

6 February 1996

A4-0023/96

REPORT

on the request for waiver of the parliamentary immunity of Mr Bernard TAPIE
Committee on the Rules of Procedure, the Verification of Credentials and
Immunities

Rapporteur: Mr Florus Wijsenbeek

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At the sitting of 28 November 1995, the President of the European Parliament announced that he had received a request for waiver of parliamentary immunity concerning Mr Bernard Tapie, forwarded by the Minister of Justice of the French Republic on 17 November 1995 at the request of Public Prosecutor at the Aix-en-Provence Court of Appeal, and that he had referred it to the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, pursuant to Rule 6(1) of the Rules of Procedure.

At its meeting of 29 November 1995 the committee appointed Mr Wijsenbeek rapporteur.

At its meeting of 24 January 1996 it heard Mr Tapie, pursuant to Rule 6(3) of the Rules of Procedure and held an exchange of views on the reasons for or against waiver of immunity.

At its meeting of 5 February 1996 it considered the draft report and adopted the proposal for a decision by 13 votes to 2, with 3 abstentions.

The following were present for the vote: Fayot, chairman; Wijsenbeek, vice-chairman and rapporteur; Mosiek-Urbahn, vice-chairman; Lambraki, vice-chairman; Aglietta, Arroni (for Florio), Corrie, Cot (for Manzella), Dell'Alba, Donnelly, Evans, Fabre-Aubrespy, Ford, Gil-Robles (for Palacio Vallelersundi), Gutierrez Diaz (for Ephremidis), Janssen van Raay, Jean-Pierre, Langen, Malangré, Nordmann, Rack and Rosado, Fernandes (for Crowley).

The report was tabled on 6 February 1996.

A
PROPOSAL FOR A DECISION

Decision on the request for waiver of parliamentary immunity concerning Mr Bernard Tapie

The European Parliament,

-having received a request for waiver of parliamentary immunity concerning Mr Tapie, forwarded by the Minister of Justice of the French Republic on 17 November 1995 and notified on 28 November 1995,

-having regard to Article 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 and to Article 4(2) of the Act concerning the election of representatives to the European Parliament by direct universal suffrage of 20 September 1976,

-having regard to the judgments of the Court of Justice of the European Communities of 12 May 1964 and 10 July 1986¹,

-having regard to Article 26 of the French Constitution,

-having regard to Rule 6 of its Rules of Procedure,

-having regard to the report of the Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A4-0023/96),

1. Decides not to waive parliamentary immunity with regard to Mr Bernard Tapie;

2. Instructs its President immediately to forward this decision and the report of its committee to the appropriate authority of the French Republic.

¹Judgment of the Court of Justice in Case 101/63: Wagner v Fohrmann and Krier [1964] ECR 397 and Case 149/85: Wybot v Faure [1986] ECR 2403.

B
EXPLANATORY STATEMENT

I. FACTS

1. The request from the Public Prosecutor at the Aix-en-Provence Court of Appeal refers to an order to send the papers in the case to the Public Prosecutor dated 20 October 1995 made by the examining magistrate responsible for the investigation into the management of Olympique de Marseille FC, which began in November 1990. According to that order, the examining magistrate considers that new charges, which were revealed when an additional indictment dated 16 March 1995 was issued, whereby two members of the club's management were questioned further, may also be brought against Bernard Tapie in his capacity of President of OM, in addition to those on the grounds of which he was questioned on 26 March 1994.

The examining magistrate therefore plans to question Mr Tapie further in relation to several charges.

He requests waiver of parliamentary immunity in order to have Mr Bernard Tapie remanded in custody on the grounds of a serious breach of the peace and because he fears that Mr Tapie will attempt to influence the course of the judicial inquiry relating to the others questioned and witnesses in France and abroad.

'He also feels that his guarantees that he will appear in court are open to doubt because, on the one hand, his stated address is that of a residence of which he is neither the owner nor the lessee and, on the other, because he may well possess capital abroad'. The magistrate contends that 'in this respect, court supervision would be inadequate and even ineffective'. (see PE 215.331, p. 15, fourth paragraph).

II. TEXTS AND GENERAL CONSIDERATIONS CONCERNING PARLIAMENTARY IMMUNITY OF MEMBERS OF THE EUROPEAN PARLIAMENT

2. Article 10 of the Protocol on the Privileges and Immunities of the European Communities² annexed to the Treaty establishing a Single Council and Single Commission of the European Communities³ incorporates the provisions of Article 9 of each of the protocols annexed to the Treaties establishing the ECSC, EEC and EAEC and reads as follows:

'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.'

3. Since the offences of which Mr Tapie, a French Member of the European Parliament, is accused were committed in the territory of the French Republic, Mr Tapie therefore enjoys the immunities accorded to Members of the French Parliament as established by Article 26 of the French Constitution⁴.

²See also the text of Article 9 of the Protocol: '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'.

³Referred to in Article 4(2) of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage of 20 September 1976.

⁴Article 26 of the French Constitution is set out in the annex.

4. The procedure within the European Parliament is governed by Rule 6 of the Rules of Procedure⁵.

5. Since the first five-year parliamentary term, the European Parliament has taken a decision on a number of requests for waiver of immunity. Parliament's deliberations have given rise to certain general principles which were recognized definitively in the resolution adopted at its sitting of 10 March

⁵Rule 6

'1. Any request addressed to the President by the appropriate authority of a Member State that the immunity of a Member be waived shall be announced in Parliament and referred to the committee responsible.

1987⁶ on the basis of the report by Mr Donnez on the draft Protocol revising the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 in respect of Members of the European Parliament (A2-121/86).

6. It might be useful to set out here those principles which apply in this case, while emphasizing that decisions taken with respect to waiver of

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2. The committee shall consider such requests without delay and in the order in which they have been submitted.
 3. The committee may ask the authority which has submitted the request to provide any information or explanation which the committee deems necessary for it to form an opinion on whether immunity should be waived. The Member concerned shall be heard at his request; he may bring any documents or other written evidence he deems relevant. He may be represented by another Member.
 4. The committee's report shall contain a proposal for a decision which simply recommends the adoption or rejection of the request for the waiver of immunity. However, where the request seeks the waiver of immunity on several counts, each of these may be the subject of a separate proposal for a decision. The committee's report may, exceptionally, propose that the waiver of immunity shall 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 him from performing the duties proper to his mandate.
 5. The committee 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 justify prosecution, even if, in considering the request, it acquires detailed knowledge of the facts of the case.
 6. The report of the committee shall be placed at the head of the agenda of the first sitting following the day on which it was tabled. No amendment may be tabled to the proposal(s) for a decision.

Discussion shall be confined to the reasons for or against each proposal to waive or uphold immunity.

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

7. The President shall immediately communicate Parliament's decision to the appropriate authority of the Member State concerned, with a request, if immunity is waived, that he should be informed 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.
8. Should a Member be arrested or prosecuted after having been found in the act of committing an offence, any other Member may request that the proceedings be suspended or that he be released.'

⁶OJ C 99, 13.4.1987, p. 44.

Members' immunity must have a solid legal basis so that they are not affected by various considerations relating in particular to political persuasion or even the nationality of the Member involved.

(a) Purpose of parliamentary immunity

Parliamentary immunity is not a Member's personal privilege but a guarantee of the independence of Parliament and its Members in relation to other authorities. On the basis of this principle, the date of the alleged offences, which may be prior to or after the election of the Member, is irrelevant; account must only be taken of the protection of the parliamentary institution through that of its Members.

(b) Legal ineffectiveness of a renunciation of immunity

The Committee on the Rules of Procedure, the Verification of Credentials and Immunities takes the view that it should not depart from the principle upheld to date by the European Parliament whereby renunciation of parliamentary immunity by the Member concerned is legally ineffective.

(c) Time-limit on immunity

The Court of Justice has twice been called upon to interpret the words 'during the sessions of the European Parliament' set out in Article 10 of the Protocol on the Privileges and Immunities of the European Communities.

It emerges from these two judgments of the Court of Justice (Wagner v Fohrmann and Krier of 1 May 1964, Case 101/63, [1964] ECR 397 and Wybot v Faure of 10 July 1986, Case 149/85, [1986] ECR 2403) that the European Parliament holds an annual session of one year, during which its Members enjoy the immunity provided for in the Protocol, and also during periods of adjournment of the session.

Moreover, the purpose of the immunity itself implies that immunity is effective for the duration of the mandate and covers commencement of proceedings, preparatory inquiries, measures for the execution of pre-existing judgments, appeals or applications for judgments to be set aside. Immunity ceases to be effective at the end of the mandate.

(d) Independent nature of European parliamentary immunity compared with national parliamentary immunity

The reference to the immunities accorded to members of national parliaments in Article 10(a) does not mean that Parliament cannot establish its own rules which may eventually develop into a body of 'case law'; as far as the waiving of parliamentary immunity is concerned, one should not confuse parliamentary immunity itself, which is the same for both national and European members of parliament, with the waiving of immunity, which is the prerogative of each individual parliament; these rules, which are derived from decisions adopted on requests for waiver of immunity, create a consistent concept of European parliamentary immunity which, in general terms, is independent of national procedures; if this were not the case, disparities in the treatment of members of one and the same parliament would be accentuated as a result of their nationality.

7. The application of these principles has given rise to a constant factor in Parliament's decisions, which has become a fundamental criterion for the consideration of the action to be taken on each request for waiver of immunity: in all cases where the offences alleged to have been committed by a Member of the European Parliament fall under the heading of political activity, immunity is not waived. This criterion has been supported by other considerations which support a decision for or against waiver of immunity, concerning in particular:

- 'fumus persecutionis', i.e. the presumption that behind the criminal proceedings is the intention to damage the political activities of the Member (just to quote a few examples: anonymous denunciations at the basis of the inquiry, the lateness of the request compared with the allegations);
- the particularly serious nature of the allegations.

8. The Committee on the Rules of Procedure, the Verification of Credentials and Immunities has considered the issue of ascertaining whether it was pertinent or not, when a decision had to be taken on a request for waiver of immunity of a Member, to take account of the fact that the legislations of the Member States other than the State of origin of the Member provide for less severe penalties for the alleged offence - or even do not regard it as a breach of the law. This new criterion will, of course, have to be the subject of an in-depth study.

III. REASONS FOR THE PROPOSAL FOR A DECISION

9. Although a request for waiver of immunity seems justified in respect of the allegations and the intention of the examining magistrate to take measures to deprive the Member of his freedom, it appears nonetheless:

- that the decision already taken by the Secretariat of the French National Assembly prohibits the magistrate from taking any measure to remand Mr Tapie in custody, immunity only being waived for the purposes of the exercise of court supervision which the magistrate regards as being 'inadequate and even ineffective',
- that although the application of the provisions concerning court supervision is compatible with the exercise of the national mandate, it would create an obstacle to the free exercise of the European mandate, since that mandate is partly exercised outside the national territory,

-that at all events, pursuant to the new constitutional law in France, any member may be subject to proceedings, questioned, tried and imprisoned following a final sentence, without the need for waiver of parliamentary immunity to be secured.

IV. CONCLUSION

10. On the basis of the above considerations, the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, having considered the reasons for and against waiving parliamentary immunity pursuant to the second subparagraph of Rule 6(6) of the Rules of Procedure, recommends to Parliament that parliamentary immunity should not be waived in this instance.

Article 26 of the French Constitution

OF 4 OCTOBER 1958

August 1995

No Member of Parliament may be prosecuted, sought, arrested, detained or tried as a result of the opinions or votes expressed by him in the exercise of his functions.

No Member of Parliament may be arrested or subject to any other measure depriving the Member of freedom or restricting that freedom for criminal or minor offences without the authorization of the Secretariat of the Assembly of which he is a Member, except in the case of a crime or *flagrante delicto* or of final conviction.

Detention, measures depriving the Member of his freedom or restricting that freedom or the prosecution of the Member of Parliament shall be suspended during the session if the assembly of which he is a member so demands.

The assembly concerned shall meet automatically for additional sittings to enable, where appropriate, the provisions of the preceding paragraph to be applied.