

OPINION OF ADVOCATE GENERAL

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delivered on 9 June 2011¹**I — Introduction**

1. By the question it has referred for a preliminary ruling, the national court asks the Court about the substantive conditions for giving effect to the immunity conferred by European Union ('EU') law on the Members of the European Parliament in respect of the opinions they express in the performance of their duties.
2. Although the Court has already been able to rule on the procedures for giving effect to the parliamentary immunity granted to the Members of the European Parliament,² it is requested, in the present case, to define the substantive aspects of immunity in the light of Article 8 (formerly Article 9) of Protocol No 7 on the Privileges and Immunities of the European Union.³
3. Like the constitutional systems of several Member States that have followed the example of the model developed in France after the revolution of 1789, the Protocol offers two principal types of protection specific to Members of the Parliament:⁴ first, protection of freedom of speech in a Member's performance of his duties, that is to say, substantive immunity, also called 'absolute immunity' or 'parliamentary immunity',⁵ and procedural immunity, also called 'freedom from arrest',⁶ guaranteed to Members of the European
- 4 — See the European Parliament's comparative study No PE 168.399 entitled 'Parliamentary immunity in the Member States of the European Union and in the European Parliament', *Legal Affairs Series*, working paper, available at the following address: <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=4125#search=%20Parliamentary%20Immunity%20in%20the%20Member%20States%20of%20the%20European%20Union%20and%20the%20European%20Parliament>.
- 5 — The constitutions and doctrine applicable in the different Member States use different terminology to designate the two aspects of immunity. Thus, the first aspect covers 'irresponsabilité' in France, 'insidicabilità' in Italy, 'inviolabilidad' in Spain, 'non-liability, non-accountability, privilege of freedom of speech' in the United Kingdom, 'Verantwortungsfreiheit' in Germany and 'berufliche Immunität' in Austria.
- 6 — The second aspect is designated by the term 'inviolabilité' in France and Belgium; by the term 'inmunidad' in Spain; by the term 'Immunität' or 'Unverletzlichkeit' or 'Unverfolgbarkeit' in Germany; by the term 'außerberufliche Immunität' in Austria; by the term 'inviolabilidade' in Portugal; by the terms 'inviolabilità' and 'improcedibilità' in Italy; and by the term 'freedom from arrest' in the United Kingdom.
- 1 — Original language: French.
- 2 — Joined Cases C-200/07 and C-201/07 *Marra* [2008] ECR I-7929.
- 3 — (OJ 2010 C 83, p. 266, formerly Protocol No 36 on the Privileges and Immunities of the European Communities (1965) (OJ 2006 C 321E, p. 318; 'the Protocol'). Inasmuch as the reference was made on 2 April 2010 and the subject-matter of the question referred for a preliminary ruling concerns the interpretation of the Protocol, the numbering of the FEU Treaty will be used in this Opinion.

Parliament in respect of legal proceedings during their term of office. Moreover, the Protocol gives Members the freedom to attend and participate in the activities of the Parliament during its sessions.⁷ In the present case, the Court is requested to define the scope of the former type of immunity, namely substantive immunity.

II — Legal framework

A — *EU law*

1. Charter of Fundamental Rights

4. Under Article 11 of the Charter of Fundamental Rights of the European Union,⁸ all persons have the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

7 — This freedom is referred to in Article 7 of the Protocol, which is irrelevant to the present case.

8 — OJ 2010 C 83, p. 389; ‘the Charter of Fundamental Rights’.

2. Protocol No 7 on the Privileges and Immunities of the European Union

5. Article 8 of the Protocol provides that ‘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.’

6. Subparagraphs (a) and (b) of the first paragraph of Article 9 (formerly Article 10) of the Protocol provide that, during the sessions of the Parliament, its Members enjoy, in the territory of their own State, the immunities accorded to members of the parliament of that State and, in the territory of any other Member State, immunity from any measure of detention and from legal proceedings. The last paragraph of that article also provides that the Parliament may decide to waive the immunity of one of its Members.

3. Rules of Procedure of the European Parliament⁹

7. Rule 6 of the Rules of Procedure of the European Parliament (‘the Rules of Procedure of the Parliament’), entitled ‘Waiver of immunity’, provides, in paragraph 1, that, in

9 — Rules of Procedure of the European Parliament, adopted pursuant to Article 199 EC (now Article 232 TFEU) (OJ 2005 L 44, p. 1), as amended. The latest version is available on the website of the European Parliament.

the exercise of its powers in respect of privileges and immunities, Parliament is to 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. Rule 6(3) states that any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in plenary session and referred to the committee responsible.

8. Rule 9 of the Rules of Procedure of the Parliament, entitled 'Members' financial interests, standards of conduct, mandatory transparency register and access to Parliament is worded as follows:

'...

2. Members' conduct shall be characterised by mutual respect, be based on the values and principles laid down in the basic texts on which the European Union is founded, respect the dignity of Parliament and not compromise the smooth conduct of parliamentary business or disturb the peace and quiet of any of Parliament's premises....

3. The application of this Rule shall in no way detract from the liveliness of parliamentary debates nor undermine Members' freedom of speech.

It shall be based on full respect for Members' prerogatives, as laid down in primary law and the Statute for Members.

It shall be based on the principle of transparency and be so undertaken that the relevant provisions are made clear to Members, who shall be informed individually of their rights and obligations

...'

9. Chapter 4 of Title VI of the Rules of Procedure of the Parliament, which includes Rules 152 to 154, governs the measures applicable in the event of non-compliance with the standards of conduct of Members.

10. Rule 152, relating to immediate measures, sets out the powers of the President enabling him to call to order any Member who disrupts the smooth conduct of the proceedings or whose conduct fails to comply with the relevant provisions of Rule 9. Rule 153 of the Rules of Procedure of the Parliament sets out the penalties applicable to Members, which include a reprimand and temporary suspension from participation in the activities of Parliament. Rule 154 governs appeal procedures.

11. Annex XVI to the Rules of Procedure of the Parliament, entitled 'Guidelines for the interpretation of the standards of conduct of Members', is worded as follows:

'1. A distinction should be drawn between visual actions, which may be tolerated provided they are not offensive and/or

defamatory, remain within reasonable bounds and do not lead to conflict, and those which actively disrupt any parliamentary activity whatsoever.

2. Members shall be held responsible for any failure by persons whom they employ or for whom they arrange access to Parliament to comply on Parliament's premises with the standards of conduct applicable to Members.

The President or his representatives may exercise disciplinary powers over such persons and any other outside person present on Parliament's premises.'

B — *National law*

12. The first paragraph of Article 68 of the Italian Constitution provides that Members of Parliament shall not be called to answer for opinions expressed or votes cast in the exercise of their office.

III — The facts and the question referred for a preliminary ruling

13. Mr Patriciello, an Italian Member of the Parliament, is charged, in criminal proceedings brought against him before the Tribunale di Isernia (District Court, Isernia), Italy, with having falsely accused an officer of the Municipal Police of Pozzilli, Italy, of unlawful behaviour, during an altercation which took place on 1 August 2007 in a public parking area situated not far from a neurological institute.

14. It is apparent from the order for reference that Mr Patriciello has to answer a charge of making false accusations under Article 368 of the Italian Penal Code for declaring that the police officer had falsified the times when booking several drivers whose vehicles were parked in contravention of road traffic laws and, accordingly, for accusing the officer in question of the criminal offence of forgery of documents. Mr Patriciello persisted in the presence of policemen who had come to the scene in order to check whether the alleged unlawful behaviour had indeed taken place.

15. By decision of 5 May 2009, the European Parliament, following a request from Mr Patriciello, based on Rule 6(3) of the Rules of Procedure of the Parliament, decided, on the basis of the report of the Committee on Legal Affairs, to defend his immunity ('the

decision to defend immunity'). The decision is reasoned as follows:

'As a matter of fact, in his statements, Mr Patriciello merely commented on facts in the public domain, the rights of the citizens to have an [sic] easy access to a Hospital and to the healthcares [sic], which had an important impact on the daily life of his constituents. Mr Aldo Patriciello did not act for [sic] his own interest, he did not want [sic] insult the public official but he act [sic] for [sic] general interest of his electorate in the framework of his political activity. In so doing he was carrying out his duty as a Member of Parliament in expressing his opinion on a matter of public interest to his constituents.'¹⁰

16. In the order for reference, the Tribunale di Isernia notes that, under Article 9(a) of the Protocol, Members of the European Parliament are to enjoy, in respect of acts committed on their national territory, the immunities and privileges with the same substantive and procedural limits as those provided for by the national law. However, according to Article 68 of the Italian Constitution, the privilege of absolute immunity extends to extra-parliamentary activities only if they are closely linked to the performance of the duties and aims of the parliamentary mandate.

10 — Report A6-0286/2009 on the request for defence of the immunity and privileges of Aldo Patriciello (2009/2021(IMM)), available on the website of the European Parliament: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0286+0+DOC+PDF+V0//EN>.

17. In those circumstances, the national court points out that, without prejudice to any assessment as to the soundness of the charge, the facts giving rise to the main proceedings have no link whatsoever with any expression of opinion in the performance of Euro-parliamentary duties. As the order for reference shows, according to the indictment, the argument that Mr Patriciello did no more than comment on matters concerning the general public, that is to say, on the right of citizens to be able to have easy access to hospitals and healthcare, with no intention of insulting the official, appears to be unfounded. Indeed, the Member, even if this remains to be ascertained, expressly accused an officer of the Municipal Police, in the presence of the police, of forgery of official documents. Such conduct appears, *prima facie*, to have no connection with the general concerns of his constituents and, as such, does not seem, even *in abstracto*, to be covered by the defence of immunity, as recognised by the Parliament in its decision to defend immunity.

18. However, the Tribunale di Isernia notes that the decision to defend immunity was adopted on the basis not only of Article 9(a) but also of Article 8 of the Protocol.

19. Against that background and having regard to its duty, under Article 4(3) TEU, to cooperate in good faith, the Tribunale di Isernia decided to stay proceedings and to refer

the following question to the Court for a preliminary ruling:

V — The procedural aspects of the question referred for a preliminary ruling

‘Do the facts construed as a criminal offence allegedly committed by Aldo Patriciello, a Member of the European Parliament, described in the indictment and in favour of whom the European Parliament adopted a decision on 5 May 2009 to support a defence of immunity, categorised as making false accusations under Article 368 of the Penal Code, constitute the expression of an opinion in the performance of parliamentary duties for the purposes of Article[8] [11] of the Protocol?’

A — The admissibility of the Parliament’s observations

21. First of all, I note that the admissibility of Parliament’s written observations may raise certain doubts in the light of the wording of the provisions of the first and second paragraphs of Article 23 of the Statute of the Court of Justice of the European Union. Under those provisions, the request for a preliminary ruling is notified by the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

IV — Procedure before the Court

20. The reference for a preliminary ruling was received by the Court on 2 April 2010. Written observations have been lodged by Mr Patriciello, the Italian and Greek Governments, and by the Parliament and the European Commission. All, with the exception of the Italian Government, were represented at the hearing of 15 February 2011.

22. In the present case, it is clear that the European Parliament is not the author of the Protocol, which is the only subject-matter of the question referred for a preliminary ruling.¹² However, the present case undoubtedly relates to the constitutional interests of the Parliament and concerns its institutional dimension.

23. Therefore, in view of the intrinsic link between the provisions of the Rules of Procedure of the Parliament and Articles 8 and 9

11 — The wording of the question referred for a preliminary ruling refers to the former Article 9 of the Protocol. However, in the version applicable to the facts of the case in the main proceedings, Article 9 has become Article 8 of the Protocol.

12 — Unlike *Marra*, paragraphs 22 and 23, the Rules of Procedure of the Parliament are not the subject-matter of this reference for a preliminary ruling.

of the Protocol, and of their common aim of ensuring that the Parliament performs its constitutional mission without impediment, as representative of the citizens at Union level,¹³ it seems to me that in this case the Court should take a rather liberal attitude. I would add that I consider that the Court's case-law supports giving the Parliament the opportunity to express its views on this.¹⁴ Consequently, I propose that the Court consider the Parliament's written observations to be admissible.

B — The significance of the question referred for a preliminary ruling

24. I think it important, as a preliminary point, to put forward the significance of this reference for a preliminary ruling, by which the Court is asked whether a measure such as that at issue in the main proceedings constitutes an opinion expressed in the performance of parliamentary duties.

¹³ — See Article 10(1) and (2) TEU.

¹⁴ — I recall the classic judgments concerning Parliament's capacity to be sued (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339) and Parliament's capacity to sue (Case C-70/88 *Parliament v Council* [1990] ECR I-2041), followed by a judgment on the merits (Case C-70/88 *Parliament v Council* [1991] ECR I-4529). I consider that such a reading is justified, a fortiori where Parliament's institutional interests are concerned.

25. The difficulty faced by the national court in the present case seems to lie in a certain tension between, on the one hand, the reasons for the decision to support the defence of Mr Patriciello's immunity and, on the other hand, the incriminating evidence relating to the matters in question. In that decision, the European Parliament invoked both Article 9(a) and Article 8 of the Protocol.

26. In that regard, while recognising, like Advocate General Poiares Maduro, that Articles 8 and 9 of the Protocol may sometimes cover the same acts, for they function in a cumulative manner, and should be read together,¹⁵ I nevertheless think it clear that Article 9 of the Protocol often relates to acts that constitute ordinary or non-political crimes or offences not falling within the ambit of Article 8 of the Protocol, in particular, acts that cannot be described as opinions or votes, whether they take place within Parliament or without.

27. Moreover, the Court has already held that, in proceedings brought against a Member of the European Parliament in respect of opinions expressed or votes cast by him, the assessment whether the conditions for applying the absolute immunity provided for in Article 8 of the Protocol have been met falls within the exclusive jurisdiction of the national courts which, if they have doubts, may refer a question to the Court under Article 267 TFEU, courts of final instance being, in such circumstances, obliged to make

¹⁵ — See the Opinion of Advocate General Poiares Maduro in *Marra*, point 10.

a reference to the Court.¹⁶ Consequently, even if the Parliament, pursuant to a request from the Member concerned, adopts, on the basis of the Rules of Procedure of the Parliament, a decision to defend immunity, that constitutes an opinion which does not have binding effect with regard to national judicial authorities.¹⁷

28. Moreover, the national court expressly ruled out the possibility of applying in favour of Mr Patriciello the provisions of the Italian Constitution in conjunction with Article 9(a) of the Protocol, according to which a Member enjoys, in the territory of his own State, the immunities accorded to members of the parliament of that State.

29. Having regard to all the foregoing, I consider that the reply to be given in the present case must be based exclusively on Article 8 of the Protocol, which concerns the scope of substantive immunity.

30. Finally, it is evident that it is for the national court alone to determine the alleged facts and to classify them in the light of the Italian legislation. Consequently, the question referred for a preliminary ruling will have, in my view, to be substantially reformulated so that the Court must rule on the interpretation of the relevant provisions of the Protocol

and on the scope of the immunity enjoyed by Members of the European Parliament, thus providing the national court with the most extensive guidance to help it to rule in the proceedings pending before it.

VI — The substance of the question referred for a preliminary ruling

A — Freedom of political expression as a fundamental right

31. Article 8 of the Protocol is undoubtedly intended to protect the freedom of expression of the Members of the European Parliament, without which a representative body cannot exist. Indeed the Members of the European Parliament may not be bound by any instructions or receive a binding mandate. It is therefore a free mandate, which represents their freedom of political expression given form.¹⁸

¹⁸ — Article 4 of the Act of 1976 concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, decision of the representatives of the Member States meeting within the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage (OJ 1976 L 278), See also Article 2 of the Rules of Procedure of the Parliament.

¹⁶ — *Marra*, paragraphs 32 to 34.

¹⁷ — *Ibid.*, paragraph 39

32. However, everyone has the right to freedom of expression. It includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.¹⁹

33. Thus, as a fundamental right, freedom of expression gives everyone the right to express opinions, however questionable or shocking, minority or extravagant they may be. Nevertheless, the exercise of that freedom may be limited by the rights and interests of others.

34. The lawfulness of those limits of freedom of expression varies according, on the one hand, to the nature of the opinions and the context in which they are expressed and, on the other, to the position of the person expressing them. Thus, for example, freedom of expression in the sphere of political debate is more extensive than in business communications. In the light of the specific calling of journalists or parliamentarians, the overriding reasons justifying restrictions of their freedom of expression must be more forceful than those invoked generally.

35. Freedom of expression has the particular feature that it is both a right in itself but also a matrix essential to nearly every other form

of freedom.²⁰ In the context of public debate, freedom of expression constitutes one of the pillars of a democratic society, the constituents of which, according to the European Court of Human Rights, are pluralism, tolerance and broadmindedness.²¹ Freedom of expression is inseparable from the objective of democracy.²²

36. In the same way as in the Member States, the legitimacy of the European Union is based on the principle of democratic representation.²³ The Members of the European Parliament are thus entrusted with a specific mission of democratic representation which

20 — Expression of Mr Justice Cardozo, decision of the United States Supreme Court in *Palko v Connecticut*, 302 US 319 (1937), in Hallé, M., *Discours politique et Cour européenne des droits de l'homme*, Brussels, 2009, p. 7.

21 — European Court of Human Rights, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24. See Moysse, F., 'La liberté d'expression et l'ordre public en droit européen', *Annales du droit luxembourgeois*, Vol. 15, 2005, pp. 57 to 71. Article 52(3) of the Charter of Fundamental Rights, which relates to the scope and interpretation of rights and principles, provides that, in so far as the rights contained in the charter correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), their meaning and scope, including the accepted limitations, are the same as those laid down by the ECHR. It is therefore necessary to be guided by that case-law in this case.

22 — Charrière-Bournazel, Ch., 'La liberté d'expression et ses limites', *Annuaire international des droits de l'homme*, Vol. II, 2007, p. 236.

23 — Just like the Member States, the European Union is required to comply with the democratic principle, both under national constitutional laws and under EU law. With the entry into force of the Treaty of Lisbon, that principle is enshrined in Title II TEU, the whole of which is dedicated to it. It follows, therefore, that any exercise of powers by the Union must be able to be linked to the will of the people, see Gennart, M., 'Les parlements nationaux dans le traité de Lisbonne: évolution ou révolution', *Cahiers de droit européen*, 2010, Nos 1 and 2, pp. 17 to 46.

19 — Article 11(1) of the Charter of Fundamental Rights.

is carried out, in particular, through free political discussion.

37. In accordance with the case-law of the European Court of Human Rights, freedom of political expression, as a preferred means of achieving the objectives relating to the development of a democratic society, covers electoral and parliamentary statements. It is established that the limits of criticism with regard to a politician, acting in that capacity, and with regard to the government, must be wider than in relation to a private individual.²⁴ According to the European Court of Human Rights, freedom of political debate is undoubtedly not absolute in nature.²⁵ Conversely, an offensive or slanderous remark may become a subject for political debate, if there is a general interest in discussing it. It is a question of securing a safe space for public discourse to take place.²⁶ However, in its recent case-law, the European Court of Human Rights has acknowledged the possibility of interfering in the context of electoral debate.²⁷

38. In the present case, the European Parliament considered, in its decision to defend

immunity, that Mr Patriciello had acted in the general interest of his constituents. In that regard, it should be pointed out that, in the case-law of the European Court of Human Rights, opinions relating to matters of public concern are placed on an equal footing with political discussion.²⁸ That court has expressly stated that the problem of the use of social security funds,²⁹ public expenditure,³⁰ the appropriation of public assets,³¹ and corruption among politicians,³² *inter alia*, are matters of public concern. The national courts should, in the light of that case-law, be able to identify whether a criticism relating to a particular point is part of a more general debate. If it is, the opinion in question has special status and requires greater protection.³³

39. Moreover, since the case in the main proceedings concerns an officer of the Municipal Police, it should be pointed out that, by virtue of their position, civil servants are placed, in the eyes of the European Court of Human

24 — European Court of Human Rights, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, § 42, and *Oberschlick v. Austria*, judgment of 23 May 1991, Series A no. 204, § 59.

25 — European Court of Human Rights, *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 46.

26 — See the Opinion of Advocate General Poiares Maduro in *Marra*, point 36.

27 — European Court of Human Rights, *Etzeberria and Others v. Spain*, judgment of 30 June 2009, no. 35579/03; *Féret v. Belgium*, judgment of 16 July 2009, no. 15615/07; and *Willem v. France*, judgment of 16 July 2009, no. 10883/05.

28 — This interpretation was upheld by the European Court of Human Rights in *Thorger Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, § 64.

29 — European Court of Human Rights, *Eerikäinen and Others v. Finland*, judgment of 10 February 2009, no. 3514/02, §§ 66 to 68.

30 — European Court of Human Rights, *Flux v. Moldova*, judgment of 24 November 2009, no. 25367/05, § 39.

31 — European Court of Human Rights, *Porubova v. Russia*, judgment of 8 October 2009, no. 8237/03, § 43.

32 — European Court of Human Rights, *Bacanu and R v. Romania*, judgment of 3 March 2009, no. 4411/04, § 91.

33 — Where the national court has failed to take this aspect into account, the European Court of Human Rights has censured a State for infringement of Article 10 of the ECHR. See European Court of Human Rights, *Eerikäinen and Others v. Finland* and *Karsai v. Hungary*, judgment of 1 December 2009, no. 5380/07, § 29.

Rights, halfway between private individuals and politicians. Without equating politicians to civil servants, that court makes it clear that the limits of acceptable criticism with regard to civil servants, exercising their official functions, may in some circumstances be wider than in relation to private individuals.³⁴

B — *The principles governing parliamentary immunity in the Parliament and in the Parliamentary Assembly of the Council of Europe*

40. However, the European Court of Human Rights has pointed out that civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may prove necessary to protect them from offensive verbal attacks when on duty. That applies also to defamatory allegations concerning acts performed in the exercise of their duties.³⁵ The requirements connected with the protection of civil servants must, if necessary, be weighed against the interests of freedom of the press or freedom to discuss matters of public concern.³⁶

41. By way of introduction, I note that there is a historical link, based on a common principle and identical provisions, between the system of privileges and immunities granted to the Members of the Parliamentary Assembly of the Council of Europe and that granted to the Members of the Parliament.³⁷ In my view, that link justifies harmonising the two texts for the purpose of interpreting the scope of parliamentary immunity in the present case.

42. Under Article 343 TFEU, the Union enjoys in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, on the conditions laid down in the Protocol. Chapter III of the Protocol sets out the idea of legal guarantees for the Members of the European Parliament.

43. Thus, the privileges and immunities of the Members of the Parliament are those of the Union, which have been established in order that the Union may carry out its task.

34 — European Court of Human Rights, *Janowski v. Poland*, judgment of 21 January 1999, *Reports of Judgments and Decisions* 1999-I, § 33. See also European Court of Human Rights, *Thoma v. Luxembourg*, judgment of 29 March 2001, *Reports of Judgments and Decisions* 2001-III, § 47, and *Mamère v. France*, judgment of 7 November 2006, *Reports of Judgments and Decisions* 2006-XIII, § 27.

35 — See, inter alia, *Janowski v. Poland*; *Busuioc v. Moldova*, judgment of 21 December 2004, no. 61513/00, § 64; *Mamère v. France*, § 27; and *Taffin v. France*, judgment of 18 February 2010, no. 42396/04, § 64.

36 — European Court of Human Rights, *Haguenaer v. France*, judgment of 22 April 2010, no. 34050/05, §§ 47 and 48.

37 — Harms, Th., *Die Rechtsstellung des Abgeordneten in der Beratenden Versammlung des Europarates und in Europäischen Parlament*, Hansischer Gilddenverlag, 1968, p. 88. See also Resolution 1325 (2003) on immunities of Members of the Parliamentary Assembly, available on the website of the Assembly of the Council of Europe at the following address: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta03/FRES1325.htm>. See also the identical provisions of the Agreement on the Statute of the Western European Union, international representatives and personnel, of 11 May 1955.

44. It is to be pointed out that the very imprecise scope of the immunities, on which the European parliamentarians can rely, reflects its origins, namely, that the immunities scheme was conceived only as a supplement to the national rules relating to the privileges of Members.³⁸ In spite of the Parliament's various initiatives, no draft amendment to Articles 8 and 9 of the Protocol has as yet been successful.³⁹

45. In this regard, I wish to stress that the main reason for establishing European immunity is not to benefit individuals but to help effectively to protect their tasks. Parliamentary immunity is therefore conceived not as a personal privilege of parliamentarians but as a safeguard for the institution. Since the integrity of the European Parliament must be protected, certain freedoms and immunities have been granted to its Members in order to enable them to move freely within the European Union, to act freely in the performance

of their duties as parliamentarians and to be free of any threat in connection with those duties.⁴⁰

46. As is apparent from the Rules of Procedure of the Parliament, in the exercise of its powers in respect of privileges and immunities, the Parliament seeks primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties.⁴¹

47. In comparison, under the Statute of the Council of Europe, the representatives of the Member States of the Council enjoy the privileges and immunities necessary to the performance of their functions.⁴² These immunities are granted in order to preserve the integrity of the Parliamentary Assembly of the Council of Europe and to safeguard the independence of its Members in exercising

38 — The Protocol was adopted in 1965, at the time when the Parliament was composed of Members elected by the national parliaments, in accordance with their national procedures. The Protocol was supposed to cover only the 'European' part of parliamentary activity. See Benlolo Carabot, M., 'Les immunités des Communautés européennes', *Annuaire français de droit international*, 2008/2009, pp. 549 to 588.

39 — With regard to the European Parliament's attempts to specify the terms of the Protocol, see the report of the Legal Affairs Committee of the European Parliament, entitled 'Parliamentary immunity in the European Parliament', No PE 360.487/REV2, October 2005, available at the following address: <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=17288>. See the European Parliament resolution of 6 July 2006 on modification of the Protocol on Privileges and Immunities, P6_TA(2006) 0314, available on the Parliament's website <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0314&format=XML&language=EN>.

40 — See *Privileges and immunities of Members of the European Parliament*, Eighth Report of House of Commons of 18 March 1986, comments of Donnez, G., *Select Committee on the European Communities*, London, 1986, paragraph 17.

41 — Rule 6(1) of the Rules of Procedure of the Parliament. Moreover, this approach underlies the Court's case-law, inter alia Case 149/85 *Wybot* [1986] ECR 2391, paragraph 12. In the light of this, the approach taken by the Court of First Instance of the European Communities in Case T-345/05 *Mote v Parliament* [2008] ECR II-2849, which had the effect of creating a subjective right for the beneficiaries of immunities seems to me to be debatable in the light of the aim of immunity based on the protection of the exercise of their functions; see paragraphs 29 to 34 of that judgment.

42 — The Members of the Assembly enjoy the privileges and immunities provided for in the General Agreement on Privileges and Immunities of the Council of Europe (of 2 September 1949) and its Additional Protocol (of 6 November 1952). See Article 40 of the Statute of the Council of Europe, and Articles 13 to 15 of the General Agreement on Privileges and Immunities, and also Articles 3 and 5 of the Additional Protocol, volume 'Statute of the Council of Europe'.

their European office.⁴³ Moreover, under the Additional Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, those privileges and immunities are granted to the representatives of the Members, not for their personal benefit but in order to safeguard the independent exercise of their functions in connection with the Council of Europe.⁴⁴

48. However, the foregoing considerations do not undermine the hypothesis of the dual aspect of parliamentary immunity, the aim of which is to protect both the Parliament and its Members as individuals.⁴⁵

43 — Article 65 of Part XVII of the Rules of Procedure of the Assembly. Moreover, the Committee on Rules of Procedure, Immunities and Institutional Affairs of that assembly follows the evolution at European and international level of legal instruments concerning privileges and immunities of parliamentarians; see the Rules of Procedure of the Assembly, Terms of reference, Part IX. Committee on Rules of Procedure, Immunities and Institutional Affairs (paragraph 5).

44 — Article 5 of the abovementioned Additional Protocol to the General Agreement on Privileges and Immunities. This shows, moreover, that the Member States of the Council of Europe have not only the right but the duty to waive the immunity of their representatives. See also Resolution 1490 (2006) on the interpretation of Article 15a of the General Agreement, available at the following address: <http://assembly.coe.int/Main.asp?link=/Documents/Adopted-Text/ta06/ERES1490.htm>.

45 — See the Opinion of Advocate General Poireres Maduro in *Marra*, point 12. I would point out, however, that, at a hearing of the Constitutional Law Committee of the Finnish Parliament in 1933, eminent constitutionalists of the time proposed that the substantive immunity of members of parliament should give them the opportunity to criticise freely the government, the authorities and other persons or contemporary things or phenomena, without fear of legal proceedings or without the need to study in detail the criminal code before expressing an opinion. See Hakikila, E., *Suomen tasavallan perustuslait* (The constitutional laws of the Republic of Finland), Porvoo, 1939, p. 416.

49. Thus, as regards, first, the protection of freedom of speech and of the vote in connection with a Member's performance of his duties, substantive immunity, also called 'absolute immunity' or 'parliamentary immunity',⁴⁶ reflected in Article 8 of the Protocol, enables a Member to avoid legal proceedings for certain categories of act, namely those linked to the exercise of his mandate.

50. The Court of Justice has already held that that substantive immunity is absolute in nature.⁴⁷

51. This consideration must be interpreted in the light of the principle,⁴⁸ which underlies substantive immunity, that absolute immunity being unlimited in time, it is valid both during the mandate and after its expiry. It is also absolute in that it covers all forms of legal liability, in particular criminal and civil liability. Moreover, it is an unconditional non-liability, for it may not be waived by either the Parliament or the Member. Nevertheless, the absolute nature of the immunity covers, under Article 8 of the Protocol, only 'opinions expressed or votes cast by them in the performance of their duties'.

46 — Compare with footnote 5.

47 — *Marra*, paragraph 27.

48 — Since Article 8 of the Protocol does not refer back to national legislation, the substantive immunity for which it provides must be regarded as founded exclusively on EU law. See *Marra*, paragraph 26.

52. Secondly, the purpose of procedural immunity or freedom from arrest, referred to in Article 9 of the Protocol, is to prevent the exercise of the parliamentary mandate's being hampered by criminal actions in respect of acts committed by Members as ordinary citizens. Article 9 therefore guarantees the Members of the European Parliament protection against legal proceedings during the term of their mandate. The freedom from arrest provided for in Article 9 is limited to the duration of the sessions and becomes ineffective if the Member is found in the act of committing an offence and if the Parliament waives immunity.⁴⁹

53. Historically, the purpose of that procedural immunity was to stop the executive

power or individuals preventing or hampering the performance of Members' functions by bringing proceedings or making unfounded criminal accusations against them. Consequently, the immunity concerned is not absolute in nature but merely requires the measures adopted against a Member to be implemented after or between sessions of the Parliament.

54. Substantive immunity stemming from absolute immunity applies simply because it is laid down in the Protocol, and on condition that a Member's acts fall within the ambit of substantive immunity. In contrast, for procedural immunity to apply, a decision of the European Parliament is required in order to permit or prohibit an arrest or legal proceedings.

49 — In that regard, I think the Parliament's practice is inconsistent and likely to cause controversy. On the one hand, the Parliament has considered that the procedural immunity referred to in Article 9 (formerly Article 10) of the Protocol applies not only to acts committed during the term of the mandate, but also retroactively to acts committed by former Members of the Parliament. According to the Parliament, only acts committed after the expiry of the mandate are excluded from the scope of procedural immunity, hence the need to waive immunity in respect of former Members (see Report No PE 360.487/REV2 of the Legal Affairs Committee of the European Parliament, referred to in footnote 39, p. 7). I have serious doubts as regards the compatibility of that interpretation with the objective of procedural immunity referred to in Article 9 of the Protocol and with the principles of equality before the law and those relating to access to the law enshrined by the Charter of Fundamental Rights. On the other hand, the Parliament has stated that it is very doubtful that Article 9 can apply to former Members of the Parliament. According to the Parliament, it is necessary to protect former Members from attacks in respect of opinions expressed or votes cast in the performance of their duties. However, the application of Articles 7 (formerly Article 8) and 9 of the Protocol seems to be limited to Members of the Parliament during its sessions. See the report on the request for defence of immunity and privileges of Koldo Gorostiaga (2004/2102(IMM)) of 25 January 2005, and the report on the request for defence of immunity and privileges of Andrzej Pęczak, former Member of the European Parliament (2005/212/(IMM)), of 22 November 2005.

55. Bearing in mind these principles, it seems to me that freedom of expression in general, freedom of expression in political debate and relating to the public interest and the scope of the substantive immunity of a Member of the Parliament are rights which, although they are different, are continually confused. It is worth pointing out that the expression of an opinion by a Member of the Parliament may be protected, either by bringing into action the principle of the wider freedom of expression that applies to political debate, or by bringing into action the principle of freedom of expression that is in general applicable, with the result that such an opinion may not automatically be penalised, even if it has been expressed in circumstances that do not fall within the ambit of the substantive immunity linked to the performance of the duties of a

Member of the Parliament. The present case therefore concerns the question how to draw the line of demarcation, in respect of freedom of expression, between the degree of protection of an individual in general, of a participant in political debate and of a Member of the Parliament.

57. As regards its objective, parliamentary immunity includes, in my view, not only rights but also responsibilities.⁵¹ The importance of this approach has also been underlined by the Council of Europe's Parliamentary Assembly, according to which the possibility of sanctions⁵² should be increased in the event of the opinions expressed by Members of the Assembly containing defamation, insults or slander.⁵³ The rare cases of defamatory opinions attributable to Members of the Parliamentary Assembly have led to a proposal to reinforce protection for the reputation of injured persons.⁵⁴

C — Concerning the rules of conduct applicable to Members of the Parliament

56. Under Article 232 TFEU, the European Parliament is to adopt its Rules of Procedure. Without wishing to establish a direct parallel between the provisions of the Protocol and those of the Rules of Procedure of the Parliament, I consider the latter to be a useful reference document for the purpose of the reply to be given in the present case. It should be added that an institutional practice, well established within the Parliament, has grown up concerning the application of Article 9 of the Protocol in requests for waiver of the immunity of Members of the European Parliament.⁵⁰

58. It is important to point out that, although the Members of the Parliament benefit, in the exercise of their functions, from substantive immunity, they are still subject to the rules of conduct laid down by that institution.

59. Those rules, especially Rules 9(2), 152 and 153 of the Rules of Procedure of the Parliament, seek to define the limits of the

50 — On this practice, see Report No PE 360.487/REV2 of the Legal Affairs Committee of the European Parliament, referred to in footnote 39.

51 — See the publication of the Inter-Parliamentary Union (IPU) entitled 'Freedom of expression, Parliament and the promotion of tolerant societies', Geneva, 2005, available at the address: http://www.ipu.org/pdf/publications/freedom_en.pdf. (p. 57 et seq.).

52 — Rule 21 of the Rules of Procedure of the Parliamentary Assembly.

53 — See Resolution 1325, paragraph 5. I would point out that, in German law, under Paragraph 46(1) of the Basic Law, defamation is excluded from the scope of the substantive immunity of members of parliament.

54 — Doc. 12059, entitled 'Ensuring protection against attacks on the honour and reputation of persons', available at the address: <http://assembly.coe.int/Documents/Working-Docs/Doc09/EDOC12059.pdf>.

behaviour of Members of the Parliament and the sanctions in the event of infringement. It is apparent from those Rules of Procedure that the conduct in question has to be based on the values and principles defined in the fundamental EU legislation, to preserve the dignity of Parliament and not to compromise the efficient progress of parliamentary work.

60. In so far as those rules show the very nature of the behaviour which forms an integral part of the exercise of parliamentary duties, I consider that that information may be taken into consideration in the interpretation of Article 8 of the Protocol in order to define the scope of substantive immunity.

D — The scope of substantive immunity as provided for in Article 8 of the Protocol

61. According to an argument put forward by academic lawyers, substantive immunity extends to all the forms which parliamentary activity may take, whether in writing in parliamentary documents, or in speeches and votes in all their forms, in the parliamentary assemblies and committees.⁵⁵

55 — Jeuniaux, M.-Ch., 'Le statut personnel des membres du Parlement européen', Doctoral thesis, University of Toulouse, 1987, p. 179.

62. There are undoubtedly various parliamentary models of and approaches to substantive immunity among the Member States of the European Union. However, they all have the same objective, namely to safeguard the performance of the duties of a Member of Parliament and, *in fine*, the functioning of the institution.⁵⁶

63. The classic model of substantive immunity which covers opinions expressed or votes cast by Members in the exercise of their functions applies also to the Members of the Council of Europe's Parliamentary Assembly.⁵⁷ In that connection, the term 'opinions expressed' includes both the oral and written interventions of Members in the exercise of their functions within that Assembly. A parliamentarian's insults addressed to a person in the public domain do not fall under the definition of opinion.⁵⁸ Substantive immunity also includes opinions expressed during official functions exercised by Members in the Member States.⁵⁹ It is therefore a question of

56 — See the Parliament's comparative study No PE 168.399, referred to in footnote 4.

57 — Substantive immunity is the subject of Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe.

58 — See the report of the Committee on Rules of Procedure and Immunities of 25 March 2003 entitled 'Immunities of Members of the Parliamentary Assembly', Doc. 9718 revised, available at the address: <http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9718.htm>.

59 — See Resolution 1325 (2003) of the Council of Europe's Parliamentary Assembly and the report of the Committee on Rules of Procedure and Immunities of 25 March 2003, referred to in footnote 58.

protecting parliamentarians on official business in the Member States of the Council of Europe.

64. In addition, it is interesting to note an initiative of the European Parliament of 1987, seeking to amend Article 8 of the Protocol, so that Members of the European Parliament are protected in respect of opinions expressed and votes cast during parliamentary debates, within bodies established by Parliament or working with it or on which the Members sit as Members of the Parliament.⁶⁰

65. Consequently, the current debate concerning the criterion to be used for defining parliamentary activities for the purposes of Article 8 of the Protocol has refocused on the choice between a 'spatial' criterion and a 'functional' criterion. In order to contribute to this discussion, I should like to ask the Court to alter the perspective of the examination of the statements at issue.

66. Substantive immunity covers, in my view, three aspects. The first, which is objective in nature, is designed to give Members the opportunity of engaging in and conducting parliamentary political debate entirely freely and

so of promoting various political causes in order to influence the exercise of Parliament's legislative, budgetary and review powers. The second aspect, which is also objective in nature, is designed to safeguard the opportunity of expressing critical opinions, inter alia, in respect of the executive of the European Union and of the Member States and thus of contributing to a vertical and horizontal division of powers within the Union. The third aspect, which is subjective, must be understood from the point of view of a fundamental right that restricts the fundamental rights of other citizens, such as the right of access to justice. These three aspects of substantive immunity therefore result in the establishment of an exception to the principle of equal treatment of citizens.⁶¹ For this reason, it is essential to find, when interpreting its scope, the balance necessary in a democratic society.

67. In that regard, I share the opinion of the Commission, which points out that Article 8 of the Protocol must have a scope fully compatible with Article 6 of the ECHR which corresponds to Article 47 of the Charter of Fundamental Rights. A restriction of the right of access to justice by reason of parliamentary immunity must not be disproportionate

60 — See the Protocol on the revision of the Protocol on Privileges and Immunities of the European Communities of 8 April 1965 in so far as it concerns the Members of the European Parliament (OJ 1987 C 99, p. 43): 'Members of Parliament shall not be subject to any form of inquiry, detention or legal proceedings, in connection with civil, criminal or administrative proceedings, in respect of opinions expressed or votes cast during debates in Parliament, in bodies created by or functioning within the latter or on which they sit as Members of Parliament.'

61 — See Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights. On the proportionate nature of this limitation, see the Opinion of Advocate General Poiares Maduro in *Marra*, point 31.

to the legitimate aim, safeguarded by that immunity.⁶²

68. As regards the ‘spatial’ criterion, I agree with Advocate General Poiares Maduro. I believe there can be no doubt 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.⁶³

69. I note that, according to the Council of Europe’s Parliamentary Assembly, given the international nature of the Assembly, it is important that absolute immunity should be defined in relation to the typical activities of its Members and not by reference to a notion of geographical location.⁶⁴

70. However, in my view, the importance of parliamentary premises as a privileged place of political debate, also at Union level, must not be disregarded. Accordingly, the interpretation of the concept of parliamentary immunity must not standardise the Parliament

as a political institution by treating in the same way opinions expressed by a Member of the European Parliament in the parliamentary forum and those which he may express, for example, in a television reality show.

71. That said, it is important to point out that substantive immunity does not apply to all the activities of a Member of the Parliament, even if they are conducted within the Parliament or during sessions.⁶⁵ In order to apply the spatial criterion, the activity in question must necessarily have a link with the activities carried out as a Member of the Parliament. In the Member States, there is, in most cases, a link between the substantive and temporal scope of absolute immunity and the notion of opinions inherent in the activities particular to the Parliament.⁶⁶ Thus, discussions *intra muros* during parliamentary work in the

62 — European Court of Human Rights, *Patrono, Cascini and Stefanelli v. Italy*, judgment of 20 April 2006, no. 10180/04, §§ 63 and 64, and *C.G.I.L. and Cofferati v. Italy*, judgment of 24 February 2009, no. 46967/07, §§ 74 and 75.

63 — See the Opinion of Advocate General Poiares Maduro in *Marra*, point 35.

64 — Doc. 9718 revised, referred to in footnote 58, in which it is stated that ‘[s]ince the upheavals that occurred between 1989 and 1991, the Assembly and its [M]embers have been more involved on the ground: observation of elections, visits to the scene in the event of crises and in the course of parliamentary diplomacy, members’ negotiations with national officials as part of the accession procedure for countries requesting Council of Europe membership, and the monitoring procedure’.

65 — By way of example, verbal harassment of waitresses in the Parliament cafeteria would not fall within the scope of Article 8 of the Protocol.

66 — In Belgian law, under Article 58 of the Belgian Constitution, non-liability (non-accountability, privilege of freedom of speech) covers the opinions or votes of a parliamentary member, provided that he is acting ‘in the exercise of his parliamentary mandate’. In German law, Paragraph 46(1) of the Basic Law refers to a ‘statement or vote in the Bundestag’. In Spanish law, Article 71 of the Spanish Constitution, in French law, Article 26 of the French Constitution, and in Luxembourg law, Article 68 of the Luxembourg Constitution use the expression ‘in the exercise of his functions’. In Finnish law, Article 30 of the Finnish Constitution links the scope of parliamentary immunity to the opinions and attitudes adopted by the Member in the Parliament.

broad sense⁶⁷ clearly fall within the scope of Article 8 of the Protocol.

72. With regard to activities and statements outside the confines of the Parliament, the main difficulty is linked to the application of the 'functional' criterion, which is therefore the only relevant criterion for interpreting the scope of substantive immunity. In my view, the objective of Article 8 of the Protocol cannot be to extend immunity to all statements of Members of the Parliament. Such an interpretation seems to me to conflict with the fundamental rights which are equality before the law⁶⁸ and access to justice, even though the Parliament appears to have adopted this position in its practice concerning the lifting of immunity.⁶⁹ However, substantive immunity is designed to protect the Members of the Parliament as such, and not as politicians in general.

73. In his Opinion in *Marra*, Advocate General Poiares Maduro suggested that, for the

67 — Namely participation in sessions, parliamentary work, committees, meetings, press conferences, and receiving delegations.

68 — By way of example, in Sweden, the proposal to amend the Swedish Constitution seeking to extend the scope of parliamentary immunity to political debate *extra muros* was rejected, owing to the inequality or which would result between the different participants in those debates. See the report of the Constitutional Reform Committee, entitled 'En reformerad Grundlag—Betänkande av Grundlags Utredningen', SOU 2008:125, pp. 609 and 610.

69 — In the practice of the European Parliament, immunity is not waived if the criminal charges relate to the 'political activities' of a Member of the Parliament. This term has been interpreted by the Parliament on a basis which it described in its report as 'extremely broad and flexible'. See Report No PE 360.487/REV2 of the Parliament's Legal Affairs Committee, referred to in footnote 39, pp. 23 and 24.

purpose of deciding whether the statements of a Member of the Parliament have been made in the performance of his duties, the criterion should be the nature and content of the comments of Members of the European Parliament. He made the classification of opinions subject to two conditions, namely, the opinions must be of genuine public interest and a distinction must be drawn between factual allegations and value judgements.⁷⁰

74. Inasmuch as, in my view, this aspects requires deeper analysis, I should like, before I answer the question of the interpretation of the expression 'opinion expressed or vote cast in the performance of his duties' included in Article 8 of the Protocol, to consider the concepts of public interest and of the distinction between value judgements and factual allegations, and then propose that the scope of substantive immunity should be established by means of an organic rather than a functional link.

1. Genuine public interest

75. Public interest is one of the fundamental aspects of freedom of expression, for it contributes to the protection of the multiplicity of values in the society which that freedom

70 — Opinion of Advocate General Poiares Maduro in *Marra*, points 37 to 39.

is capable of preserving. Nevertheless, as regards the scope of the immunity arising under Article 8 of the Protocol, I think it difficult to require every statement made by a Member of the European Parliament to have a political connotation that always reflects a genuine public interest.

76. The aim of an extensive freedom of expression, such as that conferred on the Members of the Parliament, is to offer them the opportunity of participating in political debate linked to their functions without unjustified hindrance. That freedom must also include the opportunity of expressing opinions that are subjective, selfish or unsuitable, since a parliamentarian's purpose is to promote political causes, without being subject to any duty whatsoever to be objective.

77. In fact, the aim of democratic political debate is to contribute to the definition of the public interest, by suggesting different conceptions of it. The public interest does not precede democratic debate, but it is that debate which contributes to a better understanding of the public interest.

78. The concept of genuine public interest cannot therefore, in my view, constitute a relevant criterion for applying substantive immunity to the positions taken by Members of the Parliament and falling within the scope of Article 8 of the Protocol. If it could, the content of political debate would be subject to censure a posteriori by the legal authorities,

which in itself would wholly contradict the idea of parliamentary immunity.⁷¹

2. Value judgements and statements of fact

79. The distinction between a statement of fact and a value judgement,⁷² evoked *inter alia* in the observations of the European Parliament and the Commission, appears established in contemporary thought. The origin of this thesis is found in the statement of David Hume that duty cannot be inferred from facts.⁷³ In 20th century philosophy, that principle was adopted by the 'non-cognitivist' theories according to which comments relating to values or rules lie outside the

71 — I cannot deny, as the case-law of the European Court of Human Rights has shown, the role which the public interest may play in the assessment of whether a statement is covered by freedom of expression or whether it may be sanctioned. In the case of the Members, such an assessment is therefore possible only after it has been established that the statement at issue does not fall within the scope of the substantive immunity conferred on Members.

72 — According to the generic definition, the role of value judgements is to provide an assessment, either positive or negative, of their object. See Villa, V., 'Legal theory and value judgements', in *Constructing Legal Systems, European Union in Legal Theory*, ed. MacCormick, p. 119. For the purposes of analysing parliamentary immunity, it is necessary to include judgements expressing deontological assessments, concerning the fairness or moral value of acts, in the category of value judgements.

73 — The Scottish philosopher affirmed this thesis in his *Treatise of Human Nature* published in 1739. This idea was extended to apply to value judgements by the English philosopher G.E. Moore (1873-1958).

dichotomy between what is true and what is false. In contrast, statements of fact are either true or false. Thus, objectivity is possible in so far as the debate concerns facts, but value judgements are more or less relative, or even subjective.⁷⁴

80. In view of the conceptual difficulties in the field of moral philosophy, attaching to that distinction, it seems to me dangerous to base the legal interpretation of a rule of EU law on that distinction. It seems to me, as to certain exponents of legal theory, that to establish a clear distinction between value judgements and statements of fact in the area of the law is, from a conceptual point of view, difficult if not impossible. Moreover, I note that it is quite possible to express value judgements by means of a sentence which is presented on a semantic level as a purely factual statement.⁷⁵

81. Nevertheless, it is useful to note that the distinction between value judgements and statements of fact is one of the classic criteria in the practice of the European Court of Human Rights. In short, in the case of a

statement of fact, the Court acknowledges that it is possible to prove the truth of the facts (*exceptio veritatis*)⁷⁶, which is excluded in cases of value judgements.

82. It has been rightly pointed out in academic writings that the European Court of Human Rights does not apply a simple dichotomy between the two concepts, that is to say, it distinguishes not between a 'pure opinion' and a 'factual statement', but between 'pure factual statements' and mixed statements, expressing both fact and opinion.⁷⁷

83. That proves, in my view, that the opposition of these two concepts is not free from doubt, as the European Court of Human Rights has itself acknowledged.⁷⁸ In accordance with the case-law of that Court, the difference between value judgements and statements of fact therefore lies in the level of factual proof to be established.⁷⁹ However, I doubt whether it is possible purely and simply to transpose that case-law to the limits

74 — See on this argument, for example, Shafer-Laundau, R., *Moral Realism. A Defence*, Oxford University Press, 2005, pp. 18 to 52.

75 — For example, a statement which refers to the objective fact that a political opponent is of a certain ethnic origin may reveal a negative value judgement on the part of the person expressing it. Revisionist statements regarding the Holocaust constitute a flagrant example of the fact that it is possible to express shocking value judgements by statements which appear purely factual.

76 — See a classic judgment of the European Court of Human Rights on the subject: *Bladet Tromsø A/S and Stensaas v. Norway*, judgment of 20 May 1999, *Reports of Judgments and Decisions* 1999-III, § 65.

77 — Hochmann, Th., 'La protection de la réputation. Cour européenne des droits de l'homme. Pfeifer c. Autriche, 15 novembre 2007', *Revue trimestrielle des droits de l'homme*, 2008/76, p. 1185. This leads to a widening of the scope of the concept of 'value judgement' and to a narrowing of the concept of 'statement of fact'.

78 — European Court of Human Rights, *Scharsach and News Verlagsgesellschaft v. Austria*, judgment of 13 November 2003, *Reports of Judgments and Decisions* 2003-XI, § 40.

79 — *Idem*.

of the substantive immunity of a Member of the Parliament.

immunity draws a distinction between statements of fact and value judgements.⁸¹

84. I would point out that substantive immunity shields certain opinions expressed by the Members of the Parliament from possible criminal or civil liability. From this perspective, opinions must be studied as acts, more specifically as speech acts that may or may not constitute offences such as making false accusations, defamation or insult.⁸⁰

86. Finally, I think it timely to draw the Court's attention to the fact that a comparison between the concept of 'exercise of [his] parliamentary functions' and value judgements leads to a limitation of the scope of freedom of political debate.

85. In an assessment of opinions as acts, the question whether an assertion is a statement of fact or a value judgement seems to me less important than the objective content of a statement and its illocutionary force. Speech acts structure social interaction through their illocutionary force which creates a link between interlocutors. See Moreso, J.J., *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, 1998, pp. 12 and 13, and Ruiters, D.W., *Institutional Legal Facts*, Dordrecht, 1993, pp. 37 to 51. A finding of fact may therefore have an illocutionary force which characterises it as a defamatory act.

87. Indeed, when carrying out his duties, a Member of the Parliament must be able to express the concerns and defend the interests of his constituents. For that reason, he must, while being protected by substantive immunity, be free to make statements of fact that have not been established or that may be incorrect. More often than not, they will be mixed expressions within the meaning of the case-law of the European Court of Human Rights. A Member of the Parliament must therefore be given the 'benefit of the doubt', namely the opportunity of criticising the functioning of other institutions without having first to carry out extensive research for the purpose of proving his statements.

80 — In philosophy, the theory of the speech acts states that statements constitute not only a means of transmitting information but also acts. It is therefore necessary to distinguish between the propositional content of a statement and its illocutionary force. Speech acts structure social interaction through their illocutionary force which creates a link between interlocutors. See Moreso, J.J., *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, 1998, pp. 12 and 13, and Ruiters, D.W., *Institutional Legal Facts*, Dordrecht, 1993, pp. 37 to 51. A finding of fact may therefore have an illocutionary force which characterises it as a defamatory act.

81 — For example, in these two cases (Cases A3-0088/89 and A3-0040/90), concerning comments made by Mr Le Pen, his first comment may be categorised as a value judgement and the second as a revisionist statement of fact. In both cases, the competent parliamentary committee had proposed that immunity should not be waived, but the plenary session of the Parliament did not follow its advice. See the annex to Report No PE 360.487/REV2 of the Parliament's Legal Affairs Committee, referred to in footnote 39.

88. I therefore take the view that substantive immunity must cover not only value judgements but also statements of fact, provided that they satisfy the organic criterion which I am going to propose.

1. The criterion of proportionality stemming from the case-law of the European Court of Human Rights

E — The establishment of an organic criterion⁸²

90. As regards the case-law relating to the limits of immunity, according to the European Court of Human Rights, while freedom of expression is important for everybody, it is especially so for a person elected by the people who represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential forums for political debate.⁸³ That Court also points out that it is important that the assessment be made in the light of the specific circumstances, and that it should not be a review *in abstracto*.⁸⁴

89. Inasmuch as I am convinced that the criterion of a 'functional' link based on the concept of public interest and on the distinction between value judgements and statements of fact does not enable a useful reply to be given to the question concerning the substantive conditions for giving effect to the immunity conferred by EU law, I propose that the Court should introduce a criterion specific to the nature of the duties of a Member of the European Parliament, on the basis of the case-law of the European Court of Human Rights. This criterion links substantive immunity not to the content of a Member's comments, but rather to the relationship between the context in which those comments are made and the parliamentary work of the Parliament.

91. In general, when interpreting the scope of parliamentary immunity, the European Court of Human Rights appears to opt for a restrictive approach. Accordingly, it has considered compatible with the ECHR an immunity which covered statements made during parliamentary debates in legislative chambers and was designed to protect the Parliament's interests as a whole, as opposed to those of its Members taken individually.⁸⁵

82 — Which is related to the institutional position of a Member of the Parliament in the constitutional organisation of the European Union. The term 'organic' is therefore not used in the sense of 'inherent to' or 'specific to'.

83 — European Court of Human Rights, *Jerusalem v. Austria*, judgment of 27 February 2001, *Reports of Judgments and Decisions* 2001-II, §§ 36 and 40.

84 — *Mutatis mutandis*, European Court of Human Rights, *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, § 24.

85 — European Court of Human Rights, *A. v. the United Kingdom*, judgment of 17 December 2002, *Reports of Judgments and Decisions* 2002-X, §§ 84 and 85.

92. In point of fact, I think the fundamental judgment is that in *A. v. the United Kingdom*. After concluding that the parliamentary immunity enjoyed by the member of the House of Commons in the case pursued the legitimate aims of protecting free speech in parliament and maintaining the separation of powers between the legislature and the judiciary, the European Court of Human Rights examined the proportionality of the immunity in question. Accordingly, from the point of view of its compatibility with the ECHR, the broader an immunity, the more compelling must be the reasons justifying it.⁸⁶

93. Moreover, the judgment in *Cordova v. Italy*⁸⁷ resulted, in particular, in a narrow interpretation of immunity, to the effect that it is not intended to protect a Member of Parliament when he is not acting as such. In that judgment, the European Court of Human Rights emphasised that the conduct of a Member could be not linked to the exercise of his parliamentary functions in their strict sense and, above all, that it could not, by its very nature, be compared with an act falling within the scope of parliamentary functions. That Court considered that the be-

haviour at issue⁸⁸ was more consistent with a personal quarrel and that, in such circumstances, it would not be right to deny someone access to a court.⁸⁹

94. On the basis of that finding, the Court held that ‘the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body. To hold otherwise would amount to restricting in a manner incompatible with Article 6(1) of the Convention the right of individuals to have access to a court whenever the allegedly defamatory statements have been made by a parliamentarian.’⁹⁰

95. In the light of these arguments, the proportionality of the scope of the immunity must, in my view, be considered a key aspect for the purposes of interpreting Article 8 of the Protocol, which prompts me to suggest that the Court of Justice should introduce a new, ‘organic’ criterion.

86 — European Court of Human Rights, *A. v. the United Kingdom*, §§ 77 and 78. However, when it is a question of assessing the proportionality of an immunity, its absolute nature cannot be decisive; see European Court of Human Rights, *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B.

87 — European Court of Human Rights, judgment of 30 January 2003, *Reports of Judgments and Decisions* 2003-1.

88 — The Court considered that ironic or derisive letters accompanied by toys personally addressed by Mr Cossiga to a prosecutor cannot, by their very nature, be construed as falling within the scope of parliamentary functions. See § 62 of the judgment in *Cordova v. Italy*.

89 — *Cordova v. Italy*, §§ 61 and 62.

90 — *Ibid.*, § 63.

2. The criterion of an organic link

96. For the purposes of interpreting Article 8 of the Protocol, I suggest applying the criterion of an organic link between the activities of a Member of the European Parliament and the scope of substantive immunity.⁹¹ In my view, it is necessary to distinguish, within the very concept of substantive immunity, between the hard kernel and the sphere surrounding it.

97. I propose classifying at the heart of immunity activities constituting the exercise par excellence of the duties of a Member of the Parliament. These would cover, inter alia, opinions expressed and votes cast in the forum of the Parliament, in the Parliament's committees, delegations and political organs and also in the political groups. I suggest including there activities such as participation in conferences, missions and other political meetings outside the Parliament, as a Member of the Parliament.⁹²

91 — The application of such an organic link in a slightly more simplified form has already been suggested by academic writers; Harms, Th., *op. cit.*, p. 91.

92 — According to the Council of Europe's Parliamentary Assembly, 'obviously the words "in the exercise of their functions" apply to plenary sessions and to meetings of Assembly committees, sub-committees and other subsidiary bodies of the Assembly... Substantive immunity should also extend to the official activities performed by Assembly Members in connection with meetings and conferences of other Council of Europe bodies. See the abovementioned Doc. 9718 revised.

98. While I accept that it is probably impossible to list all the acts concerned, I consider that approval of the concept of 'activities which are in essence parliamentary' will facilitate the examination of the national court, which, in the event of doubt, may or must refer a question to the Court of Justice for a preliminary ruling in that regard.

99. As regards acts which cannot be classified as constituting the function of a Member of the European Parliament, it is necessary, following the example of the European Court of Human Rights, to apply the principle of proportionality. As that court has held, the lack of any clear connection with a parliamentary activity calls for a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed.⁹³

100. Consequently, the further the act or statement of a Member of the Parliament departs from the essential core of his duties, the more compelling must be the reasons justifying his immunity. That means striking a balance between a Member's freedom of expression, on the one hand, and the access to justice and equal treatment of citizens, on the other.

101. Conversely, the greater the comparison as to substance with the activities of a Member of the Parliament, the wider the substantive immunity conferred on Members

93 — *Cordova v. Italy*, § 63.

becomes. Above all, the question whether a speech of a Member of the European Parliament in the media is covered by substantive immunity must be assessed on the basis of those criteria. It seems to me that substantive immunity must cover statements which are made straight after parliamentary debates, which reproduce them or which comment on them. On the other hand, in so far as concerns the participation of Members of the Parliament in electoral debates or other political debates in general, those Members must not be in a better legal position than the other participants in those debates.

102. However, the question arising in this context is whether a Member of the European Parliament is entitled to rely on the protection conferred on him by Article 8 of the Protocol, when he is clearly acting as a national, regional or local, politician.

103. Indeed, the challenge which parliaments and their members must now face is to demonstrate that they are acting in the interest of the population, to improve the quality of life of the citizens and to act in such a way that their message is not discredited.⁹⁴

94 — See the publication of the Inter-Parliamentary Union (IPU) entitled 'Freedom of expression, Parliament and the promotion of tolerant societies', referred to in footnote 51, pp. 64 and 65.

104. Since the substantive immunity established in the Protocol is based on the Treaty which, in Article 343 TFEU, refers to the performance of the tasks of the Union, I consider that that immunity is intended to cover the activities of a Member of the European Parliament, 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.

105. It is clear that, having regard to the scope of contemporary political debate, most of the comments of a Member of the European Parliament have a dual nature. A speech at European level may have a clear link with the national, regional or local level. However, in the opposite case, that is to say, in the case of statements made in a purely national or local context, it may be more difficult to establish a link with the Union dimension.

106. I note, in that regard, that the Rules of Procedure of the Council of Europe's Parliamentary Assembly refer to the 'European office',⁹⁵ which may support the argument that its scope is limited to that area.

95 — Rule 65.1 of Part XVII of the Rules of Procedure of the Council of Europe's Parliamentary Assembly.

107. To summarise, in view of the nature of the immunity of the Members of the Parliament, understood as the immunity of the Union essential to the performance of its tasks, acts falling within the scope of political debate in general or when the Member speaks as a protector of the interests of the electorate at national or regional level may not, in the light of the organic criterion, be regarded as covered by substantive immunity as provided for by Article 8 of the Protocol.

108. I therefore propose that the Court should apply a balanced interpretation of substantive immunity, based on the test of an organic link, and that must observe the principles of equal treatment of citizens and of the right of access to the courts.

109. In the main proceedings, the reasons given for Mr Patriciello's immunity do not seem to me to prevail over those principles. As is apparent from the general report of the Parliament, cases of defamation concerning individuals rather than institutions have usually been regarded as falling outside a

Member's political activity. That applies, for example, to attacks on individual police officers but not to a criticism of the police as an institution.⁹⁶ The decision to defend Mr Patriciello's immunity therefore moves away from that approach.

110. In the light of all the foregoing, I consider that the act committed by Mr Patriciello falls outside the activities of a Member of the Parliament in the organic sense that I have just proposed. As is apparent from the order for reference, Mr Patriciello acted outside the precincts of the Parliament. Next, given the subject-matter of his act, he seems to have acted as a national politician, or even as an annoyed citizen. Moreover, subject to verification of the facts by the national court and their classification in the light of Italian criminal law, Mr Patriciello's behaviour cannot be regarded as having a relevant link with the exercise of his functions as a Member of the Parliament.

96 — See Report No PE 360.487/REV2 of the Parliament's Legal Affairs Committee, referred to in footnote 39, p. 24. In point of fact, the Parliament has waived immunity in cases concerning attacks on police officers; see cases A2-0130/88, A2-0105/85 and A6-0156/2006. See the annex to Report No PE 360.487/REV2, referred to in footnote 39.

VII — Conclusion

111. In view of the foregoing, I propose that the Court reply to the question from the Tribunale di Isernia as follows:

The conduct of a Member of the European Parliament, such as that at issue in the main proceedings, given that it has no link to the activities of the European Parliament, does not constitute an opinion expressed in the performance of parliamentary duties for the purposes of Article 8 of Protocol No 7 on the Privileges and Immunities of the European Union.