP, on the basis of the case-law of the European Court of Human Rights and of the nature of the immunity, which is granted to allow the performance of the tasks of the Union (Article 343 TFEU). This criterion would link substantive immunity not to the content of a Member's comments, but rather to the relationship between the context in which those comments were made and the parliamentary work of the Parliament: thus, immunity would cover the activities of a MEP, not when he deals with matters which are of concern only to a national politician but when he carries out activities as a European parliamentarian.⁴²

The Court of Justice finally addressed the question of the scope of absolute immunity in its judgment in the *Patriciello* case. There, the Court ruled that a statement made by an MEP beyond the precincts of the European Parliament and giving rise to prosecution does not constitute an opinion expressed in the performance of his parliamentary duties unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties.⁴³ More specifically, the Court held that "opinion", for the purpose of Article 8 PPI, must be understood "in a wide sense to include remarks and statements that, by their content, correspond to **assertions amounting to subjective appraisal.**"⁴⁴ Moreover, in order to enjoy immunity, an opinion must have been expressed by an MEP "in the performance of [his] duties:" thus, there needs to be a link between the opinion expressed and the parliamentary duties. The Court draws an important conclusion from the scope of the absolute immunity, which is capable of preventing prosecution and trial of the offending MEP, and thus of denying the person damaged by his statement any judicial remedy whatsoever. For this reason, the connection between the opinion expressed and parliamentary duties must be direct and obvious: the statement must present **a direct and obvious link with a general interest of concern to citizens.**⁴⁵

Finally, it must be stressed that, even when an opinion is not considered to have been expressed in the exercise of the functions of an MEP, it might still be covered by the immunity foreseen by Article 9, PPI, if the personal immunity granted by national law of the Member State concerned so provides. Thus, once it is established that an opinion expressed beyond the precincts of the European Parliament does not have an obvious and direct link with the functions of an MEP, it remains to be seen whether it is covered by the immunity provided for in Article 9, PPI, based on the immunity granted to national parliamentarians under national law (for further details, see below, at 3.2).⁴⁶

⁴² See Opinion of Advocate General Jääskinen, cited above, at para. 96-107.

⁴³ CJEU, Judgment, *Patriciello* case, conclusions.

⁴⁴ CJEU, Judgment, *Patriciello* case, at para. 32.

⁴⁵ CJEU, Judgment, *Patriciello* case, paras 33 to 36. According to Hardt, the CJEU thus endorsed the "organic" criterion proposed by Advocate General Jääskinen, thus ensuring full compatibility of its interpretation of absolute immunity with the case-law of the ECtHR: see Hardt, S., cited above, at 53. However, others have held that the Court actually followed the Opinion of Advocate General Póitias Maduro (see e.g. Passaglia, P., cited above, at 106) and, indeed, the criteria identified by the Court seem to have much more in common with his interpretation. The judgment of the Court has been criticised as creating "a real danger that the European "public space" should become one not of vibrant discussion and competing narratives, but one in which expression is chilled for fears of civil or criminal prosecution just as any other individual would be:" see Mehta, R. S., "Sir Thomas' blushes: protecting parliamentary immunity in modern parliamentary democracies," in *European Human Rights Law Review*, 2012, 3, 309-318, at 318.

⁴⁶ See P. Passaglia, cited above, p. 109, for a list of recent decision in which the European Parliament first excluded the application of Article 8, PPI, and then examined a request to waive the immunity of the MEP concerned under Article 9.

2.3. Who decides whether the principle of absolute immunity applies?

One of the issues that have arisen, over time, concerning the application of the principle of absolute immunity is that of the competence to take a final, binding decision on whether a statement made by an MEP beyond the precincts of the European Parliament has been expressed in the exercise of his functions (and is therefore covered by absolute immunity) or not.

The issue has been resolved by the Court of Justice of the European Union, in its judgment in the *Marra* case. In that case, which concerned an alleged episode of distribution of insulting leaflets, the referring court had asked the CJEU to clarify who has the final competence to determine whether an opinion is covered by the MEPs' immunity, and more specifically whether national courts are required to request the European Parliament to waive a Member's immunity, and to await the Parliament's decision before ruling on the existence of such immunity.

The Court of Justice ruled that, in order to establish "whether the conditions for the absolute immunity provided for in Article 9 [now, Article 8] of the Protocol are met, the national court is not obliged to refer that question to the Parliament. The Protocol does not confer on the Parliament the power to determine, in cases of legal proceedings against one of its Members in respect of opinions expressed or votes cast by him, whether the conditions for applying that immunity are met." Consequently, the CJEU stated that "such an assessment is within the exclusive jurisdiction of the national courts which are called on to apply such a provision, and which have no choice but to give due effect to that immunity if they find that the opinions or votes at issue were expressed or cast in the exercise of parliamentary duties." In case of doubts as to the interpretation and application of Article 8 PPI, the national courts may refer a question to the Court under the procedure for references for preliminary rulings, but in no case are they obliged to refer the decision to the European Parliament.⁴⁷

In the same case, the Court also clarified the interpretation and modes of application of the Rules of Procedure of the European Parliament, and in particular, the relevance of the procedure laid down for the defence of privileges and immunity of MEPs (now Rule 7). As recognised by the Court, "the Rules of Procedure are rules of internal organisation and cannot grant powers to the Parliament which are not expressly acknowledged by a legislative measure, in this case by the Protocol." Thus, "even if the Parliament, pursuant to a request from the Member concerned, adopts, on the basis of those rules, a decision to defend immunity, that constitutes an opinion which does not have binding effect with regard to national judicial authorities." A decision of the European Parliament to defend the immunity of a MEP for an opinion he expressed, adopted in accordance with Rule 7 of the RoP, is in no way binding on the national judge.⁴⁸ However, as the Court also clarified, the principle of sincere cooperation between the European institutions and the national authorities (explicitly recalled in Article 18 PPI) also applies in the context of the immunities of MEPs. Thus, when the competent national court is informed that a procedure for defence of the privileges and immunities of the MEP concerned has been initiated, it must stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible.⁴⁹

⁴⁷ CJEU, judgment, *Marra* case, cited above, paras 32-35.

⁴⁸ *Ibid.*, paras 38-39. The Court further stressed that, once the national court has established that absolute immunity applies in a specific case, it is bound to respect that immunity, as is the Parliament: this type of immunity cannot be waived by the Parliament (para. 44).

⁴⁹ *Ibid.*, paras 41-43.

Yet, the final decision as to the application of the absolute immunity principle rests exclusively with the national court; if it finds that absolute immunity applies, it must dismiss the action brought against the Member, and the European Parliament may not waive his immunity.

3. IMMUNITY

KEY FINDINGS

- MEPs' personal immunity safeguards their **independence**, protecting them from pressure in the form of threats of arrest or legal proceedings.
- The scope of personal immunity depends on **national rules**, as well as **EU law**.
- Personal immunity applies only **during the mandate**, but extends to acts committed before its commencement. It extends to any proceedings, if punitive in nature, but does not cover Members caught *in flagrante delicto*.
- Personal immunity may be **waived** by the European Parliament.

The text of Article 9, PPI, draws a clear distinction between the personal immunity that MEPs enjoy while in the territory of their own Member State, which depends on the immunity granted to national Members of Parliament, and the one accorded to them while in the territory of any other Member State, or while travelling to and from the place of meeting of the European Parliament, which is regulated directly by EU law.

This disparity of treatment has a historical reason: when the PPI was first adopted as an additional Protocol to the founding treaties of the three European Communities, the Assembly still consisted of delegates appointed by national parliaments from amongst their members. Consequently, they all actually already enjoyed, on the territory of their own Member State, the immunity granted to them in their capacity as a national parliamentarian. However, this regime remained unchanged even after Parliament became a directly elected institution. Parliament has been calling for an amendment of the regime of immunities of MEPs, through the adoption of a common Statute for MEPs, already since 1983.⁵⁰ Subsequent calls for reform of the PPI, while numerous, have not led to any changes,⁵¹ notwithstanding a decision taken by Council in 2005 to look into this issue.⁵² The current regime of immunities still relies on national laws, thus leading to significant disparities between Members of the European Parliament⁵³ and to procedural difficulties for the European Parliament itself, whenever it needs to adopt a decision on the waiver of parliamentary immunity.

⁵⁰ See Resolution on the Statute of Members of the European Parliament, 15 September 1983, in OJ C 277, 17.10.1983, p. 135.

⁵¹ See for instance European Parliament resolution of 24 April 2009 on parliamentary immunity in Poland 2008/2232(INI), para. 7. For some historical remarks, and a summary of actions undertaken by the European Parliament in order to reform the current regime and ensure uniformity, see Policy Department C, *Parliamentary immunity in the European Parliament*, cited above, pp. 4-5.

⁵² See Declaration of the Representatives of the Member States, meeting within Council, of 3 June 2005 (doc. Council 9737/05).

⁵³ Indeed, some EU Member States do not grant national parliamentarians any form of personal immunity (e.g. the Netherlands, United Kingdom), whereas others attribute them protection from arrest or detention (e.g. Italy, France) or even from criminal prosecution (e.g. Spain). For more information of the different national regimes, see Policy Department C, *Handbook*, cited above. The system has even been called "discriminatory": see Hardt, S., cited above, at 44.

3.1. Duration of the immunity

Article 9 PPI provides that Members enjoy the immunity granted by this rule “during the sessions of the European Parliament.” In practice, immunity is effective throughout the Member’s five-years term of office, save in cases of resignation, incompatibility or death.⁵⁴

Since the immunity foreseen by Article 9 PPI is a “personal” immunity, i.e. a form of inviolability of the person of Members of the European Parliament to ensure the normal functioning of the institution, Parliament has interpreted it as also covering actions committed by the Member before his/her election.⁵⁵ Thus, this immunity shields MEPs from being tried, during their mandate, even for facts committed before its beginning – but only until they are MEPs. Once a person ceases to be a Member of the European Parliament, this type of immunity ceases to apply and he may be tried for any action committed before or during the mandate, save of course for votes cast and opinions expressed in the exercise of his functions (to which Article 8 PPI continues to apply).

3.2. Scope of the immunity

Article 9, PPI, provides for an immunity covering any action not falling under the scope of Article 8, that is: votes cast and opinions expressed not in the exercise of the MEP’s functions; and any action which cannot be considered as an opinion or a vote. As clarified by the Court of Justice, Article 9 PPI concerns immunity in legal proceedings relating to acts other than those referred to in Article 8.⁵⁶ Consequently, a Member cannot claim to benefit, under Article 9, of national provisions on absolute immunity, as this type of immunity is already exclusively covered by Article 8 PPI.⁵⁷

As already mentioned, the scope of the immunity under Article 9 varies depending on whether the MEP concerned finds himself in the territory of his own Member State, or in that of another Member State. In the first case, the scope of the personal immunity depends entirely on that of the immunity granted by national law to national parliamentarians:⁵⁸ thus, some MEPs enjoy no immunity at all, whereas others are granted very broad protection from prosecution, arrest and detention.⁵⁹ In the second case, on the contrary, the scope of the immunity is specified by EU law itself: article 9(1)(b) makes it clear that MEPs are protected from any measure of detention and from legal proceedings.

Whenever the applicable immunity is that deriving from Article 9(1)(a), the European Parliament is conferred powers in accordance with national law. Thus, in a recent judgment the Court of Justice seemed to accept that, if national law confers on the national

⁵⁴ See OPPD, *Non-labile? Inviolable? Untouchable?* cited above, p. 23. This interpretation of the words “during the sessions” was confirmed in CJEU, *Roger Wybot v Edgar Faure and others*, 149/85, EU:C:1986:310, in which the Court held that “the European Parliament must be considered to be in session, even if it is not actually sitting, until the decision is taken closing its annual or extraordinary sessions.”

⁵⁵ See Policy Department C, *Parliamentary immunity*, cited above, p. 6. Also see, in the Annex to the same publication, the Table summarising the requests for waiver of parliamentary immunity of Members of the European Parliament decided on since the first parliamentary term.

⁵⁶ See CJEU, Judgment in the *Marra* case, cited above, para. 45.

⁵⁷ Also see Committee on Legal Affairs, *Stocktaking of parliamentary committee activities during the 7th legislature*, at p. 97.

⁵⁸ In the words of the CJEU: “the extent and scope of the immunity enjoyed by Members of the Parliament in the territory of their own State are to be determined by the various national laws to which that provision refers.” See CJEU, *Bruno Gollnisch v European Parliament*, T-42/06, EU:T:2010:102.

⁵⁹ For an analysis of the regimes of parliamentary immunity set out in the national laws of the 28 EU Member States, see Policy Department C, *Handbook*, cited above

Parliament the power to request suspension of a prosecution against one of its Members, the same power is also granted to the European Parliament with regard to MEPs.⁶⁰

One question that has arisen in the past is whether the immunity provided for in Article 9 (1)(a) PPI only covers criminal proceedings or also extends to civil proceedings. Initially, it was argued that, since none of the six founding Member States of the European Communities granted their national parliamentarians immunity from civil proceedings, it could be inferred that they did not intend to grant a broader personal immunity to Members of the European Parliament. This interpretation was also supported by the practice of the European Parliament itself.⁶¹ However, in September 2003 Parliament adopted a decision defending one of its Members from civil proceedings; in the Explanatory Statement to the Report adopted by the Committee on Legal Affairs and the Internal Market, it was clarified that, in the case at hand, the level of damages claimed (roughly EUR 150 000) was clearly intended to be punitive, and therefore to have a deterrent effect similar to a criminal charge.⁶² Consequently, it must be held that personal immunity may also extend to civil proceedings.

Another problematic issue has been whether the personal immunity of MEPs also applies when they are called to testify in Court. In the past, the European Parliament has received several requests to authorise its Members to testify in Court, or to waive their immunity in order to allow them to do so. However, as recognised by the Committee on the Rules of Procedure, the Verification of Credentials and Immunities in 1996,⁶³ MEPs do not require, and should not require, Parliament's authorisation to appear as witnesses or experts. Indeed, this is further clarified by Rule 6, RoP, which states that, where Members are required to appear as witnesses or expert witnesses, there is no need to request a waiver of immunity, provided that the date and time of the hearing does not make it difficult for them to perform their parliamentary duties, and that they are not obliged to testify concerning information obtained confidentially in the exercise of their mandate.

As clarified in Article 9(3) PPI, personal immunity never applies when a Member is found in the act of committing an offence (*in flagrante delicto*), and it can always be waived by the European Parliament. The procedure for waiver of the immunity is further detailed in the Rules of Procedure and will be examined below.

⁶⁰ Ibid., para. 115.

⁶¹ See Policy Department C, *Parliamentary immunity in the European Parliament*, cited above, p. 12.

⁶² See Report on the request for defence of parliamentary immunity and privileges submitted by Jannis Sakellariou, 12 September 2003, A5-0309/2003, Explanatory Statement: "Damages whose primary purpose is punitive are generally awarded to the victim of a wrongful act. In US law, the focus is on the deterrent nature of punitive damages: the aim is to discourage the perpetrator from repeating the act which prompted the damages award and potential imitators from perpetrating such an act for the first time. Given that, in recent years, this legal instrument has increasingly become an established part of the legal systems of the EU Member States, through the recognition and enforcement of foreign court judgments, such as those handed down in the USA, there is every possibility that it will be used as a roundabout means of taking legal action against Members in a manner similar to criminal proceedings. The reference to 'legal proceedings' in the 1965 text of the PPI must thus today be interpreted as covering an attempt to secure punitive damages by means of civil proceedings."

⁶³ See the Minutes of Proceedings of the sitting of Wednesday, 27 March 1996, in OJ C 117, 22.4.1996, p. 5.

4. PROCEDURES AND GENERAL PRINCIPLES

KEY FINDINGS

- The Rules of Procedure set out the manner in which decisions to defend or to waive a Member's immunity are taken.
- The practice of the Committee of Legal Affairs clarifies how decisions on immunity are taken. As a general rule, immunity is defended only if there is a clear *fumus persecutionis*.

The Rules of Procedure of the European Parliament include a detailed description of the procedures to be followed in cases concerning privileges and immunities of MEPs. These include: the procedure to request defence of parliamentary immunity, which can apply to cases of absolute immunity and of personal immunity alike; the procedure to decide on requests for waiver of the personal immunity of a MEP; and the procedure to be followed in case urgent action is needed. Moreover, the Rules of Procedure recall several general principles: for instance, that parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members (Rule 5) and that in the exercise of its powers in respect of privileges and immunities, Parliament acts to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties (Rule 6). In addition, the Committee on Legal Affairs has, over the years, developed a practice of its own, from which several general principles can be inferred.

4.1. Defence of privilege and immunities

Rule 7, RoP provides for the possibility to request Parliament to decide whether the authorities of a Member State have breached the immunity of a Member or a former Member. Such a request to defend a Member's immunity may be made in any case affecting the privileges and immunity of Members: i.e., it may arise from breaches of the Members' freedom of movement, of their absolute immunity, or of their personal immunity.

In accordance with the Rules of Procedure, the request to defend a Member's immunity is only admissible if no request for defence or waiver of the immunity has already been received in respect of the same legal proceedings; moreover, the request is not to be considered if a request for waiver of the immunity in respect of the same legal proceedings is subsequently received. This clarifies the rationale behind the procedure: its aim is to ensure that Parliament is informed of any case of alleged breach of the immunity of its Members. In practice, Members may submit requests to defend their immunity when they claim that certain proceedings violate absolute immunity for opinions and votes (for instance, because the national court considers certain opinions not to have been expressed in the exercise of parliamentary functions), or when they claim that a court is proceeding against them in violation of Article 9 PPI, without having obtained waiver of their personal immunity.

This procedure has been introduced following concerns voiced by Italian MEPs after the reform of national rules concerning parliamentary immunity; indeed, since in 1993 the

relevant constitutional rules were amended⁶⁴ and no longer required waiver of the immunity to initiate criminal proceedings, MEPs were concerned that they could be charged and tried without the Parliament even being aware of the trial, in particular in cases regarding their absolute immunity for opinions and votes. The procedure is drawn from the practice created by the Italian Constitutional Court in its judgment 1150/88, and allows Members to request Parliament to decide on the applicability of the immunity in any given case.⁶⁵

The case-law of the Court of Justice of the European Union has further clarified two important points: firstly, that the procedure for defence of the immunity may be applied both in cases concerning the personal immunity of MEPs and in cases where their absolute immunity for opinions and votes is at stake; and secondly, that Parliament's decision to defend the immunity of an MEP in cases concerning the application of Article 8 PPI is only indicative, and not binding for the competent national Court.

As regards the application of the procedure for defence of the immunity in cases of personal immunity under Article 9 PPI, the CJEU clarified in the *Gollnisch* case⁶⁶ that, since a MEP can be deprived of his immunity only if the Parliament has waived it, defence of immunity is conceivable where, in the absence of a request for waiver of a Member's immunity, immunity is endangered by the action of the police or judicial authorities. Consequently, a decision of the Parliament in response to a request to defend the immunity of an MEP is conceivable only where no request for waiver of that immunity has been submitted to the Parliament by the competent national authorities.⁶⁷

On the other hand, the Court's decision in the *Marra* case made it clear that the procedure for defence of the immunity also applies to absolute immunity for opinions expressed and votes cast in the exercise of parliamentary duties.⁶⁸ As mentioned above (see Chapter 2), the Court ruled that the decision of the European Parliament to defend a Member's absolute immunity, adopted in accordance with Rule 7 of the RoP, is in no way binding on the national judge.⁶⁹ Thus, the final decision as to whether an opinion is, or is not, covered by the absolute immunity is the exclusive competence of the proceeding national judge, who may, if in doubt as to the interpretation of the relevant EU rules, refer the case to the CJEU for a preliminary ruling on the matter. Moreover, given that the decision of the European Parliament to defend, or not to defend, the Member's immunity produces no binding legal effects, it may not be the subject of an action for annulment in front of the Court of Justice, as foreseen by Article 263 TFEU.⁷⁰ However, in accordance with the principle of sincere cooperation, if Parliament initiates a procedure for defence of the immunity and the competent national court is informed of the fact, it must stay the judicial proceedings until Parliament has issued its opinion.⁷¹

⁶⁴ Constitutional law 29 October 1993, n. 3, *Modifica dell'articolo 68 della Costituzione*.

⁶⁵ See European Parliament resolution on the immunity of Italian Members and the Italian authorities' practices on the subject (2001/2099(REG)), 11 June 2002. Also see P. Caretti, M. Morisi and G. Tarli Barbieri, cited above, at 6.

⁶⁶ See CJEU, Bruno Gollnisch, EU:T:2013:23, cited above, paras 51 ff.

⁶⁷ The Court then continues to state that conversely, where a request for waiver of immunity is made by the national authorities, the Parliament must take a decision to waive or not to waive immunity. In such a case, defence of immunity no longer has any *raison d'être*, since either the Parliament waives immunity and the defence of immunity is no longer conceivable, or it refuses to waive immunity and defence of immunity is unnecessary, since the national authorities are advised that their request for waiver of immunity has been rejected by the Parliament and since immunity therefore precludes the measures which those authorities could or would take. *Ibid.*, at para. 56.

⁶⁸ See judgment in the *Marra* case, cited above, at 37.

⁶⁹ *Ibid.*, paras 38-39.

⁷⁰ CJEU, Nigel Paul Farage v. European Parliament, T-564/11, EU:T:2012:403, at para. 27.

⁷¹ *Ibid.*, paras 41-43.

Finally, Rule 7 RoP also makes it clear that that, in cases of requests for defence of parliamentary immunity, if Parliament took the decision not to defend it, the Member concerned may make a request for reconsideration of the decision, submitting new evidence. However, such request is inadmissible if the President considers that the new evidence submitted is not sufficiently substantiated to warrant reconsideration, or if proceedings have been instituted against the decision under Article 263 of the Treaty on the Functioning of the European Union (which provides for the CJEU's power to review the legality of acts adopted by institutions and bodies of the Union).

4.2. Procedures and principles for cases on immunities

The procedure for waiver of immunity of an MEP is described in detail in the European Parliament's Rules of Procedure, and is further specified through the practice of the competent committee.

4.2.1. Ordinary procedure for waiver or defence of immunity

Rule 9, RoP clarifies in detail the procedure to be followed in immunity cases.

Requests for the waiver or the defence of a Member's or a former Member's immunity are announced in plenary and dealt with *in camera* by the Committee on Legal Affairs.⁷²

Requests to waive a Member's immunity must emanate from the 'competent authority' of the Member State concerned, and be addressed to the President of the European Parliament: thus, even if the PPI does not explicitly rule out the possibility that Parliament might waive the immunity of an MEP on its own initiative, the Rules of Procedure do not provide for such an option.⁷³ In accordance with Rule 9(11), in order to simplify the task of verifying whether a request for waiver of a MEP's immunity has been presented by the competent authority, the committee may consult the Member States and draw up an indicative list of the competent national authorities.⁷⁴ On the other hand, requests to defend a Member's immunity may emanate from any Member or former Member, but they may not be made by another Member without the agreement of the Member concerned.

The practice of the Committee on Legal Affairs is to have a number of standing rapporteurs for cases of immunities, the rule being that the rapporteur in each specific case must not be of the same nationality or from the same political group as the Member concerned.⁷⁵ The Member has the right to be heard and present documents or other relevant written evidence, and may be represented by another Member, if he so wishes. Moreover, the Committee is granted the power to request information from the national competent authority.

As regards the right to be heard, the RoP set out the procedure to be followed to ensure that this right is respected, also granting the Member the power to renounce such right and to be represented by another Member. Thus, the Chair of the Committee on Legal Affairs is

⁷² As clarified by Rule 9(10), which provides that "the committee shall treat these matters and handle any documents received with the utmost confidentiality."

⁷³ Committee on Legal Affairs, *Stocktaking*, cited above, at p. 97.

⁷⁴ The list is available as an Annex to the *Handbook on the incompatibilities and immunity of the Members of the European Parliament*, cited above

⁷⁵ Committee on Legal Affairs, *Stocktaking*, cited above, at p. 97.

to invite the Member to be heard, indicating a date and time. If the Member fails to attend the hearing, he is deemed to have renounced the right to be heard, unless he has asked to be excused, giving reasons. The decision as to whether to accept the request to be excused pertains exclusively to the Chair, and is not subject to any appeals. If the chair grants the request, he sets a new date and time for the hearing. If the Member fails to comply with the second invitation, the procedure continues and no further requests to be excused, or to be heard, may be accepted. Once the Member concerned has been granted an opportunity to be heard, he may not be present at any further debate concerning his immunity.

After the hearing and the debate, the Committee on Legal Affairs adopts its Report, making a proposal for a reasoned decision to waive or not to waive, or to defend or not to defend, the immunity. The Committee may also offer a reasoned opinion as to the competence of the requesting authority and the admissibility of the request, but it may not, under any circumstances, pronounce on the guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution. If the request seeks the waiver of immunity on several counts, each of these may be the subject of a separate decision.

Once the Committee on Legal Affairs has adopted its report, this is examined by the plenary, and a separate vote is taken on each of the proposals contained in it. Parliament's decision is immediately communicated by the President to the Member concerned and to the requesting national authority, together with a request to be informed of any developments in the relevant proceedings and of subsequent judicial rulings.

4.2.2. Urgent procedure

Rule 8, RoP, sets out a specific procedure to be followed in urgent cases.

This Rule allows the President of the European Parliament to take an initiative to assert the privileges and immunities of a Member, as a matter of urgency, when the Member has been arrested or had his freedom of movement curtailed in apparent breach of his privileges and immunities. Before taking such a decision, the President must consult the chair and rapporteur of the Committee on Legal Affairs; moreover, afterwards, he must notify the committee of that initiative and inform Parliament. At its next meeting, the Committee on Legal Affairs takes cognisance of the President's initiative and, if it deems it necessary, it may prepare a report for submission to Parliament.

4.2.3. General principles

As has been clarified above, the role of the Committee on Legal Affairs in matters of immunity is of the utmost importance; this has been explicitly recognised by the Rules of Procedure, as amended in 2014, which empower the Committee to lay down principles for the application of Rule 9.⁷⁶ Indeed, over the years, the Committee has developed a practice of its own in dealing with immunity cases, and it consistently applies the same principles.

⁷⁶ See Rule 9(12). The Rules of Procedure have been amended in 2014: see European Parliament decision of 16 January 2014 on amendment of Parliament's Rules of Procedure on the waiver and the defence of parliamentary immunity (P7_TA-PROV(2014)0035). It is worth noting that the report of the Committee on Constitutional Affairs, which was endorsed by Parliament by a single vote and no amendments, included all the amendments suggested by the Committee on Legal Affairs in its opinion of 9 July 2013.

In particular, the Committee's practice has been to propose to waive immunity unless there is a *fumus persecutionis*, that is to say, a well-founded suspicion that the legal proceedings have been instituted with the intention of causing political damage to the Member.⁷⁷ Indicia of the existence of such a *fumus persecutionis* are, for instance, the fact that a Member stands accused of criminal charges for facts that, in the case of an ordinary citizen, would only lead to administrative proceedings, while the prosecuting authority has attempted to withhold information on the nature of the charges from the Member concerned;⁷⁸ the uncertainty as to the status and sources of the evidence adduced as a basis for the charges;⁷⁹ the timing of the prosecution (during an electoral campaign, years after the alleged offences were committed) and the overtly political aims of the private individual bringing the prosecution (who claimed to be acting on behalf of citizens who objected in general terms to the Member carrying out a public activity).⁸⁰

Moreover, in the past Parliament has clarified the concept of *fumus persecutionis* in general terms: thus, when a prosecution is initiated by a political adversary, without proof to the contrary, immunity is not to be waived if there are reasons to believe that it aims to damage the Member (not to obtain reparation);⁸¹ proceedings based on anonymous accusations and requests made a long time after the alleged facts are to be treated as indicia of *fumus persecutionis*;⁸² and the failure to prosecute other participants in the alleged offence, so that the MEP alone has been criminally charged for a fact involving a plurality of suspects, has also been treated as suspicious.⁸³

Other general criteria to which the Committee on Legal Affairs has frequently made reference in its reports on cases of immunity, as a guidance in order to take its decisions, are the particularly serious nature of the charges and whether the laws of Member States other than the State of origin of the MEP concerned lay down less severe penalties for the act in question, or do not even regard it as a criminal offence.⁸⁴ Decisions to waive the immunity of an MEP have been taken following to allegations of corruption or other serious criminal activities (such as fraud or membership of the Camorra), but also in cases concerning minor and clearly non-political crimes (such as road traffic offences).⁸⁵ Moreover, in a case concerning opinions expressed by an MEP, the Committee held that immunity should not be defended when the statements concerned are contrary to Article 21 of the EU Charter of Fundamental Rights and could have attracted penalties under (then) Rule 153 RoP. In that case, the Committee clarified that Article 8 PPI serves to ensure that MEPs enjoy freedom of speech, but that this freedom does not authorise slander, libel, incitement to hatred, questioning the honour of others, or any utterance contrary to Article 21, CFREU.⁸⁶

⁷⁷ See Committee on Legal Affairs, *Stocktaking*, cited above, at 98.

⁷⁸ See Committee report A7-0047/2011; European Parliament decision of 8 March 2011 on the request for waiver of the immunity and privileges of Elmar Brok.

⁷⁹ See Committee report A7-0195/2013; European Parliament decision of 11 June 2013 on the request for defence of the immunity and privileges of Małgorzata Handzlik.

⁸⁰ See Committee report A7-0030/2009; European Parliament decision of 20 October 2009 on the request for waiver of the immunity of Marek Siwiec.

⁸¹ See Committee Report A6-0140/2007 of 13 April 2007 on the request for waiver of the immunity of Vural Öger, Explanatory Statement.

⁸² See Committee Report A4-0155/98, by the (then) Committee on the Rules of Procedure, the Verification of Credentials and Immunities, of 27 April 1998 on the request for waiver of the immunity of Mr António Carlos Ribeiro Campos, Explanatory Statement. Also see Policy Department C, *Parliamentary immunity in the European Parliament*, cited above, p. 25, and the sources cited there.

⁸³ See Committee Report A5-0246/03 of 19 June 2003 on the request for waiver of the immunity of Mr Daniel Marc Cohn-Bendit.

⁸⁴ See for instance *ibid.*; also see Policy Department C, *op. ult.* cited above, p. 23.

⁸⁵ See Corbett, R., Jacobs, F., Shackleton, M., *The European Parliament*, Jon Harper Publishing, London 2011, at 72.

⁸⁶ See Committee Report A7-0245/2014; European Parliament decision of 2 April 2014 on the request for defence

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ANNEX 1 - SOURCES OF LAW

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

ARTICLE 343

The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.

PROTOCOL (NO 7) ON THE PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION

CHAPTER III - MEMBERS OF THE EUROPEAN PARLIAMENT

Article 7 (ex Article 8)

No administrative or other restriction shall be imposed on the free movement of Members of the European Parliament travelling to or from the place of meeting of the European Parliament.

Members of the European Parliament shall, in respect of customs and exchange control, be accorded:

- (a) by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official missions;
- (b) by the government of other Member States, the same facilities as those accorded to representatives of foreign governments on temporary official missions.

Article 8 (ex Article 9)

Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.

Article 9 (ex Article 10)

During the sessions of the European Parliament, its Members shall enjoy:

- (a) in the territory of their own State, the immunities accorded to members of their parliament;
- (b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

RULES OF PROCEDURE OF THE EUROPEAN PARLIAMENT

Rule 5 Privileges and immunities

1. Members shall enjoy privileges and immunities in accordance with the Protocol on the Privileges and Immunities of the European Union.
2. Parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament as a whole and of its Members.
3. Passes allowing Members to circulate freely in the Member States shall be issued to them by the President of Parliament as soon as he has been notified of their election.
4. Members shall be entitled to inspect any files held by Parliament or a committee, other than personal files and accounts which only the Members concerned shall be allowed to inspect. Exceptions to this rule for the handling of documents to which public access may be refused pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents are laid down in Annex VII to these Rules of Procedure.

Rule 6 Waiver of immunity

1. In the exercise of its powers in respect of privileges and immunities, Parliament acts to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties. Any request for waiver of immunity shall be evaluated in accordance with Articles 7, 8 and 9 of the Protocol on the Privileges and Immunities of the European Union and with the principles referred to in this Rule.
2. Where Members are required to appear as witnesses or expert witnesses, there is no need to request a waiver of immunity, provided:
 - that they will not be obliged to appear on a date or at a time which prevents them from performing their parliamentary duties, or makes it difficult for them to perform those duties, or that they will be able to provide a statement in writing or in any other form which does not make it difficult for them to perform their parliamentary duties; and
 - that they are not obliged to testify concerning information obtained confidentially in the exercise of their mandate which they do not see fit to disclose.

Rule 7 Defence of privileges and immunity

1. In cases where the privileges and immunities of a Member or former Member are alleged to have been breached by the authorities of a Member State, a request for a Parliament decision as to whether there has, in fact, been a breach of those privileges and immunities may be made in accordance with Rule 9(1).
2. In particular, such a request for the defence of privileges and immunities may be made if it is considered that the circumstances constitute an administrative or other restriction on the free movement of Members travelling to or from the place of meeting of Parliament or on an opinion expressed or a vote cast in the performance of their duties, or that they fall within the scope of Article 9 of the Protocol on the Privileges and Immunities of the European Union.

3. A request for the defence of the privileges and immunities of a Member shall not be admissible if a request for the waiver or defence of that Member's immunity has already been received in respect of the same legal proceedings, whether or not a decision was taken at that time.

4. No further consideration shall be given to a request for the defence of the privileges and immunities of a Member if a request for the waiver of that Member's immunity is received in respect of the same legal proceedings.

5. In cases where a decision has been taken not to defend the privileges and immunities of a Member, the Member may make a request for reconsideration of the decision, submitting new evidence. The request for reconsideration shall be inadmissible if proceedings have been instituted against the decision under Article 263 of the Treaty on the Functioning of the European Union, or if the President considers that the new evidence submitted is not sufficiently substantiated to warrant reconsideration.

Rule 8 Urgent action by the President to assert immunity

1. As a matter of urgency, in circumstances where a Member is arrested or has his or her freedom of movement curtailed in apparent breach of his or her privileges and immunities, the President, after consulting the chair and rapporteur of the committee responsible, may take an initiative to assert the privileges and immunities of the Member concerned. The President shall notify the committee of that initiative and inform Parliament.

2. When the President makes use of the powers conferred on him by paragraph 1, the committee shall take cognisance of the President's initiative at its next meeting. Where the committee deems it necessary, it may prepare a report for submission to Parliament.

Rule 9 Procedures on immunity

1. Any request addressed to the President by a competent authority of a Member State that the immunity of a Member be waived, or by a Member or a former Member that privileges and immunities be defended, shall be announced in Parliament and referred to the committee responsible.

The Member or former Member may be represented by another Member. The request may not be made by another Member without the agreement of the Member concerned.

2. The committee shall consider without delay, but having regard to their relative complexity, requests for the waiver of immunity or requests for the defence of privileges and immunities.

3. The committee shall make a proposal for a reasoned decision which recommends the adoption or rejection of the request for the waiver of immunity or for the defence of privileges and immunities.

4. The committee may ask the authority concerned to provide any information or explanation which the committee deems necessary in order for it to form an opinion on whether immunity should be waived or defended.

5. The Member concerned shall be given an opportunity to be heard, may present any documents or other written evidence deemed by that Member to be relevant and may be represented by another Member.

The Member shall not be present during debates on the request for waiver or defence of his or her immunity, except for the hearing itself.

The chair of the committee shall invite the Member to be heard, indicating a date and time. The Member may renounce the right to be heard.

If the Member fails to attend the hearing pursuant to that invitation, he or she shall be deemed to have renounced the right to be heard, unless he or she has asked to be excused from being heard on the date and at the time proposed, giving reasons. The chair of the committee shall rule on whether such a request to be excused is to be accepted in view of the reasons given, and no appeals shall be permitted on this point.

If the chair of the committee grants the request to be excused, he or she shall invite the Member to be heard at a new date and time. If the Member fails to comply with the second invitation to be heard, the procedure shall continue without the Member having been heard. No further requests to be excused, or to be heard, may then be accepted.

6. Where the request seeks the waiver of immunity on several counts, each of these may be the subject of a separate decision. The committee's report may, exceptionally, propose that the waiver of immunity should apply solely to prosecution proceedings and that, until a final sentence is passed, the Member should be immune from any form of detention or remand or any other measure which prevents that Member from performing the duties proper to the mandate.

7. The committee may offer a reasoned opinion as to the competence of the authority in question and the admissibility of the request, but shall not, under any circumstances, pronounce on the guilt or otherwise of the Member nor on whether or not the opinions or acts attributed to him or her justify prosecution, even if, in considering the request, it acquires detailed knowledge of the facts of the case.

8. The committee's report shall be placed at the head of the agenda of the first sitting following the day on which it was tabled. No amendments may be tabled to the proposal(s) for a decision.

Discussion shall be confined to the reasons for and against each proposal to waive or uphold immunity, or to defend a privilege or immunity.

Without prejudice to Rule 164, the Member whose privileges or immunities are under consideration shall not speak in the debate.

The proposal(s) for a decision contained in the report shall be put to the vote at the first voting time following the debate.

After Parliament has considered the matter, a separate vote shall be taken on each of the proposals contained in the report. If a proposal is rejected, the contrary decision shall be deemed adopted.

9. The President shall immediately communicate Parliament's decision to the Member concerned and to the competent authority of the Member State concerned, with a request that the President be informed of any developments in the relevant proceedings and of any judicial rulings made as a consequence. When the President receives this information, he shall transmit it to Parliament in the way he considers most appropriate, if necessary after consulting the committee responsible.

10. The committee shall treat these matters and handle any documents received with the utmost confidentiality.

11. The committee, after consulting the Member States, may draw up an indicative list of the authorities of the Member States which are competent to present a request for the waiver of a Member's immunity.
12. The committee shall lay down principles for the application of this Rule.
13. Any inquiry as to the scope of Members' privileges or immunities made by a competent authority shall be dealt with in accordance with the above rules.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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