The immunity of Members of the German Bundestag has its constitutional basis in Article 46 of the Basic Law. Paragraph 1 of this article governs what is known as 'indemnity' (see point 2 below) and paragraphs 2 to 4 govern immunity proper. Within the German parliament itself, Article 46 is supplemented by Rule 107 of the Bundestag's Rules of Procedure, and in particular by the Decision of the German Bundestag on the lifting of immunity of Members of the Bundestag and the Principles governing questions of immunity adopted by the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure (First Committee). Both these texts are adopted at the beginning of each electoral term by the plenary or by the First Committee and are printed jointly as Annex 6 to the Rules of Procedure.

1. Immunity within the meaning of Article 46(2)-(4) of the Basic Law

a) Requirements

The purpose of parliamentary immunity is first and foremost to ensure the ability of the Bundestag to function and work. It protects the Bundestag as a constitutional body against attacks from the executive and judiciary at all levels of state administration. As the Federal Constitutional Court has ruled, Article 46(2) of the Basic Law does not automatically confer rights on individual Members of the Bundestag. Members are, however, entitled to expect that the Bundestag, in any decision it takes on the lifting of immunity, will not be guided by inappropriate or arbitrary motives.

Immunity covers criminal proceedings and other coercive measures against individual Members of the Bundestag. Parliamentary immunity forms an obstacle to criminal prosecution. It does not rule out criminal law proceedings and measures, but makes their execution dependent on authorisation from the Bundestag.

Authorisation is required for any criminal proceedings against a Member of the Bundestag, for searches and confiscations in the course of proceedings in which the Member is accused or charged, and for arrests and the making of declarations in lieu of oath in execution procedures, to mention only the most important cases (cf. also list in point 14 of the Principles governing questions of immunity).

b) Procedure

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1. Article 46 [Immunities of Members]

(1) At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or for any speech or debate in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults.

(2) A Member may not be called to account or arrested for a punishable offence without permission of the Bundestag, unless he is apprehended while committing the offence or in the course of the following day.

(3) The permission of the Bundestag shall also be required for any other restriction of a Member’s freedom of the person or for the initiation of proceedings against a Member under Article 18.

(4) Any criminal proceedings or any proceedings under Article 18 against a Member and any detention or other restriction of the freedom of his person shall be suspended at the demand of the Bundestag.
The rules governing the granting of authorisation to lift immunity vary depending on the stage reached in the criminal proceedings.

Under the general authorisation in the 'Decision of the German Bundestag concerning the lifting of the immunity of Members of the Bundestag' (Annex 6 to the Bundestag’s Rules of Procedure), investigation proceedings are permitted in principle. However, before opening investigations, the relevant public prosecution services must notify the President of the Bundestag of their intention to open investigation proceedings against a Member of the Bundestag. At the same time they must also notify the Member concerned, except where there are exceptional reasons relating to the prosecution not to do so. Concrete investigation measures may begin 48 hours after the notification is received by the President of the Bundestag. In individual cases, where appropriate, this time limit may be extended; weekends and public holidays are not included in calculating the time limit. The President then forwards the notification to the First Committee without delay. The committee is informed of the investigation proceedings by its Chair at its earliest possible meeting, and looks further into the matter if there appears to be a need to consult or make inquiries. Members of the Bundestag who are affected will be notified by their parliamentary party Chair.

However, this general authorisation does not cover search measures or indictments, including applications for the issue of a penalty order. As soon as the prosecuting services have completed their investigations in an individual case resulting in an indictment, or deem a search warrant necessary, they must apply to the Bundestag for an individual authorisation for such measures through the usual channels, i.e. via the Public Prosecutor and the regional and federal Justice Ministries. Once the application is received by the President of the Bundestag, it is forwarded to the First Committee. The committee then discusses the matter at its earliest possible meeting, considers the plausibility of the prosecution service’s application, though without evaluating the evidence, takes into account the interests of the Member concerned and then makes its recommendation for a decision to the plenary. In the interest of the Member concerned, the recommendation for a decision does not specify the nature of the charges. Furthermore, in the interest of the Member and of the Bundestag as a whole, it is the practice of the plenary to decide on the recommendation for a decision without debate. The Bundestag thus avoids being drawn into an evaluation of the evidence which, by reason of the separation of powers, it is not entitled to make. In this connection it should be stressed that, in granting authorisation, the Bundestag is not finding the charge to be justified and proven; it is not making any statement about guilt or innocence.

In less serious cases, i.e. traffic violations and de minimis cases, the First Committee, acting unanimously, may issue a 'pre-decision'. This pre-decision is structured in a similar way to a recommendation for a decision to the Bundestag, but is not distributed as a Bundestag publication, merely forwarded to Members in photocopied form. A pre-decision is deemed to be adopted by the Bundestag if there is no objection to it within seven days. In the event of an objection, the plenary must take a decision on the basis of a recommendation for a decision by the First Committee.

Only after the Bundestag, on the basis of the recommendation for a decision from the First Committee or of a ‘pre-decision’, has given permission for criminal proceedings to be opened, may the immunity of a Member said to have been lifted in respect of the facts and procedural measure in question. The lifting of immunity does not imply any pre-judgment of the Member concerned, neither does it affect his legal status as a Member of the Bundestag. The Member naturally remains a Member of the Bundestag and his right to exercise his mandate is not impaired. Because the Member must continue to take part in the
work of the Bundestag, the timetable of sittings of the Bundestag must also be taken into account in the setting of dates by the prosecution and the court.

c) Practice regarding the granting of authorisation

It is the constant practice of the Bundestag to give authorisation for an indictment, the issuance of a penalty order or the execution of a judicial search warrant after evaluating whether the conditions for such authorisation are met.

The purpose of the Bundestag’s practice is therefore to ensure that, in the event of criminal proceedings or other coercive measures, its Members are not treated differently from other members of the public. The only exception is in the case of ‘political insults’ other than those that are defamatory. Since, in accordance with the constitutional principle of ‘indemnity’, statements made within the Bundestag may not be the subject of prosecution, the same should also apply to political insults made in the sometimes exaggerated cut and thrust of public debate.

In view of the right of privacy of the person concerned and given that, where the Bundestag takes note of investigation proceedings or authorises the lifting of immunity, it is not expressing any opinion regarding guilt or innocence, immunity proceedings are treated with discretion. This includes communications with the press.

Where other Members of the Bundestag who do not belong to the Immunities Committee require information concerning the substance of an immunity case, such information will be provided by the committee’s Chair, Chairs of parliamentary parties, and rapporteurs.

2. Indemnity under Article 46(1) of the Basic Law

Indemnity confers immunity from prosecution in respect of votes and speeches in the Bundestag, its committees and parliamentary parties, or in their official publications. It constitutes grounds for ruling out prosecution, and therefore protects Members from criminal penalties. However, it also prohibits civil proceedings for injunctions, revocation and damages. Unlike immunity proper, indemnity imposes a blanket ban on prosecution which cannot be overturned even with the permission of the Bundestag, and continues after the end of the Member’s mandate.

Indemnity does not cover defamatory insults, i.e. making or repeating untrue statements knowing them to be untrue.

3. Measures not requiring authorisation

Not all measures which an individual Member of the Bundestag might feel to be coercive require permission to lift immunity. No authorisation is, for example, required for searches of a Member’s private premises or confiscations in prosecutions or court proceedings in which the Member is merely a witness. No authorisation is needed, either, for blood tests taken during traffic controls.

Measures under the Administrative Offences Act are also exempted from the requirement to seek permission for the lifting of immunity. However, in proceedings for administrative offences pending before a court, the court must apply for permission if it finds that the offence in question could also be held to be a criminal offence (point 2b of the Decision on the Lifting of Immunity).
4. Other cases in which authorisation is required, and the right to refuse to give evidence

Alongside the right of immunity proper, relating to investigative and criminal proceedings, there are a number of other rules set out, inter alia, in points 14 and 15 of the *Principles governing questions of immunity*.

Furthermore, if a Member has to be questioned as a witness while the Bundestag is in session, this must take place at the seat of the Bundestag. Any exemptions from this rule require permission from the Bundestag (Articles 50 of the Code of Criminal Procedure and 382 of the Code of Civil Procedure in conjunction with Section C of the *Principles governing questions of immunity*), which may be issued as a 'pre-decision'. Where the questioning relates to matters subject to a duty of confidentiality under the law or under the Rules of Procedure, permission to take a statement must be obtained from the President of the Bundestag.

Furthermore, every Member of the Bundestag has the right under Article 47 of the Basic Law to refuse to give evidence. A Member may refuse to give evidence concerning persons who have confided facts to him as a Member, and concerning those facts themselves. The same applies contrariwise, when a Member has confided facts to another person. Wherever there is a right to refuse to give evidence, there is a corresponding prohibition on the confiscation of documents, images, recordings and digital media.

Dr Johann Wadephul, MdB