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REPORT

on the request for defence of the immunity and privileges of Luigi de Magistris
(2011/2098(IMM))

Committee on Legal Affairs

Rapporteur: Bernhard Rapkay

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for defence of the immunity and privileges of Luigi de Magistris

(2011/2098(IMM))

The European Parliament,

- having regard to the request by Luigi de Magistris of 3 May 2011, announced in plenary on 9 May 2011, for the defence of his immunity in connection with proceedings pending before the Court of Milan, Italy,
 - having heard Luigi de Magistris in accordance with Rule 7(3) of its Rules of Procedure,
 - having regard to the written submissions made by Luigi de Magistris in accordance with Rule 7(3) of its Rules of Procedure,
 - having regard to Articles 8 and 9 of the Protocol (No 7) on the Privileges and Immunities of the European Union, annexed to the Treaty of the Functioning of the European Union, to Article 6(2) of the Act of 20 September 1976 concerning the election of the members of the European Parliament by direct universal suffrage,
 - having regard to the judgments of the Court of Justice of the European Union of 12 May 1964, 10 July 1986, 15 and 21 October 2008, 19 March 2010 and 6 September 2011¹,
 - having regard to Article 68 of the Constitution of the Italian Republic,
 - having regard to Rules 6(3) and 7 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A7-0074/2012),
- A. whereas a Member of the European Parliament, Luigi de Magistris, has requested the defence of his parliamentary immunity in connection with proceedings before an Italian court;
- B. whereas the request by Luigi de Magistris relates to a writ of summons filed against him before the Court of Milan on behalf of Mr Giancarlo Pittelli in connection with statements made by Luigi de Magistris in his book *Assalto al PM, storia di un cattivo magistrato* ('Attack on the public prosecutor – the story of a bad magistrate'), which was published in April 2010;
- C. whereas according to the writ of summons, statements made in that book constitute libel, resulting in a claim for damages;

¹ Case 101/63 *Wagner v Fohrmann and Krier* [1964] ECR 195, Case 149/85 *Wybot v Faure and Others* [1986] ECR 2391, Case T-345/05 *Mote v Parliament* [2008] ECR II-2849, Joined Cases C-200/07 and C-201/07 *Marra v De Gregorio and Clemente* [2008] ECR I-7929, Case T-42/06 *Gollnisch v Parliament* (not yet published in the ECR) and Case C-163/10 *Patriciello* (not yet published in the ECR).

- D. whereas the book was published at a time when Luigi de Magistris was a Member of the European Parliament, following his election at the 2009 European Parliament elections;
- E. whereas, according to Article 8 of the Protocol on the Privileges and Immunities of the European Union, 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, and whereas, according to Article 9 of that Protocol Members shall enjoy, in the territory of their own State, the immunities accorded to members of their Parliament;
- F. whereas Luigi de Magistris makes reference to both Articles 8 and 9 of the Protocol, but whereas Article 9 is not relevant in view of Article 68 of the Italian Constitution and he is therefore obviously relying solely on Article 8;
- G. whereas, in accordance with Parliament's established practice, the fact that the legal proceedings are of a civil or administrative law nature, or contain certain aspects falling under civil or administrative law, does not *per se* prevent the immunity afforded by that article from applying;
- H. whereas the facts of the case, as manifested in the writ of summons and in Luigi de Magistris's written submissions to the Committee on Legal Affairs, indicate that the statements made do not have a direct, obvious connection with Luigi de Magistris's performance of his duties as a Member of the European Parliament;
- I. whereas Luigi de Magistris, in publishing the book in question, was therefore not acting in the performance of his duties as a Member of the European Parliament;
 - 1. Decides not to defend the immunity and privileges of Luigi de Magistris;
 - 2. Instructs its President to forward this decision and the report of its competent committee immediately to the competent authority of the Italian Republic and to Luigi de Magistris.

EXPLANATORY STATEMENT

1. Background

At the sitting of 9 May 2011 the President announced, under Rule 6(3) of the Rules of Procedure, that on 3 May 2011 he had received a request from Mr Luigi de Magistris concerning the defence of his parliamentary immunity with reference to Articles 8 and 9 of the Protocol on privileges and immunities of the European Union and to Article 68 of the Constitution of the Italian Republic as amended by Constitutional Law No 3 of 29 October 1993. The President referred the request to the Committee on Legal Affairs under Rule 6(3). Mr De Magistris was heard by the Committee on 26 January 2012 in accordance with Rule 7(3).

The background to the request for defence is as follows: Mr De Magistris was summoned before the Court of Milan by Mr Giancarlo Pittelli in connection with statements made by Luigi de Magistris in his book '*Assalto al PM, storia di un cattivo magistrato*' (EN: 'Attack on the public prosecutor - story of a bad magistrate'), which was published in April 2010. In the book Luigi de Magistris discusses the criminal proceedings '*Shock*', which involved Mr Pittelli in his capacity as the legal counsel for the defendant in that case.

Mr Pittelli alleges that statements made on pages 27, 58-60, 88-90 and 113-114 in the book are very offensive to him, since he is presented therein as a member of a white-collar mafia, upholding inappropriately close relationships with the judiciary, businessmen and politicians, including tangling with criminal proceedings.

For his part, Luigi de Magistris submits that in the book he expressed his opinion on important matters relating to the public interest and maintains that he has conducted investigations in the course of the criminal case '*Shock*', which aroused great interest because of the serious nature of the criminal conduct allegedly involved in that case. The book therefore constitute an expression of the political activity of an MEP, who has the right to voice his opinions on matters of legitimate public interest and concern.

2. Law and procedure on the immunity of Members of the European Parliament

Articles 8 and 9 of the Protocol (No 7) to the TFEU on the Privileges and Immunities of the European Union read as follows (emphasis added):

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 other Member States, immunity from any measure or 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.

Article 68 of the Italian Constitution reads as follows:

Article 68 [Indemnity, Immunity]

- (1) Members of Parliament shall not be called to answer for opinions expressed or votes cast in the exercise of their functions.*
- (2) No members of Parliament shall, without the authorisation of the Chamber to which they belong, be subjected to search warrants on their persons or in their homes, nor arrested or otherwise deprived of personal freedom, nor kept in state of detention, save in the case of execution of an irrevocable sentence of conviction, unless they be caught in the act of committing an offence for which an order of arrest is mandatory.*
- (3) A similar authorisation shall be required in order to subject Members of Parliament to any form of interception of their conversations or communications, and in order to seize their mail or correspondence.*

The procedure in the European Parliament is governed by Articles 6 and 7 of the Rules of Procedure. The relevant provisions read as follows:

Rule 6 - Waiver of immunity

- 1. In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties. (...)*
- 3. Any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible.*
- 4. As a matter of urgency, in circumstances where Members are arrested or have their freedom of movement curtailed in apparent*

breach of their privileges and immunities, the President, after having consulted 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.

Rule 7 - Procedure on immunity

- 1. The committee responsible shall consider without delay and in the order in which they have been submitted requests for the waiver of immunity or requests for the defence of immunity and privileges.*
- 2. 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 immunity and privileges.*
- 3. 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. 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. (...)*
- 6. In cases concerning the defence of immunity or privileges, the committee shall state whether the circumstances constitute an administrative or other restriction imposed on the free movement of Members travelling to or from the place of meeting of Parliament or an opinion expressed or a vote cast in the performance of the mandate or fall within aspects of Article 9 of the Protocol on Privileges and Immunities which are not a matter of national law, and shall make a proposal to invite the authority concerned to draw the necessary conclusions.*
- 7. The committee may offer a reasoned opinion about the competence of the authority in question and about 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. (...)*

3. Justification for the proposed decision

Articles 8 and 9 of the Protocol on the Privileges and Immunities of the European Union was expressly invoked by Luigi De Magistris in his request. With reference to Article 68 of the Italian Constitution, quoted above, Article 9 is not relevant in this case. Luigi de Magistris is therefore obviously relying solely on Article 8.

The book in question was published at a time when Luigi de Magistris was a Member of the European Parliament, following his election during the 2009 European Parliament elections.

In accordance with Parliament's established practice, the fact that the legal proceedings are of a civil or administrative law nature, or contain certain aspects falling under civil or administrative law, does not *per se* prevent the immunity afforded by that article from applying.

As the Court of Justice has held, the scope of the absolute immunity provided for in Article 8 'must be established on the basis of Community law alone'¹. However, the Court has also recently held that 'a statement made by a Member of the European Parliament beyond the precincts of that institution and giving rise to prosecution in his Member State of origin for the offence of making false accusations does not constitute an opinion expressed in the performance of his parliamentary duties covered by the immunity afforded by that provision unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties'². The Court gave further guidance on what constitutes such a connection by stating that any allegations made by a Member would have to be capable of "presenting a direct link with a general interest of concern to citizens", and that such a link would thus have to be obvious³ (emphasis added).

The statements made by Luigi de Magistris in this case relate to allegations of improper conduct of third parties in connection with criminal investigations which he was conducting before he became a Member of the European Parliament. The statements therefore appear to be rather far removed from the duties of a Member of the European Parliament and hardly capable, therefore, of presenting a direct link with a general interest of concern to citizens, and even if such a link could be demonstrated, it would not be obvious.

Against this background, the Committee considers that the facts of the case, as manifested in the writ of summons and in Luigi de Magistris's written submissions and oral presentations to the Committee, indicate that the statements made do not have a direct, obvious connection with Luigi de Magistris's performance of his duties as a Member of the European Parliament.

The Committee therefore considers that, in publishing the book in question, Luigi de Magistris was not acting in the performance of his duties as Member of the European Parliament.

4. Conclusion

On the basis of the above considerations and pursuant to Article 6(3) of the Rules of Procedure, after considering the reasons for and against defending the Member's immunity, the Committee on Legal Affairs recommends that the European Parliament should not defend the parliamentary immunity of Luigi De Magistris.

¹ *Marra*, cited above, at paragraph 26.

² *Patriciello*, cited above, operative part.

³ *Patriciello*, cited above, at paragraph 36.

RESULT OF FINAL VOTE IN COMMITTEE

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| Date adopted | 26.3.2012 |
| Result of final vote | +: 9 -: 2 0: 1 |
| Members present for the final vote | Luigi Berlinguer, Sebastian Valentin Bodu, Giuseppe Gargani, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Bernhard Rapkay, Evelyn Regner, Alexandra Thein, Rainer Wieland, Cecilia Wikström |
| Substitute(s) present for the final vote | Piotr Borys, Eva Lichtenberger |