

# EUROPEAN PARLIAMENT

2004



2009

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*Session document*

FINAL  
**A6-0329/2006**

10.10.2006

## **REPORT**

on the request for defence of the immunity and privileges of Mario Borghezio  
(2006/2151(IMM))

Committee on Legal Affairs

Rapporteur: Maria Berger

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## PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

### on the request for defence of the immunity and privileges of Mario Borghezio (2006/2151(IMM))

*The European Parliament,*

- having regard to the request by Mario Borghezio for defence of his immunity, forwarded by letter of 23 May 2006 and announced in plenary sitting on 1 June 2006,
- having heard Mario Borghezio in accordance with Rule 7(3) of its Rules of Procedure,
- having regard to Articles 9 and 10 of the Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities and 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 12 May 1964 and 10 July 1986<sup>1</sup> of the Court of Justice of the European Communities,
- 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 (A6-0329/2006),

1. Decides not to defend the immunity and privileges of Mario Borghezio.

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<sup>1</sup> Case 101/63 *Wagner v Fohrmann and Krier* [1964] ECR 195, and Case 149/85 *Wybot v Faure and others* [1986] ECR 2391.

## EXPLANATORY STATEMENT

### I. FACTS

By letter of 7 June 2006 the President of the European Parliament forwarded to the Committee on Legal Affairs, pursuant to Rule 6(3) of the Rules of Procedure, a letter from Mr Mario Borghezio, Member of the European Parliament, requesting the defence of his immunity.

Pursuant to Article 6(3) of the Rules of Procedure, the European Parliament noted the request at its plenary sitting of 1 June 2006 and referred it to the Committee on Legal Affairs.

In his request for defence of his immunity, Mr Mario Borghezio, MEP, refers to a letter addressed to him by the Public Prosecutor's Office in Milan on the opening of criminal proceedings (Sections 369 and 369a of the Italian Code of Criminal Procedure) and on the conclusion of investigations (Section 415a of the Code of Criminal Procedure). In this letter, Mr Borghezio was informed that the Prosecutor's Office had carried out investigations in connection with a charge against him and that the preliminary investigations had been concluded in relation to an offence against Section 639(2) of the Criminal Code<sup>1</sup>, in that on 25 January 2005 he did write with a spray can the words "Disgrace to Forleo" on the pavement outside the Palace of Justice in Milan.

At its meeting of 12 September 2006, the Committee on Legal Affairs heard Mr Borghezio pursuant to Rule 7(3) of the Rules of Procedure. Mr Borghezio relied in particular on the fact that, during a demonstration prompted by the well-known judgment in a terrorist case, he had

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<sup>1</sup> This section reads as follows:

'Art. 639.

#### DEFACING OR FOULING THE PROPERTY OF OTHERS

Whosoever, except in the cases specified in Article 635, defaces or fouls moveable or immoveable property belonging to another person or persons shall be punishable, subject to an action being brought by the aggrieved party, by a fine of up to Lire 200.000.

If the offence is committed against an object of historical or artistic interest, wherever it is situated, or against immoveable property situated in an area of historic interest, it shall be publicly actionable and punishable by a term of imprisonment of up to one year or a fine of up to Lire 2 million. (1)

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(1) Paragraph added by 13(2) of Law no 352 of 8 October :

'Art. 639-a.

#### CASES IN WHICH PROSECUTION IS NOT CONDITIONAL ON AN ACTION BEING BROUGHT BY THE AGGRIEVED PARTY

In the cases specified in Articles 631, 632, 633 and 636, the offence shall be actionable publicly if it is committed against water, land, grounds or public buildings intended for use by the public.'

expressed his political opinion by writing the word "Disgrace" on the pavement using a spray can he had borrowed from another demonstrator. In so doing he had merely expressed his opinion, and was not committing deliberate criminal damage. If any damage had been done to the pavement it was negligible. The suspicion of tendentious prosecution (*fumus persecutionis*) arose from the very fact that such a trivial matter had been brought to the criminal courts.

## II. LEGAL TEXTS AND GENERAL CONSIDERATIONS ON THE IMMUNITY OF THE MEMBERS OF THE EUROPEAN PARLIAMENT

1. Articles 9 and 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 read as follows:

*“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 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.”*

2. In this connection, Article 68 of the Constitution of the Italian Republic is relevant. It reads as follows:

*Art. 68*

*(1) Members of parliament may not be called to answer for opinions expressed or votes cast in the exercise of their office.*

*(2) Members of parliament may not be subjected to searches of their person or homes without prior authorization by their chamber, nor arrested or otherwise deprived of personal freedom, nor kept in a state of detention, except on an irrevocable conviction or caught in the act of a crime for which arrest is mandatory.*

*(3) The same authorization is required to subject members of parliament to any form of interception of their conversations or communications, and in order to seize their mail or correspondence..*

3. In the European Parliament the procedure is subject to the provisions of Rules 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 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.”*

*“Rule 7 : Procedures 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 decision which simply 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 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; he may bring any documents or other written evidence he deems relevant. He 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 10 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.*

*(...)”*

4. Since its first 5-year electoral period, a number of general principles have developed in

practice which were finally recognised with the resolution adopted at the sitting of 10 March 1987<sup>1</sup> 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). It seems appropriate to recall some of these principles which are relevant to this case.

#### 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. In line with this principle, the date on which the alleged deeds took place is of no importance and may be either prior to or subsequent to the election of the Member, since protection of Parliament through its Members is the sole consideration.

#### Independence of European parliamentary immunity from national parliamentary immunity

The fact that Article 10, first paragraph, section (a) of the Protocol on the Privileges and Immunities of the European Communities refers to the immunities accorded to members of national parliaments does not mean that the European Parliament cannot create its own rules for the waiver of parliamentary immunity.

The decisions of Parliament have led to the emergence of a consistent notion of European parliamentary immunity which, in general terms, is independent of the various national parliamentary procedures. This prevents Members from receiving different treatment on the grounds of their nationality. Thus, while immunity is taken into account in accordance with national law, the European Parliament takes the decision whether to waive a member's immunity on the basis of its own consistent principles.

Parliamentary immunity serves to protect the freedom of speech and the freedom of political debate of Parliament's Members. Accordingly, Parliament's relevant committee has always held the consistent view that on principle a Member's immunity should on no account be waived if the acts with which he/she is charged form part of his/her political activities or are immediately linked to such activities.

This covers, among other things, expressions of opinion which may be deemed to form part of a Member's political activity, for example at demonstrations, at public meetings, in the press, in a book, on TV, by signing a political document, or in court.

In addition to this principle, other considerations which may argue for or against the waiver of immunity also need to be taken into account, particularly in connection with tendentious prosecution ("*fumus persecutionis*"), i.e. the suspicion that the prosecution has been brought with the intention of causing political damage to the Member. In accordance with the definition of "*fumus persecutionis*" in the explanatory statement of the Donnez report, the term essentially means that immunity will not be lifted if there is reason to believe that the prosecution has been brought with the intention of causing the Member political damage.

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<sup>1</sup> OJ. C 99, 13.4.1987, p. 44.

If, for example, court proceedings are brought by a political opponent, immunity will not, failing evidence to the contrary, be waived if the charge seems to be intended to cause the Member harm rather than to obtain reparation for damages. Similarly, immunity is also not waived if court proceedings have been brought under circumstances which make it likely that they were brought solely with a view to causing damage to the Member in question.

### **III. GROUNDS FOR THE PROPOSAL FOR A DECISION**

The Committee on Legal Affairs has discussed in detail Articles 9 and 10 of the Protocol on Privileges and Immunities which are relevant here.

The committee first investigated the relevance of Article 9. Article 9 concerns the absolute immunity of Members in relation to the expression of opinions in the performance of their duties. Mr Borghezio claimed that, by spraying the word “disgrace” on the pavement outside the Palace of Justice, he was expressing an opinion linked to his office as a Member of the European Parliament. It should however be noted that the act of which Mr Borghezio is accused relates to the offence of criminal damage, which according to Section 639, in the variant of paragraph 2, of the Italian Criminal Code, is an offence for which prosecution is mandatory and for which a term of imprisonment of up to one year or a fine is prescribed. The spraying of words with a spray paint may also be an expression of opinion: however, it is not the expression of opinion which is at issue here but the actual damage caused by the spray to the pavement. In other words, what is at issue are the circumstances surrounding this expression of opinion which may have resulted in criminal damage.

As regards the applicability of Article 10(a) of the Protocol on Privileges and Immunities, there does not seem to be any reason to suspect tendentious prosecution (*fumus persecutionis*).

There is no evidence to support the view that the charges brought against Mr Borghezio sought to cause him damage in connection with his political activity as an MEP. It may be assumed that any other Italian citizen who had expressed his opinion using a spray paint can under similar circumstances would also have been prosecuted. Nor is there any evidence to suggest that this is too trivial a matter to have come before the criminal courts.

2. Under the terms of Rule 7(2) of the Rules of Procedure, the proposal for a decision of the committee should simply recommend the adoption or rejection of the request for the defence of immunity and privileges.

### **IV. CONCLUSIONS**

**In the light of the above considerations, the Committee on Legal Affairs recommends, after examining the evidence for and against the defence of immunity, to reject the request for the defence of Mr Borghezio’s immunity.**



## PROCEDURE

<b>Title</b>	Request for defence of the immunity and privileges of Mario Borghezio
<b>Procedure number</b>	2006/2151(IMM)
<b>Request for defence of immunity from*</b> Date of request Date announced in plenary	Mario Borghezio 23.5.2006 1.6.2006
<small>*In one language only</small>	
<b>Committee responsible</b> Date announced in plenary	JURI 1.6.2006
<b>Rapporteur(s)</b> Date appointed	Maria Berger 12.6.2006
<b>Previous rapporteur(s)</b>	
<b>Discussed in committee</b>	12.9.2006
<b>Date adopted</b>	3.10.2006
<b>Result of final vote</b>	+ 17 - 1 0 0
<b>Members present for the final vote</b>	Maria Berger, Carlo Casini, Rosa Díez González, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Klaus-Heiner Lehne, Katalin Lévai, Antonio López-Istúriz White, Hans-Peter Mayer, Aloyzas Sakalas, Francesco Enrico Speroni, Diana Wallis, Rainer Wieland, Tadeusz Zwiefka
<b>Substitute(s) present for the final vote</b>	Jean-Paul Gauzès, Luis de Grandes Pascual, Kurt Lechner, Marie Panayotopoulos-Cassiotou
<b>Date tabled</b>	10.10.2006
<b>Comments (available in one language only)</b>	