

Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union

Final Draft

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AN ECPRD PUBLICATION ON TOPICAL PARLIAMENTARY AFFAIRS

PREFACE

This paper represents the second in a new series of publications on issues in parliamentary practice from the European Centre for Parliamentary Research and Documentation (ECPRD).

Rules on Parliamentary Immunity in the European Parliament and Member States of the European Union outlines the very topical debate on the privileges that should be afforded to those elected to office, and details the arrangements that exist for parliamentarians in parliaments across the EU Member States and in the European Parliament.

Its priority, as with the other studies in this series, is to provide an easy to consult and accessible introduction for both public service practitioners and members of the public on the predominant issues in parliamentary activity.

It is often the case that basic yet essential information on the workings of parliaments is diffuse and difficult to track down. This ECPRD paper brings together such information, allowing the reader to become knowledgeable about the mechanisms in place on the subject of parliamentary immunity across the EU.

The European Centre for Parliamentary Research and Documentation is a cooperative body under the aegis of the European Parliament and the Parliamentary Assembly of the Council of Europe. It is primarily an international network of research departments and parliamentary libraries but also involves other officials responsible for information gathering and dissemination. Its aim is to facilitate contacts and exchanges between the officials of member parliaments to the mutual benefit of all.

Created in 1977 by the Conference of Speakers of European Parliamentary Assemblies, which delegated to the Presidents of the European Parliament and the Parliamentary Assembly of the Council of Europe its formation and management, it is comprised of 41 member countries and 7 guest countries, allowing 67 parliamentary chambers to cooperate within the ECPRD.

The main activities of the ECPRD are seminars hosted by member parliaments on subjects of relevance to parliamentary officials. The two main emphases in recent years have been, broadly, how parliaments should react to the challenges of the new technology, and parliamentary management and democratisation. In addition, there are working groups which meet annually to consider the technical aspects of information and communications technology, and on macro-economic policy.

The Secretariat of the ECPRD is based in the European Parliament in Brussels. It is staffed by permanent officials of the Parliament, and acts as a clearing house for information requests for comparative research. It also manages the ECPRD website at <http://www.ecprd.org>.

INTRODUCTION

In ancient Rome, the tribunes of the people enjoyed special protection in order that they should freely exercise their functions. Anyone who infringed that prohibition was liable to punishment and could even be executed.

Today's right to immunity is based on the same basic idea, although, thankfully, it does not incur the same penalty! The representatives of the people must enjoy certain guarantees to underline the importance of their office, but more importantly to give them the peace of mind they need to implement their mandate.

The idea of a written statement of the rights of the individual *vis-à-vis* those in power is of Anglo-Saxon origin. No parliamentary prerogative, it was felt, would need to be created. It sufficed to make a reference to *common law*, i.e. to the traditional rights and freedoms of individuals against the abuse of royal power. Therefore there was no need to establish any specific protection for parliamentarians since common law was sufficient. Such an approach was clearly only possible if a fundamental agreement in the country on basic political values existed.

A totally different situation arose in France where the 1789 Declaration of the Rights of Man and Citizens did not confirm a series of basic and accepted rights but proclaimed a new universal aspiration that *was to prevail by virtue of the triumph of pure reason*¹. The Declaration was the outcome of a revolution and not based on a broad agreement. As a result, special measures were necessary to safeguard the representatives of the people and protect them from abuse, thus it was declared that *the person of each deputy shall be inviolable*.

Over the years two separate categories of immunity have emerged:

- the principle of non-accountability or non-liability, generally referring to the freedom of speech approach; and
- the principle of inviolability, generally interpreted as the freedom from arrest.

The French model based on these two components has been the most successful, first in Europe and also in the former colonies.

Non-accountability is a relatively homogeneous and highly stable principle throughout the parliaments of the world, whereas inviolability is increasingly becoming a contested affair.

In more recent times, parliamentary immunity has been called anachronistic, obsolete and contrary to the fundamental principles of modern constitutional law. Such criticisms have been countered by those who argue that, despite existing anomalies, the reasons which originally lay behind the introduction of parliamentary immunity into the modern constitutions still exist. This debate has resulted in some countries reforming their legal procedures and changing the practices followed by some parliamentary assemblies, leading towards a restriction in the scope of inviolability. As an issue in parliamentary management, the debate surrounding immunity is rapidly growing in importance, and therefore requires examination on a European level.

¹

M. Van der Hulst, *The Parliamentary Mandate*, 2000

Rules on Parliamentary Immunity in the European Parliament and Member States of the European Union is primarily based on Marília Crespo Allen's comprehensive European Parliament working paper entitled "Parliamentary Immunity in the Member States of the European Union and the European Parliament" which was published in 1999. The ECPRD is grateful to her for having allowed it to make extensive use of her study.

The scope of parliamentary immunity should always be analysed in four different aspects; the protection for whom – the protection period – the protection venue – and the acts to be protected.

In her paper, Mrs Crespo stresses that apart from legal regulations and jurisprudence other factors of an institutional, political and cultural nature are a determined factor and must be taking into consideration. This makes it difficult to present clear conclusions or trends. However, *a few simple observations* [Mrs Crespo] can be made.

It can be seen, for example, that the number of requests for the waiving of parliamentary immunity (or the suspension of detention or judicial proceedings) is substantially higher in some Member States (e.g. Italy, Greece) than in others (e.g. France, Denmark, Finland and Sweden).

In some parliaments there is a clear predominance of rejected requests relating to cases of waiving of immunity, which could indicate a broader interpretation of this concept (e.g. the Portuguese Assembly of the Republic, the Greek Chamber of Deputies), while in others the reverse is found (e.g. the Bundestag); in many cases, however, it is impossible to make out a clear and continual preponderance of accepted or rejected requests from the data supplied.

Among the guiding principles used by the various parliaments as a basis for their decisions to refuse requests for the waiving of parliamentary immunity we find, in particular, the following:

- *verification of the existence of definite signs that the purpose of the criminal proceedings is to unfairly persecute the Member of Parliament and to threaten his freedom and independence in carrying out his mandate;*
- *the political nature of the facts considered criminal;*
- *the lack of seriousness of the facts or the obvious lack of grounds for the accusation.*

In contrast, the waiving of immunity has been based in particular on the 'serious, sincere and loyal' nature of the requests submitted and on the particular gravity or nature of the criminal offences imputed (such as when they involve an element of ostensible public scandal or their urgent evaluation in court is necessary, owing to the fact that the reputation of the parliamentary institution itself or the basic rights of third parties are involved), or else its purpose has been to enable all necessary investigative measures to be taken on the understanding that the judicial proceedings must be conducted in such a way that they will not interfere with the discharge of parliamentary office.

Some parliaments have mentioned their right to grant requests to waive inviolability only in part, for instance by deciding on a case-by-case basis to refuse or authorise restrictions on freedom for which authorisation has been sought (France) or by giving permission for a Member to be, say, committed for trial but not arrested (Belgium).

In addition, because significant changes have been made to the legal arrangements applicable in some Member States, it is still too early to analyse what has not yet developed into fully fledged parliamentary practice.

This publication's function is to provide an introduction to the current arrangements across the European Union on the subject of parliamentary immunity, and to enable those wishing to check on the current arrangements of a particular country an opportunity to do so without recourse to heavy research.

This paper is composed of three main parts. Part One is devoted to explaining the background of the concept, the basic varieties of it, and the main issues which are under debate. Part Two outlines the arrangements for parliamentary immunity across the parliaments of the fifteen EU Member States. Finally, Part Three details the provisions existing for European Parliament members.

Mr Dick TOORNSTRA
Co-Director ECPRD

Part One:

The Concept of Immunity

Most national legal systems provide for dual protection of members of parliament: *non-liability* or *non-accountability* for votes cast and opinions expressed in the performance of their duties and, as regards all other acts, *inviolability*, prohibiting detention or legal proceedings without the authorisation of the Chamber of which they are members.

Different Member States use different names to refer to these two aspects. Non-liability, for example, is called 'inviolabilidad' in Spain, 'irresponsabilité' in France and Belgium, 'irresponsabilidade' in Portugal, 'insindacabilità' in Italy, 'Indemnität' or 'Verantwortungsfreiheit' (non-liability), or 'Abstimmungs-und Redefreiheit' (freedom of voting and expression) in the Federal Republic of Germany, 'berufliche Immunität' (professional immunity) in Austria, and 'privilege' or 'freedom of speech' in the United Kingdom.

The second aspect of immunity is referred to in Spain as 'inmunidad', in France and Belgium as 'inviolabilité', in Portugal as 'inviolabilidade', in Italy either as 'inviolabilità' or as 'improcedibilità', in the Federal Republic of Germany as 'Immunität' or 'Unverletzlichkeit' (inviolability), or 'Unverfolgbarkeit' (exemption from legal proceedings), or even, as in Austria, 'außerberufliche Immunität' (extra-professional immunity), and in the United Kingdom as 'freedom from arrest'.

For the sake of simplicity, this paper uses the term 'non-liability' when referring to the first privilege, and 'inviolability' when referring to the second.

It should be noted that this duality of concepts is comparatively unimportant in three EU Member States: the Netherlands, the United Kingdom and Ireland. In the Netherlands, members of parliament do not enjoy any inviolability, and British members of parliament and Irish members of the Dail are given scant protection in this regard.

HISTORICAL BACKGROUND

The origins of parliamentary immunity date back to a session of the English Parliament in 1397, when the House of Commons passed a bill denouncing the scandalous financial behaviour of King Richard II of England. Thomas Haxey, the member who was behind this direct act against the King and his court, was put on trial and sentenced to death for treason. Following pressure applied by the Commons, however, the sentence was not carried out, and Haxey received a royal pardon.

This event prompted the House of Commons to review the right of members of parliament to discuss and debate in complete autonomy and freedom, without interference from the Crown. Freedom of speech, introduced into the House of Commons at the beginning of the sixteenth

century was confirmed in the 1689 Bill of Rights, which expressly protected discussions and acts of Members of Parliament from any form of interference or objection from outside Parliament.

After the 1789 French Revolution, the need was established to guarantee the non-liability of elected representatives for opinions expressed by them in the performance of their duties. Such non-liability was enshrined in law by the Decree of 23 June 1789, approved on a proposal from Mirabeau. This was followed by the proclamation, in a Decree dated 26 June 1790, of the privilege whereby Members of the Assembly might not be indicted without the Assembly's authorisation.

The relatively wider scope of parliamentary privileges in France, parts of which were taken from the English model, is closely connected with the position of superiority over the other bodies of the State which the National Assembly and its Members acquired within the context of the Revolution.

Since then, parliamentary immunity has been enshrined in the other countries of continental Europe where the French model, with its dual aspects of non-liability/inviolability, has exerted a predominant influence.

NON-LIABILITY

Its scope normally covers protection against all kinds of public penalties for acts committed in the performance of members' duties or, more popularly formulated, deals with members' freedom of speech. In general, MPs are not liable in civil or criminal terms for the acts encompassed within this form of immunity.

The protection against public penalties afforded by non-liability does not, however, exclude members from disciplinary liability within the scope of Parliament or, in principle, from the application of measures of a political or partisan nature which may go to the point of exclusion.

With regard to the acts covered by non-liability, these include votes and opinions expressed. The Spanish Constitution contains no reference to votes cast, but these are included within the scope of this privilege.

The scope of the protection afforded as regards 'opinions' stated is one of the most controversial aspects of non-liability. The majority of constitutional texts make use of the concept of opinions expressed 'in the exercise of duties' (Austria, Belgium, France, Greece, Italy, Luxembourg, Portugal), which permits a somewhat broad interpretation, so that it makes the protection applicable to certain statements made outside Parliament.

In France, according to the information obtained, judicial practice appears to have proceeded from a narrow definition of the acts covered by non-liability, excluding, for example, comments made by a member of parliament during a radio interview or views expressed in a report drawn up in connection with a mission undertaken at the request of the Government.

Some constitutions refer specifically to votes cast and opinions expressed on the floor of the House or at parliamentary committee meetings.

Denmark's Constitution, for example, provides that members of parliament may not be subject to criminal action for statements made in the Folketing. The Netherlands Constitution reserves that protection for statements made in the States General or at parliamentary committee meetings, while the Irish Constitution refers to statements made in both. Under the Finnish Parliament Act the protection applies to opinions expressed in Parliament. In the same way, according to the Basic Law of Germany, non-liability covers votes cast and opinions expressed in the Bundestag or on one of its committees.

Despite the reasonably broad nature of constitutional texts, legal theory and parliamentary practice tend, in the majority of systems, to reject the extension of non-liability to opinions expressed, for example, in newspaper articles, public debates or election declarations. On the other hand, they are unanimous in recognising that statements made in the ordinary fulfilment of civic duties or duties of a purely private nature are not covered by this aspect of immunity.

Under the Greek Constitution, members of parliament, by virtue of their non-liability, may refuse to testify on information obtained or passed on in the performance of their duties or on the persons who have supplied or to whom they themselves have given such information.

Unlike inviolability, non-liability has an absolute quality, reflected in particular in the duration of its effects: the protection afforded is maintained even after the member's mandate has come to an end.

In some Member States, parliaments are not empowered to waive the non-liability applying to their Members, this situation being recognised to derive from the absolute nature of the form of immunity in question. In other Member States, however, non-liability may be waived by decision of the House. This is the case, for example, in Denmark, Finland, Sweden, Germany, and Greece. In Italy, Parliament is frequently called upon to consider requests relating to the application of non-liability.

In most Member States, non-liability is considered to belong to the public sphere, and a member of parliament cannot, therefore, relinquish it of his own free will. In the United Kingdom, however, since the Defamation Act 1996 entered into force, members have been permitted to forgo their privilege in defamation trials.

On another point relating to the United Kingdom, non-liability applies not only to members, but to all those attending parliamentary proceedings (witnesses, Civil Servants, experts, and so forth). This is also the case in the Irish Parliament where parliamentary committee meetings are concerned.

INVIOLABILITY

In general, this form of immunity is such that, unless Parliament gives its authorisation, no member may be arrested or prosecuted for acts ***not*** carried out in the performance of his duties.

The scope of inviolability varies according to the degree of protection afforded to members: it may thus be the case that, unless the House concerned has given its prior authorisation, members are protected only from arrest or, in addition, from enforcement of particular measures such as searches or, more widely still, from summonses before a court or indeed any form of criminal proceedings.

In a number of Member States the scope of inviolability has been restricted in the 1990s to the extent that the authorisation of the House is no longer required in order to institute criminal proceedings. Authorisation is necessary only when it is proposed to take certain steps against a member such as arrest or other specific measures (such as in Italy and France). In Belgium, the House concerned must give its authorisation for a member to be committed for trial, or summoned directly before a court or tribunal, or arrested. Authorisation is no longer required, however, for an investigation to take place.

The only acts covered are, in principle, those likely to be the subject of criminal prosecution. Some legal systems exclude from the sphere of inviolability certain categories of offence considered as more serious. For example, the Irish Constitution excludes offences such as treason, felony and violations of public order. Under certain conditions, the Portuguese Constitution excludes premeditated offences punishable by imprisonment of more than three years. The Swedish Constitution excludes criminal offences punishable by a term of imprisonment not less than two years.

Derogations from the principle of inviolability are sometimes laid down for minor offences. Such is the case with simple misdemeanours, since it is felt in some quarters that, in this case, given the relative non-seriousness of the punishment and the type of act punished, the function, independence and reputation of the parliamentary institution and of its members would not be called into question. Moreover, it is sometimes felt that it would not be compatible with the principle of equality for a member of parliament to avoid such penalties just because of his position. Under the Austrian Federal Constitutional Act, offences clearly unrelated to the political activities of the Member of Parliament concerned are excluded from the scope of inviolability.

However, the Member States are unanimous in considering that, in the case of *flagrante delicto*, inviolability must be waived, at least partially. The term '*flagrante delicto*' covers cases where a person is encountered during or in direct connection with the committing of a punishable offence.

Judges are generally responsible for ascertaining whether an offence falls under the heading of *flagrante delicto*. The Basic Law of Germany contains a peculiar provision whereby a member of parliament may be arrested when caught in *flagrante delicto* or during the day following the carrying out of the punishable act.

According to some constitutions, in order to remove immunity it is not sufficient that *flagrante delicto* be verified, but the offence in question must also be a particularly serious one. This applies, for example, to a stipulation of the Italian Constitution that the act involved must be such that an arrest warrant is compulsory. This is also the case in the Portuguese Constitution, whereby immunity against arrest or detention is maintained, even in the case of *flagrante delicto*, provided that the act concerned is not a premeditated offence punishable by more than three years' imprisonment. Section 14 of the Finnish Parliament Act stipulates that, if immunity is to be ruled out, the representative in question must be caught in the act of committing an offence carrying a minimum penalty of not less than six months' imprisonment.

As regards the *duration* of the inviolability, it can be seen that, while in some Member States it has effect throughout the duration of the parliamentary term (as for example in Denmark, Spain, Greece, Italy, Germany, and Portugal), in others it refers only to the period of the sessions (Belgium and Luxembourg).

Some constitutions contain specific provisions permitting the maintenance of immunity during the period running between the dissolution of the Chamber and the formation of a new Chamber, in the case of re-elected Members of Parliament. Such provisions are set out in the Italian Constitution and in the Greek Constitution, for those accused of political crimes.

Unlike non-liability, inviolability is effective only during the period of the parliamentary mandate, and ceases to have effect after this has expired. Legal action is thus only postponed and not permanently prevented.

PROCEDURE

The procedure for waiving parliamentary immunity is normally regulated by parliamentary rules of procedure. The rules of the Bundestag on this subject are extremely detailed, and even contain, in addition to Rules of Procedure, actual principles for guidance on decisions to be taken. The provisions in force in the French National Assembly and in the Italian, Spanish and Luxembourg Chambers, for example, are also very comprehensive. In contrast, the texts of the Rules of Procedure in Belgium, the Folketing and the Eduskunta are very succinct, whilst in some countries, such as Ireland, the UK and the Netherlands, no procedure exists at all.

In most Member States, requests to waive immunity are drawn up by the prosecution services, but in some countries may be drawn up by other authorities (the courts having jurisdiction, for example). Requests are sent to the Speaker of the House concerned either directly or, in some cases, via another authority such as the Minister of Justice or the Prime Minister.

The request, once received, is forwarded to the competent committee. This may be a committee specially formed to assess each specific case or a permanent committee. The latter is more common.

The decision of the Chamber concerned is usually based on the recommendations of the competent committee. The Rules of Procedure of the Italian Senate contain a provision authorising the submission of reports containing minority positions.

In the parliaments of some Member States there are specific rules imposing certain limitations on the debate, particularly as regards the speakers who are allowed to take part. In the Bundestag, the member in question cannot participate in the substantive debate. On the other hand, debates on questions of immunity take place 'behind closed doors' in some parliaments (such as the Luxembourg Chamber of Deputies, the Spanish Congress of Deputies and Senate, and the European Parliament). The decisions of the parliamentary assemblies on requests concerning the lifting of immunity are taken by secret ballot in Spain, Greece, Italy, Luxembourg and Portugal.

One of the most important variations connected with the procedures for waiving parliamentary immunity stems from the fact that, in some systems, a time limit is established within which the Chamber concerned must grant or refuse the authorisation requested and that specific consequences arise from the non-observance of that time-limit. The Greek Constitution, for example, states that, if the Chamber does not decide on the request for authorisation within a period of three months, the request is considered rejected.

From an analysis of parliamentary practice we can see that there is an extreme diversity of criteria and interpretations used in making decisions on immunity, which are sometimes contradictory and not always properly systematised. In some cases, the absence of fixed criteria is even presented as a demonstration of the sovereignty of Parliament, which is therefore seen as entitled to look at each specific case on a discretionary basis, without being subject to rigid, predetermined principles.

Synoptic Table: comparing non-liability and inviolability

The synoptic table below gives a general comparison between the concepts of non-liability and inviolability. It should be noted that they serve to give a broad indication of the differences, and that in some cases they will not correspond to some parliaments.

	Non-liability	Inviolability
Scope	Non-liability protects Members from most kinds of public penalties (criminal, civil and administrative) for acts committed in the performance of Members' duties, such as opinions expressed in Parliament and votes cast.	The scope of inviolability varies considerably between parliaments, although it generally confers protection from criminal, civil and administrative proceedings and arrest, except where the Member is apprehended in <i>flagrante delicto</i> . Some versions of inviolability prevent even initial investigations into a case concerning a Member, while at the other end of the spectrum, some versions give very scant protection against actions.
Persons covered	Members of parliaments and, in some cases, participants in official parliamentary meetings.	Members of parliaments
Duration	Non-liability has an absolute quality, reflected in the indefinite duration of its effects: the protection is maintained after the Member's mandate has ended.	Unlike non-liability, inviolability generally only lasts for the duration of a Members' democratic mandate.
Can immunity be lifted?	Most chambers cannot force the lifting of non-liability from Members. However, a handful of parliaments can do so.	Inviolability can always be withdrawn, usually requiring the consent of the chamber.
Procedure for lifting immunity	There are no procedures for parliaments which cannot lift non-liability, but in those that do, the procedure usually involves an initial proposal from an individual or competent official, followed by a vote for approval by the chamber.	In most cases, the initial proposal for lifting immunity is composed and presented by the relevant competent officials (the Public Prosecutor, the courts, etc) to the Speaker of the relevant chamber, who then passes it on for examination by the relevant parliamentary committee. Afterwards, the proposal is taken to the chamber for approval or rejection.

Part Two:

Immunity across EU Member States

This section outlines the different parliamentary immunity arrangements that exist across the EU's Member States. First in this section are two synoptic tables (one is for non-liability arrangements, the other for inviolability) which enable easy review and comparison of the different arrangements across Member States.

Following these two tables are the more detailed look at each system in the Member States, subdivided into five parts: the legal basis of immunity, the scope of the immunity, the duration of immunity, the procedure for waiving parliamentary immunity, and parliamentary practice in this field. All references used for the compiling of this section are outlined in the Bibliography at the end of this paper.

Synoptic Table: Non-liability across the EU

	Persons covered	Scope	Duration	Can immunity be waived?	Procedure for waiving immunity
Austria	Members of both chambers and regional diets	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution for opinions expressed and votes cast directly related to the performance of parliamentary duties.	Limited to the length of mandate	No	None, since non-liability cannot be waived
Belgium	Ministers, MPs and members of community and regional councils	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination (i.e. preliminary investigation, searches) for opinions expressed and votes cast directly related to the performance of parliamentary duties.	Unlimited	No	None, since non-liability cannot be waived
Denmark	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of the Folketing.	Unlimited	Yes.	A proposal to lift immunity is made by the private individual who wishes to institute proceedings, and a vote is taken by the House.
Finland	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed, behaviour, and votes cast directly related to the performance of parliamentary duties, made on the floor of the House.	Limited to the length of mandate	Yes	A proposal to lift immunity is made by the individual concerned (i.e. police officer, prosecutor, or private citizen) who wishes to institute proceedings. A majority of 5/6 of votes cast is necessary for lifting immunity.

France	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties.	Unlimited	No	None, since non-liability cannot be waived
Germany	Members of the Bundestag only (not the Bundesrat)	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of the Bundestag or at parliamentary committee meetings.	Unlimited	Yes	In the cases of "unconstitutional defamation" or "contempt of the Bundestag", either the Public Prosecutor or the Committee on Immunities and Rules of Procedure can call for a vote to be taken in the House.
Greece	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties.	Unlimited	Yes	In case of defamation following a vote taken in the House
Ireland	MPs and participants in official proceedings (for example: experts, civil servants, witnesses)	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of one of the two Chambers.	Unlimited	No	None, since non-liability cannot be waived
Italy	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties.	Unlimited	No	None, since non-liability cannot be waived

Luxembourg	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of the House.	Unlimited	No	None, since non-liability cannot be waived
Netherlands	Members of the States General, Ministers, Secretaries of State, and participants in official proceedings	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of the House.	Unlimited	Yes	Since 1848, the Parliament has had no part in the process of reviewing proposals to lift non-liability. If offences are carried in the connection with the performance of an MP's duties, it is up to the Supreme Court to adjudicate.
Portugal	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution, and investigation/examination, for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of the House.	Unlimited	No	None, since non-liability cannot be waived
Spain	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution for opinions expressed and votes cast directly related to the performance of parliamentary duties, made in the Parliament.	Unlimited	No	None, since non-liability cannot be waived
Sweden	MPs	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution for opinions expressed and votes cast directly related to the performance of parliamentary duties.	Unlimited	No	None, since non-liability cannot be waived

United Kingdom	Members of both Houses and participants in official proceedings (for example: experts, civil servants)	Member is only liable to disciplinary measures by the Speaker/Chamber (i.e. call to order, censure) and is exempt from criminal and civil prosecution for opinions expressed and votes cast directly related to the performance of parliamentary duties, made on the floor of the House or at parliamentary committee meetings.	Unlimited	Only in limited cases under the Defamation Act 1996 by Members of witnesses before committees.	By individual in courts.
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Synoptic Table: Inviolability across the EU

	Persons covered	Scope	Duration	Can immunity be waived?	Procedure for waiving immunity
Austria	Members of both chambers and regional diets	Member is provided with protection from criminal and administrative proceedings, and from arrest, criminal charges, sentencing, and personal search, except where the Member is apprehended in <i>flagrante delicto</i> .	Limited to the length of mandate	Yes	A request for consent to criminal or administrative proceedings is submitted to the Standing Committee on Immunities before approval by the Chamber.
Belgium	Ministers, MPs and members of community and regional councils	Member may not be committed for trial or summoned directly before a court or tribunal, or arrested, without prior authorisation of the House, except in <i>flagrante delicto</i> . Other investigative acts (e.g. questioning, searches and seizures, etc.) do not require prior authorisation. There are, however, additional procedural guarantees (e.g. presence of (a representative of) the Speaker of an assembly when a search takes place).	While the Parliament is in session	Yes	A request for the lifting of immunity is put forward to the Speaker of the relevant Chamber. After examination by a special committee, or the Justice Committee (Senate), the Chamber proceeds to a plenary vote.
Denmark	MPs	Member is provided with protection from prosecution or imprisonment of any kind, except where the Member is apprehended in <i>flagrante delicto</i> .	Limited to the length of mandate	Yes.	A proposal to lift immunity is made by the Ministry of Justice, which transmits it to the Chamber. After examination by the Committee on the Rules of Procedure, the Chamber votes.

Finland	MPs	Member is provided with protection from arrest or detention before the commencement of a trial, except where the Member is, for substantial reasons, suspected of having committed a crime for which the minimum punishment is imprisonment for at least six months.	While the Parliament is in session	Yes	A proposal to lift immunity is made by the individual concerned (i.e. police officer, Prosecutor) who wishes to institute proceedings. A simple majority of votes cast is necessary for lifting immunity.
France	MPs	Member is provided with protection from criminal and administrative proceedings (though not against preliminary investigation or searches) and arrest, except where the Member is apprehended in <i>flagrante delicto</i> , or if it concerns minor offences or penalties relating to taxation and civil matters, or on final sentencing.	Limited to the length of mandate	Yes	A proposal to lift immunity is made by the Ministry of Justice, which transmits it to the Chamber. After examination by a Bureau delegation, a decision is made by the latter in camera.
Germany	Members of the Bundestag only (not the Bundesrat)	Member is provided with protection from criminal and disciplinary proceedings (including preliminary investigation or searches) and arrest, except where the Member is apprehended in <i>flagrante delicto</i> , or if it concerns civil actions, actions for breach of contract or preparatory acts for civil imprisonment.	Limited to the length of mandate	Yes	A request can be made by a number of bodies, including the Public Prosecutor, and the courts. The Ministry of Justice transfers the request to the Speaker of the Bundestag, who then passes it on to the Committee on Electoral Scrutiny, Immunities and Rules of Procedure. A vote is taken on the committee's recommendation.
Greece	MPs	Member is provided with protection from criminal and administrative proceedings (though not against preliminary investigation or searches) and arrest, except where the Member is apprehended in <i>flagrante delicto</i> , or if he is brought before the court for recovery of debts.	While the Parliament is in session	Yes	The Public Prosecutor submits a request to the Speaker who transfers it to the Committee on Public Administration, Law, Order and Justice. A secret ballot of the Chamber is conducted after a debate.
Ireland	MPs	Any measures that might restrict the personal freedom of Members when they go to the Parliament, are sitting or are returning from there, are prohibited.	Limited to the length of mandate	No	None, since inviolability cannot be waived.

Italy	MPs	Member is provided with protection from arrest, detention, searches, investigations, surveillance and interception of communications, except in cases of <i>flagrante delicto</i> , when an arrest warrant is compulsory.	Limited to his/her term of office	Yes	The Public Prosecutor submits a request to the Speaker who transfers it to the relevant Chamber or Senate committee. Within a limited time the request is put to a secret ballot in the relevant chamber.
Luxembourg	MPs	Member is provided with protection from criminal and administrative proceedings and arrest, except where the Member is apprehended in <i>flagrante delicto</i> , or if it concerns minor offences.	While the Parliament is in session	Yes	The Minister of Justice submits a request to the Speaker who transfers it to a special committee for examination. The request is put to the Chamber, who vote by secret ballot.
Netherlands	N/A	Since 1884 MPs have had the same status as ordinary citizens as regards proceedings and enforcement of a sentence for offences under ordinary law.	N/A	N/A	N/A
Portugal	MPs	Member is provided with protection from criminal and administrative proceedings (though not against preliminary investigation or searches) and arrest, except where the Member is apprehended in <i>flagrante delicto</i> , or if the alleged offence is punishable by more than three years' imprisonment.	While the Parliament is in session	Yes	The competent authorities submit a request to the Speaker who transfers it to a special committee for examination. The request is put to the Chamber.
Spain	MPs	Member is provided with protection from criminal and administrative proceedings and arrest, except where the Member is apprehended in <i>flagrante delicto</i> .	Limited to the length of mandate	Yes	The President of the Supreme Court submits a request to the Speaker who transfers it to the relevant Chamber or Senate committee. Within a limited time the request is put to a secret ballot in the relevant chamber. If the request is not decided upon after 60 days, it is deemed to have been rejected.

Sweden	MPs	Member is provided with protection from criminal and administrative proceedings and arrest, except where the Member is apprehended in <i>flagrante delicto</i> , if the minimum penalty for the alleged offence is imprisonment for at least two years, or if the member pleads guilty.	While the Parliament is in session	Yes	The Public Prosecutor, or any person wishing to institute proceedings submits a request to the Chamber. A decision to lift immunity requires a majority of five-sixths of those voting..
United Kingdom	Members of both Houses	Immunity from arrest and detention for all civil actions. But this has almost no practical effect, since there are very few civil causes on which a person can be detained.	For 40 days after every prorogation and dissolution.	No	No, since inviolability cannot be waived.

AUSTRIA

I. The legal basis of parliamentary immunity

Article 57 of the Federal Constitutional Act governs the immunity of the Members of the Nationalrat. Section 10 of the Federal Act on the Rules of Procedure of the Nationalrat is essentially the same in content as Article 57 of the Federal Constitution Act, and Section 80 of the Rules of Procedure governs procedure in matters relating to immunity.

II. The scope of parliamentary immunity

Austrian non-liability (called ‘professional immunity’) extends to votes cast, and oral and written statements made by a member of parliament in the exercise of his mandate.

Inviolability (called ‘extra-professional immunity’) constitutes an obstacle to prosecution by the criminal courts and administrative authorities while a member of parliament remains in office, and extends to offences committed in connection with the political activities of the member concerned; even in such cases the appropriate representative body may, of course, consent to the prosecution of the member by an authority.

III. The duration of parliamentary immunity

Immunity is dependent on membership of the Nationalrat or Bundesrat and therefore ceases with such membership.

IV. The procedure for waiving parliamentary immunity

Requests for consent to the prosecution of a Member of Parliament by an authority are forwarded to the Committee on Immunities of the appropriate representative body for preliminary consideration. The committee must report to the plenary in time for the request to be put to the vote not later than the penultimate day of an eight-week period, after which consent to the prosecution is deemed to have been given.

V. Parliamentary practice

In practice, until the end of the XIXth parliamentary term, where the Nationalrat has identified a link between an act and the political activities of the member concerned, it has as a rule refused to authorise his prosecution. In parliamentary practice, by far the largest proportion of requests are received from courts seeking authorisation to prosecute Members on suspicion of defamation. Until the end of the XIXth parliamentary term, the Nationalrat usually decided not to waive the immunity of the Member concerned; since the beginning of the XXth parliamentary term, it has taken to agreeing to prosecution by an authority in such cases.

The restriction of extra-professional immunity to offences related to the political activities of Members of Parliament as a result of an amendment in 1979 has greatly reduced the number of

cases in which immunity is waived since, where it was once regularly decided to waive immunity, in such cases as traffic offences punishable by courts of law or the administrative authorities, a request for waiver of immunity is as a rule no longer required, since such offences are obviously unrelated to Members' political activities.

BELGIUM

I. The legal basis of parliamentary immunity

Article 58 of the Constitution establishes non-liability for opinions expressed and votes cast by members of parliament in the performance of their duties. Article 59 establishes the inviolability of members of parliament in criminal matters and sets out the conditions therefor. Rule 93 of the Rules of Procedure of the Chamber of Representatives lays down the procedure to be followed for requests for authorisation to bring proceedings against a member of the Chamber or suspension of proceedings already under way. The Rules of Procedure of the Senate contain no specific provisions on the above subjects.

II. The scope of parliamentary immunity

The Constitution (Article 58) stipulates that no member of either the House of Representatives or Senate may be prosecuted or undergo investigation on account of the opinions expressed or votes cast in the exercise of their parliamentary office. Actions which cannot be equated with opinions expressed or votes cast in the exercise of their parliamentary office (i.e. speeches made in Parliament, votes cast, questions and proceedings in parliamentary bodies) do not fall under the heading of non-liability. Therefore, the views expressed by a member of either House at a press conference, in an interview, at a political rally, or on another similar occasion do not form part of his parliamentary duties, and non-liability will not apply.

The rules of parliamentary inviolability apply only to criminal matters. However, they cover acts committed both in and outside the performance of a member's duties. Article 59 has been amended as a result of the constitutional revision of 1997. The former Article 59 stipulated that 'No Member of either of the two Houses may, during the session, be prosecuted or arrested as a punishment save with the permission of the House to which he belongs, except in the case of *flagrante delicto*.'

Consequently, when a member of parliament had committed a criminal offence or was suspected of so doing, no procedure connected with the related inquiry could be carried out unless the House to which the member belonged had first given its permission. The constitutional revision of 28 February 1997 now ensures that certain routine law enforcement inquiries can be pursued and completed without the authorisation of the House concerned. The House is now required to give its permission in two cases only, namely when a member is to be directly remanded or summoned before a court or tribunal, or when he is to be arrested.

III. The duration of parliamentary immunity

The non-liability applying to members of parliament is permanent: it continues after the end of their term of office and is not limited in time. The immunity in question thus constitutes real immunity: a member of parliament can never be prosecuted on account of opinions expressed and votes cast when carrying out his duties.

Members are covered by parliamentary inviolability from the moment of their election, before they have even taken the oath, although the protection becomes void if their election is declared invalid. The rules governing parliamentary immunity apply only while Parliament is in session. Once a session has closed, and until the start of the next session, protection ceases to operate, and the ordinary law of criminal procedure has to be observed.

IV. The procedure for waiving parliamentary immunity

In the House of Representatives the procedure is governed by Rule 93 of the House's Rules of Procedure. The Prosecutions Committee has the task of considering any requests with a view to making recommendations to the plenary. The only persons entitled to speak in plenary debates are the rapporteur, the member concerned or a member representing him, one member speaking in support of the request, and one speaking against it. The Rules of Procedure of the Senate, however, contain no specific provisions on the waiver of parliamentary immunity.

V. Parliamentary practice

Since the 1992-1993 session, the Chamber has considered eight cases. In every case authorisation to proceed was granted in full or in part.

On six occasions since 1 January 1993, the Senate has been called upon to rule on requests to waive the parliamentary immunity of one of its members. In two cases, the Senate decided to waive the parliamentary immunity of the Senator concerned on the understanding that the waiver would entail authorisation to take any necessary procedural steps other than the issue of an arrest warrant and the final submissions of the prosecution. In a third case, it took the same decision subject to the condition that the judicial procedure would be conducted in such a way that the Senator in question would not be prevented from discharging his parliamentary office. In every other case, it rejected the request for waiver of parliamentary immunity.

Since Article 59 of the Constitution was amended in 1997, neither the House of Representatives nor the Senate have had to decide upon a request to waive parliamentary immunity of one of its members (as at 25 June 2001). However, investigative acts have been undertaken against MPs and the procedural guarantees provided for in Article 59 of the Constitution were applied.

DENMARK

I. The legal basis of parliamentary immunity

The parliamentary immunity of members of the Folketing from imprisonment, prosecution and responsibility for statements made in the Folketing is laid down in section 57 of the Danish Constitution. These rules are supplemented by provisions in the standing orders of the Folketing where section 17(2), in conjunction with section 25, lays down provisions governing the procedure for waiving parliamentary immunity.

II. The scope of parliamentary immunity

Section 57 states that a member of the Folketing cannot without its consent be prosecuted or imprisoned. This privilege does not apply in the following three circumstances: (1) the Folketing grants its consent to such action; (2) the member is caught in *flagrante delicto*; and (3) membership of the Folketing has ceased.

The term 'prosecution' covers only public criminal prosecution and protection does not therefore extend to investigation, interrogation and fines. The same applies to civil actions and criminal cases resulting from private prosecutions. Where the prosecution was instituted before the person in question became a member of the Folketing the case may proceed to judgement.

Section 57 also states that no member of the Folketing can without its consent be held accountable outside the Folketing for his statements in the Folketing. The purpose of this provision is to ensure that members may speak freely in the Folketing on any matter without fear of any subsequent liability. This protection also applies after the person in question has ceased to be a member of the Folketing.

There is a firm assumption that the term 'in the Folketing' is not to be construed as a purely geographical criterion but that protection covers parliamentary freedom of speech in connection with the performance of the duties of a member of the Folketing. Thus it covers statements made by members in committees and commissions dealing with parliamentary matters, as well as statements concerning parliamentary matters made during meetings of parliamentary party groups. Conversely, it is assumed that it does not cover statements made at political meetings, to the press or on radio or television.

III. Duration of parliamentary immunity

Non-liability from statements made in the Folketing also applies after a person has ceased to be a member of the Folketing. Although this is not explicitly stated in section 57(2) of the Constitution, it follows from the purpose of this provision and it has always been accepted. As far as other actions are concerned, a member of the Folketing only enjoys inviolability for the duration of his mandate.

IV. Procedure for the waiver of parliamentary immunity

Where the prosecuting authorities wish to institute criminal proceedings against a member of the Folketing, it is for the chief public prosecutor to decide whether the request for waiver of immunity is to be forwarded. However, the initiative in civil cases must be taken by the private individual instituting the proceedings.

A request for the waiver of parliamentary immunity must be made in accordance with section 54 of the Constitution and section 25 of standing orders in the form of a petition. In practice, petitions for the waiver of immunity are addressed to the President of the Folketing who refers them to the Standing Orders Committee. The committee submits a report and recommendation concerning the Folketing's consent relating to the member in question. The committee's recommendation is given a single reading, see section 17(2) of standing orders. The vote on the recommendation is then held.

Since immunity can be waived only on a resolution of the Folketing, the member in question may not on his own initiative waive his immunity.

V. Parliamentary practice

In the last 15 years the Folketing has taken a position on the waiving of immunity on four occasions. In each case, immunity was waived. A request for consent to call a Member to account for statements in the Folketing, under the second sentence of section 57 of the Constitution, has been applied for no more than two or three times since adoption of the present Constitution in 1953 but consent was not granted.

The Folketing follows the practice that consent is always granted for criminal prosecution, while it is practically speaking never granted for an application to hold a Member accountable for statements in the House under the second sentence of that same provision.

FINLAND

I. The legal basis of parliamentary immunity

The immunity of Members of Parliament is enshrined in the Constitution of Finland.

Section 30 of the Constitution contains the basic rule that Members of Parliament are subject to only limited legal liability for their actions as Members. The same section guarantees members enhanced protection in criminal proceedings.

II. The scope of parliamentary immunity

The limited liability of members in Section 30 implies protection against prosecution and arrest or detention. The limited liability of members applies to opinions expressed in Parliament and to actions taken during proceedings. The section thus applies only to criminal acts committed at

Parliament that are linked to the functions of a member and the transaction of parliamentary business. Other crimes committed by members can be prosecuted as if they had been committed by any other person; the permission of Parliament is not required.

The enhanced protection of members in criminal proceedings in Section 30 prevents the arrest or detention of members until criminal proceedings have commenced in court. Once proceedings have begun, the competent court may impose detention without the consent of Parliament. It should be noted that if a member is sentenced to a term of imprisonment, Section 30 does not give protection against the carrying-out of that sentence. In respect of criminal sanctions, members are in the same position as any other citizen.

The enhanced protection of members in criminal proceedings relates to the office of member generally. It thus applies both to activities in Parliament and to other conduct. This protection does not, however, apply if a member is for substantial reasons suspected of having committed a crime for which the minimum penalty is imprisonment for at least six months.

III. The duration of parliamentary immunity

The limited liability of members for activities in Parliament (Sect. 30) continues after the end of the parliamentary mandate. The enhanced protection of members in criminal proceedings (Sect. 30) is limited to the member's mandate.

IV. The procedure for waiving parliamentary immunity

The protection offered by non-liability can be waived by Parliament. A qualified majority of five sixths of the members voting is required.

A waiver may be requested by a public official or other party having the right to prosecute or demand prosecution. The request shall be made in writing, addressed to Parliament or to the Speaker and be forwarded to the Parliamentary Office. The Speaker shall examine whether the party making the request has the right to prosecute or demand prosecution, and that the intended prosecution concerns the member's official actions. There are no binding rules concerning when Parliament shall give its consent to prosecution of a member. The decisive question is whether the intended prosecution is of such a nature that there is a public or private interest to refer the matter to the courts.

Inviolability may be waived with the consent of Parliament. A simple majority is required. A waiver may be requested by the competent official, e.g. a senior police-officer, a public prosecutor or, in the case of detention on remand, the competent court.

V. Parliamentary practice

Parliament's consent to prosecution has occasionally been sought.

Mostly, Parliament has deemed the requests manifestly unfounded and has rejected them without referral to committee. As far as could be established, three such requests have been

forwarded to the Constitution Committee for consideration. In all three cases, Parliament ultimately denied the request.

The possibility of waiving the inviolability has been applied only in the case of arrests or detention undertaken in times of political crisis.

FRANCE

I. The legal basis of parliamentary immunity

Article 26, first paragraph, of the Constitution enshrines the non-liability of Members of Parliament for opinions expressed or votes.

Inviolability results from the second, third and fourth paragraphs of Article 26 of the Constitution and Article 9a of Edict No 58-1100 of 17 November 1958 relating to the functioning of the parliamentary assemblies. Rule 80 of the Rules of Procedure of the National Assembly and Article 16 of the General Directive of the Bureau of the National Assembly, together with Rule 105 of the Rules of Procedure of the Senate, set out the procedural rules governing the waiving of parliamentary immunity.

II. The scope of parliamentary immunity

According to Article 26, no Member is subject to prosecution, search, arrest, detention or trial in respect of opinions expressed or votes cast in the course of his parliamentary duties. Non-liability under this provision is absolute: it protects members in both the civil and the criminal sphere, and its withdrawal may not be requested.

On inviolability, Article 26 states that, in criminal matters or matters of summary jurisdiction, no member may be arrested or subjected to any other measure depriving him of his freedom or restricting that freedom without the authorisation of the Bureau of the House to which he belongs, unless he has committed a crime, been apprehended in *flagrante delicto*, or is facing final sentencing. This form of inviolability does not apply to civil matters.

III. The duration of parliamentary immunity

Non-liability is permanent and perpetual: its application is not influenced by the system of parliamentary sessions, and continues after the end of the mandate.

Inviolability, on the other hand, may only be claimed within the limits of the duration of the parliamentary mandate. Moreover, the extent of the protection which it affords is no longer connected with the system of parliamentary sessions: the same system applies henceforth throughout the year.

Under the third paragraph of Article 26, the Assembly may request the suspension of detention, measures to deprive the member of freedom or to restrict that freedom or proceedings against one of its members.

IV. The procedure for waiving parliamentary immunity

When a request has been submitted to arrest a member or deprive him of or restrict his freedom, the Bureau is not called upon to judge the member, but has to decide whether the request is genuine, truthful and made in good faith. As regards requests for suspension, the appointment of a rapporteur for the *ad hoc* committee, the examination of the committee's conclusions and the inclusion of the matter on the agenda all follow the usual rules. The National Assembly or the Senate debates the conclusions at a public sitting. The Chamber concerned may deliver its opinion by public vote, adopting a resolution. Where necessary, it may be convened automatically for additional sittings to consider the request.

V. Parliamentary practice

Of the five requests considered by the National Assembly itself since 1958, two were rejected which concerned the detention of a Member following his participation in January 1960 in the 'Algiers barricades' uprising. Three were accepted which concerned offences covered by the commonly acknowledged concept of political campaigning (violation of the press laws, matters involving free radio stations and demonstrations). Since 1995, the Bureau, which is authorised to deprive Member's rights or restrict liberty, has been called upon six times and has granted the request in four cases.

For its part, the Senate accepted the nine requests tabled since 1958.

GERMANY

I. The legal basis of parliamentary immunity

Article 46 of the Basic Law contains provisions concerning the two forms of parliamentary immunity.

Rule 107 of the Rules of Procedure of the Bundestag, in the version of 2 July 1980, as most recently amended on 12 February 1998, lays down general procedural rules for the processing of matters relating to immunity. Annex 6 to the Rules of Procedure detail the procedure for waiving the immunity of members of the Bundestag and also procedural guidelines of the appropriate committee for the processing of matters relating to immunity.

The situation described above relates only to members of the Bundestag. Members of the Bundesrat are members of the Land governments, which appoint them and remove them from office. In this capacity, they do not enjoy any parliamentary immunity, although some may enjoy immunity as members of Land parliaments.

II. The scope of parliamentary immunity

The non-liability of Bundestag Members implies that no proceedings may be instituted against a member for opinions expressed or votes cast by him, provided that the actions in question are encompassed entirely within the scope of proceedings in the Bundestag, its committees, or parliamentary parties, or of Bundestag documents. Proceedings can be instituted, however, against a member guilty of libellous insult.

Inviolability in the Bundestag covers all actions punishable by law and protects members against every form of criminal proceedings provided that they have not been apprehended in the act of committing an offence or on the day after the offence was committed.

III. The duration of parliamentary immunity

Non-liability commences upon the acceptance of the mandate by the member but no earlier than the date of constitution of the Bundestag; it continues indefinitely.

Inviolability is effective for the duration of the member's mandate.

IV. The procedure for waiving parliamentary immunity

The Committee on Electoral Scrutiny, Immunities and the Rules of Procedure is informed via the appropriate notification from the prosecuting authorities when a member of the Bundestag has become the subject of a judicial inquiry. When requests have been submitted for authorisation to institute legal proceedings or take other coercive measures against a member, the committee draws up a recommendation to the Bundestag in each individual case or, when a request relates to a traffic or petty offence, a 'preliminary ruling'.

V. Parliamentary practice

The Bundestag in principle approves the implementation of criminal prosecutions against members. Preliminary proceedings are generally approved at the beginning of the parliamentary term. The bringing of charges before courts requires the authorisation of the Bundestag in each individual case.

The only exception to the basic practice of the Bundestag of waiving immunity exists in the case of what are referred to as political insults. Political insults are defamatory acts which the member commits in connection with the performance of his duties. In the case of political insults, it is necessary to secure the authorisation of the Bundestag in each individual case, even for the opening of preliminary proceedings. However, according to the practice of the Bundestag, authorisation for a criminal prosecution is not granted in such cases.

The objective of the immunity practice of the Bundestag is to treat members and other citizens on the same basis as far as possible in criminal proceedings. The right of immunity is not understood as being a privilege for members but as the prerogative of Parliament in its entirety; consequently, interference with the functioning and reputation of Parliament by other state

authorities are to be prevented. Authorisation for the implementation of criminal proceedings will be granted even where the reputation of an individual member of Parliament might thereby be diminished.

When examining immunity cases, the Bundestag does not undertake an appraisal of the evidence. However, it does examine the conclusiveness of the case presented by the prosecuting authorities. It gives authorisation only where the competent prosecuting authority unmistakably proclaims its desire to bring a charge; the immunity of a member is not waived merely as a precautionary measure, just in case a prosecuting authority might at an early stage decide that a charge is required.

GREECE

I. The legal basis of parliamentary immunity

The Greek system of parliamentary immunities is based on Articles 61 and 62 of the 1975 Constitution (revised in 1986). Rule 83 of the Rules of Procedure of the Chamber of Deputies sets out the procedure to be followed in cases of requests for the waiver of parliamentary immunity.

II. The scope of parliamentary immunity

Article 61 of the Constitution establishes the *non-liability* of members of Parliament. By reason of opinions expressed or votes cast, a member may not be subjected to any legal proceedings on the part of any judicial or other body or be subjected to any inspection on the part of private persons.

'Opinion expressed while carrying out parliamentary duties' means the opinion expressed by a member in a bill, or in an amendment submitted for the approval of the Chamber, or in a report or statement submitted to the Chamber or to the parliamentary committees, or in speeches made at meetings of the Chamber or of the committees of the latter, or, more generally, in every circumstance in which the member is required to express himself in his capacity as a member of Parliament. The non-liability of members of parliament is operative in the criminal, civil and disciplinary spheres.

The only exception to the general rule of non-liability is that legal proceedings may be brought against a member of parliament, subject to authorisation by the Chamber, where he is guilty of slanderous defamation. The Appeal Court is competent to judge the case. In this instance, proceedings may not be initiated until authorisation has been given by the Chamber. In the event of a formal refusal by the Chamber to grant authorisation, proceedings can no longer be brought against a member on the same grounds, even after the end of the parliamentary term.

Article 62 of the Constitution stipulates that, throughout the parliamentary term, no member may be prosecuted, arrested, detained or in any other way deprived of his personal freedom, without the authorisation of the Chamber, except in the case of his being caught in *flagrante delicto*. Nor may any proceedings for political offences be brought against any member of the

dissolved Chamber after the dissolution of the Chamber and before the appointment of the members of the new Chamber. In this case, inviolability does not exclude the carrying out of acts of investigation for gathering proof.

III. The duration of parliamentary immunity

Non-liability comes into force after the taking of the oath and is indefinite. All criminal proceedings brought against a member are suspended for the duration of the parliamentary term, and those for which the Assembly has refused its authorisation resume their effect at the end of the parliamentary term.

IV. The procedure for waiving parliamentary immunity

A request is forwarded to the President of Parliament; it is announced in plenary and transmitted to the competent parliamentary committee, which draws up a report, to be entered on the parliamentary agenda. The plenary reaches a decision.

V. Parliamentary practice

From January 1993 to February 1999, 124 requests for waiver of parliamentary immunity were submitted to the Chamber. The Chamber approved waiver of immunity in only two cases. The prevailing rule in Greek parliamentary is that the Chamber does not waive immunity. This practice is valid for all offences, including insult, defamation or slanderous defamation.

The non-liability of a Member covers, out of all his political activities, only opinions expressed or votes cast by him in the performance of his parliamentary duties.

IRELAND

I. The legal basis of parliamentary immunity

The legal basis of parliamentary immunity is embodied in Article 15(10, 12 and 13) of the Constitution of Ireland. From a legislative point of view, Article 2 of the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act, 1976 establishes the immunity of parliamentary committees, of the members thereof and that of officials and other persons (experts) participating in parliamentary work. The Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 establishes the immunity of persons directed by certain parliamentary committees to attend before them as witnesses or to send documents to them.

II. The scope of parliamentary immunity

Immunity protects members of parliament against any legal action likely to reduce their freedom of speech and action. Article 15(13) of the Constitution, however, specifies exceptions for serious offences (treason, crimes, violation of law and order).

The Constitution makes a distinction between the immunity of papers of Parliament ('Oireachtas') and that associated with the members of the two Houses of which it is composed.

Immunity covers all official reports and publications of Parliament or of the Houses, as well as statement made within a House, regardless of where they were made public. Similar legislative provisions exist for parliamentary committees. It should be noted that, within parliamentary committees, immunity covers not only their members but also any officials, experts and certain witnesses.

Immunity does not extend to acts done outside the parliamentary mandate, unless those acts can in any way be connected with the privileges established by the Constitution and by law for Parliament and its committees.

III. The duration of parliamentary immunity

The non-liability of members exists for all public statements made by them in acts of the 'Oireachtas' and of each of the Houses thereof. It is of unlimited duration.

The inviolability of Members as established by the Constitution lasts for the duration of the mandate.

IV. The procedure for waiving parliamentary immunity

There is no formal provision stipulating the procedure for waiving parliamentary immunity.

V. Parliamentary practice

Standing Order 58 of the Standing Orders of Dáil Éireann (1977 edition) provides for a manner of complaint by persons who are named or identified by a member of the House or a Committee in the course of proceedings in a way which adversely affects their reputation or invades their privacy.

ITALY

I. The legal basis of parliamentary immunity

The legal basis of Italian parliamentary immunity is formed by Article 68 of the Constitution. The first paragraph of this article establishes the non-liability of Members of Parliament. The second and third paragraphs of Article 68 lay down rules governing inviolability.

Rule 18 of the Rules of Procedure of the Chamber of Deputies and Rules 19 and 135 of the Rules of Procedure of the Senate govern the procedures regarding requests for the withdrawal of parliamentary immunity.

II. The scope of parliamentary immunity

Members may not be made answerable for opinions expressed or votes cast in the performance of their duties. Unless the House to which he belongs has given its authorisation, no member of Parliament may be subjected to searches of his person or home, arrested or otherwise deprived of his personal freedom, or held in detention except where the above steps are taken to enforce a final conviction or in the case of *flagrante delicto*.

Authorisation of the House is likewise required in order to intercept a member's conversations or communications by any means whatsoever or to seize his correspondence.

III. The duration of parliamentary immunity

The duration of non-liability is indefinite, continuing after a member's parliamentary mandate.

Members of parliament are covered by the immunity provided for in the Constitution for the duration of the parliamentary mandate. The immunity takes effect upon the declaration of the names of the members of parliament, since it is at this time that they 'commence the full exercise of their duties'.

Immunity ceases only when the new Chambers have convened or if a Member's mandate ceases, after resignation or lack of re-election.

IV. The procedure for waiving parliamentary immunity

The procedure is based on Rule 18 of the Rules of Procedure of the Chamber of Deputies and Rule 135 of the Rules of Procedure of the Senate. Requests are sent to the House to which the members in question belong, published, and forwarded to the relevant committee, which must examine them within 30 days (which may be extended) on the basis of an introductory report by one of its members, further information, written evidence and other documents which the Deputy or Senator concerned is entitled to supply, and the procedural documents forwarded by the judge. The committee must draw up final proposals granting or refusing authorisation for legal proceedings which are submitted in plenary together with a written report. The final decision is taken in plenary.

The denial to waive parliamentary immunity can be challenge by the requesting judge before the Constitutional Court, by raising a conflict between State powers. The Constitutional Court can void the parliamentary decision.

V. Parliamentary practice

In the current parliamentary term, the Chamber of Deputies has received five requests for authorisation of arrest, all of which have been rejected. The Chamber has also been requested to authorise ‘indirect tapping’ in four cases. During the first three years of the Senate's thirteenth parliamentary term, it rejected the request three times and granted it once.

During the same time-period, the Senate received 51 requests for decisions on non-liability, with only 6 cases resulting in decisions recognition liability on the part of the member.

LUXEMBOURG

I. The legal basis of parliamentary immunity

The legal basis of immunity is embodied in Articles 68 and 69 of the Constitution. The first establishes the non-liability of members. The second enshrines the inviolability of members of Parliament.

Rules 159 to 166 of the Rules of Procedure of the Chamber of Deputies govern the procedure for the consideration of requests for waiver of parliamentary immunity.

II. The scope of parliamentary immunity

Immunity covers opinions expressed over the period of a member's mandate. No member found guilty of a crime, offence or contravention may be subjected to arrest or prosecution during the session period without the authorisation of the Chamber of Deputies, except in cases of *flagrate delicto*. Parliamentary immunity applies only to criminal matters.

III. The duration of parliamentary immunity

Non-liability established by the Constitution is indefinite. Inviolability may only be claimed during sessions of Parliament. According to the Rules of Procedure, the annual session of Parliament, as provided for in Article 72 of the Constitution, begins on the second Tuesday in October and ends on the second Tuesday in October of the following year.

IV. The procedure for waiving parliamentary immunity

Requests for authorisation of proceedings against members of parliament may be sent to the Chamber by the Minister for Justice or the Public Prosecutor's department, who forward their requests through the Prime Minister or the alleged injured party or the member himself.

According to the Rules of Procedure, a special committee is set up for each request for authorisation of proceedings against a member of parliament or for each request for the suspension of proceedings already in progress or for the suspension of detention.

That committee informs the member in question and secures his explanations. The member may be assisted or represented by one of his colleagues. If the member in question is detained, the committee may arrange for him to be heard in person by one or more of its members delegated for that purpose.

Having concluded its work, the committee submits a report to the Chamber in the form of a motion for a resolution. The report is considered by the Chamber in closed session. Voting is by secret ballot. The Chamber's decision is announced at the next open session.

V. Parliamentary practice

A certain number of criteria have been used regularly in the past to assess requests for the waiving of parliamentary immunity, namely:

- whether the facts, assuming that they are established, may be considered as constituting an infringement;
- whether the member referred to is in fact responsible for them;
- whether the proceedings are not inspired by malevolence or by the desire to upset a political opponent;
- whether the request is not based solely on a desire to prevent a member of parliament from carrying out his duties normally or on a desire to discredit him in the eyes of the public;
- whether the facts, assuming that they are established, are sufficiently serious to justify waiver of immunity.

Since 1993, two requests for waiver of immunity have been submitted: one was declared inadmissible, the other was granted.

NETHERLANDS

I. The legal basis of parliamentary immunity

Article 71 of the Constitution lays down the rules on immunity, replacing the former Article 107, and extending immunity to Ministers and other designated officials.

The Rules of Procedure of the Chambers of the States General do not deal in specific terms with parliamentary immunity.

II. The scope of parliamentary immunity

The scope of parliamentary immunity extends to both civil jurisdiction and criminal jurisdiction. By virtue of immunity, members of parliament (as well as others taking part in debates) may not be subject to legal proceedings for opinions expressed in writing or orally. These opinions or statements may also concern facts which are not directly connected with the subjects discussed.

All acts done by members in the performance of their duties are covered by parliamentary immunity, whether in plenary session or during committee meetings. Whether these acts have been done inside or outside Parliament is immaterial. On the other hand, acts which cannot be linked to the exercise of the parliamentary mandate are excluded from immunity.

The Rules of Procedure of the Chambers of the States General lay down penalties for any members abusing their immunity by uttering insults when speaking in Parliament.

III. The duration of parliamentary immunity

Immunity may be invoked by members of parliament only during the period of activity of the Chambers. The ordinary session of the States General begins on the third Tuesday in September of each year and lasts in practice the whole year, with short adjournments.

IV. The procedure for waiving parliamentary immunity

There is no specific procedure for waiver of parliamentary immunity. The immunity provided for in Article 71 of the Constitution does not include any limitation to the conditions required for action to be taken against a Member of Parliament, since it simply establishes his non-liability. Since 1848, the authorisation of Parliament has not been necessary for the bringing of proceedings against a member of parliament who has abused his mandate. Furthermore, a law of 1884 gave members of parliament the same status as ordinary citizens as regards proceedings and enforcement of a sentence for offences under common law. On the other hand, as regards offences committed by members of parliament in connection with the performance of their duties, the Supreme Court ('Hoge Raad') is responsible for adjudicating on them.

V. Parliamentary practice

Parliament officials have confirmed that there are no recorded cases concerning attempts to withdraw immunity from Members. Given the very limited form of immunity in The Netherlands it is hard to see a reason to introduce a procedure to withdraw this form of immunity.

PORTUGAL

I. The legal basis of parliamentary immunity

The basic principles covering immunity are embodied in Article 157 and Article 196 of the Portuguese Constitution, and apply also to members of the Government.

The Rules for Deputies (Law No 7/93 of 1 March 1993 as amended several times; most recently by Law No 3/2001) takes over the relevant provisions of the Constitution in Rule 10 (non-liability) and Rule 11 (immunities) but also includes further implementing provisions.

Rule 38 of the Rules of Procedure states that the Parliamentary Ethics Committee is responsible for pronouncing on the waiving of immunities.

II. The scope of parliamentary immunity

Deputies of the Assembly of the Republic are immune from civil, criminal or disciplinary liability for votes cast or opinions expressed by them in the performance of their duties. No Deputy may be arrested or imprisoned without the authorisation of the Assembly, except in the case of pre-meditated offences carrying a maximum prison sentence of over three years and where the Deputy has been found in *flagrante delicto*.

Deputies may not be heard as declarants or defendants without the authorisation of the Assembly. It shall be obliged to deliver authorisation in the latter case where there is strong evidence that a pre-meditated offence has been committed and that offence carries a maximum prison sentence of over three years. When criminal proceedings have been initiated against a Deputy and he has been definitively accused, the Assembly shall decide whether the Deputy must be suspended so that the proceedings may continue. Such a decision shall be mandatory in the case of the type of offence referred to above.

III. The duration of parliamentary immunity

The duration of non-liability is indefinite.

Inviolability is valid for the duration of Deputies' mandates, even outside the period when the Assembly of the Republic is actually sitting (during recesses or suspension of the legislative session and during the period of dissolution of the Assembly).

IV. The procedure for waiving parliamentary immunity

The competent authority draws up the request for a waiver of immunity; the relevant committee draws up an opinion on the request, and the Assembly decides by an absolute majority of the Deputies present.

V. Parliamentary practice

The Assembly of the Republic (which to date usually abides by the opinions on this subject of the competent committee) applies an extremely broad concept of parliamentary immunity, and there is a predominant understanding that the waiving may only be authorised in exceptional cases. This conclusion is clearly corroborated by the Assembly's practice on this subject. Presently, there are already some cases where the waiver of immunity led to the suspension of the mandate, although this still remains an exception.

As regards the definition of exceptional cases, parliamentary precedent does not seem to be particularly well developed. However, it seems possible to conclude that immunity should only be waived in serious cases which bring the reputation of the Assembly into disrepute and those requiring urgent evaluation in court.

SPAIN

I. The legal basis of parliamentary immunity

The first paragraph of Article 71 of the Spanish Constitution outlines non-liability for Deputies and Senators. The second paragraph of Article 71 establishes the privilege of inviolability.

The procedure relating to the examination of requests for the waiving of parliamentary immunity is the subject of Rule 22 of the Rules of Procedure of the Senate and of Rules 10 to 14 of the Rules of Procedure of the Congress of Deputies.

II. The scope of parliamentary immunity

Deputies have non-liability from criminal, civil and disciplinary actions for opinions expressed and votes cast in Parliament. This ensures a degree of freedom of speech.

The opinions concerned need not be only those expressed orally, but all those which can be fairly deemed to be directed towards the formulation of the wishes of Parliament. Consequently, all acts which, although carried out within the context of meetings, do not have the above-mentioned purpose, such as any kind of violence to persons or things, are excluded.

The question of which acts can be regarded as a parliamentary duty has nearly always been resolved by using the criterion of a list: this usually includes all statements in a plenary session or on a committee, questions, appeals, requests, speeches, motions, judgments, amendments, private votes, agendas, introduction of bills, etc. Also included are actions which, although

performed outside the place of meeting, are performed in the exercise of the duties themselves, such as committees of inquiry or investigation. Official publications and reports on deliberations made officially to the press are also protected. It excludes all acts not related to the parliamentary function, including those which, while they are related to the representative's public function, do not affect the formulation of the wishes of Parliament: in other words, meetings with the electorate, journalistic activity, party or private meetings.

Inviolability protects the personal freedom of Deputies and Senators, sheltering them from detentions and legal proceedings, thereby ensuring that the composition and running of Parliament are not unduly affected.

Immunity provides a specific protection and safeguard in criminal matters: except in the case of *flagrante delicto*, no member of parliament may be detained and the charging or bringing of legal proceedings against Deputies or Senators is subject to the prior authorisation of their respective Chambers.

The examining magistrate is responsible for determining the existence of *flagrante delicto*, by virtue of the law of 9 February 1912.

III. The duration of parliamentary immunity

Non-liability is permanent in nature in that it continues to have effect when the parliamentary mandate expires. Inviolability is valid from the moment that Deputies or Senators are proclaimed elected and for the duration of the mandate, including recesses during a parliamentary term.

IV. The procedure for waiving parliamentary immunity

The President of the Congress must forward a request for a waiver of immunity to the Committee on the Statute for Members within five days and subject to the prior agreement of the Bureau. In the case of the Senate, the request is forwarded to the competent committee. The committee has 30 days to deliver an opinion after hearing the member concerned. The debate on the opinion is included on the agenda for the next ordinary session. Both the debate and the vote are conducted in camera. The President communicates the decision of the plenary to the President of the Supreme Court. The request is deemed to have lapsed where no decision has been reached in plenary within 60 calendar days.

V. Parliamentary practice

Between 1979 and 1999 the Senate considered 38 requests to waive parliamentary immunity, of which 16 were rejected and 22 were approved. During the first four sessions, immunity was waived in cases involving violent resistance to arrest, insults to the Government or the Head of State, illegal detention, or crimes of violence. Since the fifth session, it has invariably been waived except in one case.

In the same period (from 1979 to 1999), the Congress of Deputies considered 29 requests to waive parliamentary immunity, rejecting 11 and approving 18. Since the fifth session, the Congress has likewise followed the practice of invariably granting requests.

Since 1993 there has been a tendency to grant requests irrespective of the category of crime and hence even when the acts in question may have been ordinary offences committed by members of parliament in the exercise of their public office or in connection with political activities. However, the committees and the Chambers have taken a fairly cautious approach when dealing with allegedly criminal utterances or written statements (except for those advocating violence or terrorism).

SWEDEN

I. The legal basis of parliamentary immunity

The provisions governing immunity of members of the *Riksdag* are laid down in Chapter 4, Article 8, of the Constitution. The first paragraph provides for non-liability with regard to statements and actions by members of parliament in the performance of their duties. The second paragraph provides for inviolability, should members of parliament commit an offence as private individuals, i.e. outside their duties as members of parliament.

The procedure for securing the *Riksdag's* consent to the prosecution of a member of parliament is laid down in Chapter 3, Article 18, of the Rules of Procedure. A member of parliament who has committed an offence may be removed from office by decision of a court.

II. The scope of parliamentary immunity

According to Chapter 4, Article 8 of the Instrument of Government, no one may bring an action against any person who holds office, or has held office, as a member of the *Riksdag*, deprive him of his liberty, or prevent him from travelling within the country, on account of his actions or statements made in the performance of his duties, unless the *Riksdag* has given its consent by means of a decision in which no fewer than five sixths of those present and voting have concurred.

If a member is suspected of having committed a criminal act, the relevant provisions of law relating to arrest, detention or remand are applicable only if he admits guilt or was caught in *flagrante delicto*, or if the minimum penalty for the crime is not less than two years' imprisonment.

The provisions on immunity also apply to the Speaker and alternates performing duties as Members.

III. The duration of parliamentary immunity

According to the Constitution the withdrawal of non-liability requires the consent of the *Riksdag*, even if the member has left the *Riksdag* when the matter arises.

The inviolability provided for in the Constitution seeks solely to forestall interventions which physically prevent members of parliament from carrying out their duties. Therefore it does not apply to anyone who has been, but is no longer, a member of the *Riksdag*.

IV. The procedure for waiving parliamentary immunity

Chapter 3, Article 18 of the Rules of Procedure lays down the procedure for implementing the *Riksdag's* consent to waive a member's immunity. A prosecutor or any other party who wishes to initiate court proceedings as a result of acts committed by a member of parliament must make a written application to the Speaker to this effect. Proceedings shall then be instituted in a public court. A waiver of immunity requires a decision by the *Riksdag* taken by qualified majority.

V. Parliamentary practice

In 1994, a prosecutor applied for the *Riksdag's* consent to bring a court action against a member of parliament for corruption in the performance his duties as a member of parliament. The member had received payment through a company owned by him from another company. The prosecutor claimed that the payment constituted improper remuneration for services which were part of his duties as a member of parliament or were connected with those duties.

The *Riksdag* ruled that the provisions governing parliamentary immunity conferred a special status on members and that the notion of 'performance of the duties as a member of parliament' should therefore be interpreted restrictively and be confined to Members' activities in the Chamber and other *Riksdag* bodies directly connected with the *Riksdag*. The offence in question was not considered to have been committed in that context. The *Riksdag* was, therefore, not required to give authorisation.

Otherwise, the issue of waiving parliamentary immunity has not arisen, either during the single-chamber system, which was introduced in 1971, or the two-chamber *Riksdag* which replaced the Diet of the Four Estates in 1865.

UNITED KINGDOM

I. The legal basis of parliamentary immunity

The legal basis of parliamentary legal privilege (immunity) is to be found partly in customary law, and partly in statute. Parliamentary privilege exists to protect the institution of Parliament and the rights of its citizens to be properly represented there. No privilege attaches to individual members of parliament as such. A central privilege, claimed as long ago as the fifteenth

century, is that of absolute freedom of speech in debate. This freedom is guaranteed by statute law, Article IX of the Bill of Rights 1689. This statute also prevents the courts from examining judicially any other proceeding in Parliament and a member is not liable in the courts for what he says or does in proceedings. The two Houses also have exclusive jurisdiction over their own procedures which, under long established customary law, ought not to be examined elsewhere. In practice this is now being eroded to some extent by the development of judicial review and by the development of international courts which do not recognise Article IX of the Bill of Rights.

II. The scope of parliamentary immunity

The scope of parliamentary privilege is predominantly related to providing absolute legal protection for the debates and proceedings of Parliament.

Individual MPs do not have, and never have had, any immunity from the operation of criminal law. There is no concept whatever of waiver of any supposed immunity in this respect. The ancient right of 'freedom from arrest' which is more ancient than 'freedom of speech' originally prevented impecunious members or their servants being prosecuted in the courts for civil debt. Nowadays, it merely prevents a member from being imprisoned for a civil offence; however, since imprisonment for such offences is largely obsolete, so is the relevance of the privilege.

The only important immunity enjoyed by Peers or MPs as individuals is their freedom of speech and action in proceedings *in* Parliament. The two Houses of Parliament, however, benefit from rights such as the right to regulate their procedures free from interference, the right to institute inquiries and summon witnesses, the right to punish those guilty of breaches of privilege and contempt (exercisable by customary law), and the right to publish papers without fear of an action for defamation (exercisable by statute).

In contrast, an MP is treated like any other citizen for anything he does outside proceedings in Parliament, even where his actions relate to matters connected with his parliamentary functions, such as his constituency duties. Thus, letters written on behalf of constituents to Ministers, Government Departments or public bodies would be unlikely to be considered by the Courts of Law as enjoying parliamentary privilege, though they might well take the view that qualified privilege at common law applied to them.

III. The duration of parliamentary immunity

Section 13 of the Defamation Act 1996 enables any person to waive parliamentary privilege so far as he is concerned, for the purposes of defamation proceedings, and for those purposes only. This was enacted in order to overcome the injustice perceived to exist where a member of either House sought to sue to clear his name if he was alleged to have acted dishonestly in connection with his parliamentary duties. This is the only sense in which the concept of a waiver exists.

IV. The procedure for waiving parliamentary immunity

The concept of such waiver does not exist in any Parliament run according to the Westminster system.

V. Parliamentary practice

Essentially, Parliament has protected its integrity and standing not by the immunities conferred on its members but by punishing those who interfere with its proper functioning, whether by obstructing Parliament itself or by interfering with the parliamentary activities of its members or by attempting to corrupt them. The contempt powers of Parliament are, however, always exercised for the protection of the proper operation of the parliamentary processes themselves and not in the interests of MPs as individuals.

Offenders have been committed to prison by the Houses of Parliament, expelled (if they are Members) or reprimanded on the floor of the House by the Speaker.

Parliament's contempt powers are nowadays exercised with considerable restraint. The last imprisonment by the Commons of a member is a century old: the last expulsion took place in the 1950s, although it may be that some MPs have resigned rather than face the likelihood of expulsion. The last admonition of a stranger at the bar was nearly 40 years ago and of an MP in his place some 30 years ago.

Part Three:

Immunity in the European Parliament

I. The legal basis of parliamentary immunity

Article 28 of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities (the merger treaty) lays down that the European Communities shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks, under the conditions laid down in the protocol annexed to that treaty.

Articles 9 and 10 of this protocol (the Protocol on the privileges and immunities of the European Communities, henceforth referred to as PPI) reiterate the provisions concerning non-liability and inviolability of members of the European Parliament.

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.'

In a resolution adopted on 15 September 1983, Parliament committed itself to proposing a revision of the PPI with a view to adapting it to the new mode of composition of Parliament and to drawing up a uniform statute for all its members, prompted by the various disparities in

dealing with parliamentary immunity across Member States. Despite successive calls by Parliament for action on this issue, the Council of Ministers has so far failed to take a decision on amending Articles 9 and 10 of the PPI.

II. The duration of parliamentary immunity

The exemption of members of the European Parliament from liability for the opinions expressed and votes cast by them in the performance of their duties (as specified in Article 9 of the PPI) protects them for the entire duration of their term of office and, indeed beyond, given that the privilege is indefinite.

Inviolability provided for in Article 10 of the PPI is effective 'during the sessions of the European Parliament'. Given the specific purpose of parliamentary immunity and Parliament's practice of concluding its annual session on the day preceding the first day of the following session, it is clear that immunity is effective throughout a member's five-year term of office.

Exceptions apply where a member's term of office ends prematurely for reasons of decease, resignation or incompatibility. The date on which the term of office is deemed to have ended, and on which, consequently, the protection conferred by parliamentary immunity ceases to apply, is determined on the basis of the interpretative criteria adopted by Parliament and set out in a note attached to Rule 8 of its Rules of Procedure.

It should be added that, in view of the silence of the PPI on the matter and the absence of any other rule thereon, Parliament has adopted the criterion whereby immunity under Article 10 of the PPI applies not only to actions during a member's term of office but also retrospectively (immunity thus does not apply to actions after expiry of the term of office). This criterion is based on the premise that the primary purpose of immunity is to protect the normal functioning of the parliamentary institution, which principle might otherwise be jeopardised by actions occurring both before and after the start of a member's term of office.

III. The scope and purpose of parliamentary immunity

According to Article 28 of the merger Treaty of 8 April 1965 the privileges and immunities set out in the PPI were established with the purpose of enabling the Communities to carry out their mission. Article 4 of the EEC Treaty, Articles 3, 6 and 7 of the ECSC Treaty and Article 3 of the Euratom Treaty make it clear that the Communities are bound to act through their respective institutions, including the European Parliament. It has, accordingly, been the traditional view that the immunity defined in Articles 9 and 10 of the PPI is intended to ensure the protection of Parliament as a Community institution rather than the protection of its members as individuals.

Article 9 of the PPI (non-liability)

(a) Opinions and votes

Under Article 9 of the PPI, members of the European Parliament are exempted from liability for the opinions expressed and votes cast by them in the performance of their duties. This privilege is intended to safeguard members' freedom in the performance of their duties, leaving their

actions to be subject only to the rules governing procedure and the conventions of parliamentary etiquette.

Despite the existence of analogous provisions in the Member States, the scope of this privilege is not identical to that prevailing under the various domestic systems. The European Parliament has endeavoured to define the precise scope of the provision concerned, proposing that the existing text of Article 9 of the PPI be replaced by the following wording:

'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.'

According to legal opinion, and following the interpretation of the parliamentary committee responsible, this wording should be taken to mean opinions expressed and votes cast not only during the part-sessions of Parliament but also during the meetings of parliamentary bodies such as committees or political groups. However, Article 9 of the PPI is deemed not to cover opinions expressed by members at party conferences, during election campaigns or in books or articles which they publish.

(b) Defamatory Intent

In contrast to the German and Greek national parliamentary immunity arrangements, the PPI does not exclude actions committed with defamatory intent from the scope of non-liability. Furthermore, non-liability as defined in Article 9 of the PPI is absolute; no exclusion is permitted on the part of any entity, not even Parliament itself.

(c) Testimony in Court

An amendment of the PPI in 1987 entitles MEPs to refuse to testify in court, in so far as their testimony related to their activities as members of the European Parliament. The effect of this proposal is to give official recognition to a privilege existing in various Member States but which is not referred to in the existing protocol.

Article 10 of the PPI (inviolability)

Inviolability refers to actions by Members of the European Parliament not covered by Article 9 of the PPI, i.e.:

- opinions expressed and votes cast outside debates in the European Parliament, in the bodies set up by Parliament or functioning under its auspices, or in bodies where the Members concerned meet or are present in their capacity as Members of the European Parliament;
- actions which cannot be classified as opinions or votes, whether carried out within or outside Parliament.

Article 10 of the PPI draws a distinction between two types of situation arising 'during the sessions of the European Parliament', according to whether the Member concerned is physically present *in the territory of his own Member State or in the territory of any other Member State.*

(a) Situation in the territory of an MEP's own Member State

If an MEP is in his own Member State, the article refers the matter to the national law of the Member States, stating that MEPs are entitled to the immunities accorded to members of their respective national parliament. However, this arrangement results in an inequality of treatment between members because of the variations between the different national provisions on the matter.

This situation also entails adverse consequences for Parliament's own work, since it obliges Parliament, in each individual case of a request for waiver of immunity, to review the relevant national legislation concerning immunity and the related procedures. This may lead not only to delays in decision-making but also to errors in interpretation and even misapplication of the rules concerned.

(b) Community Immunity

Where an MEP is present on the territory of a Member State other than that of which he is a national, he is exempt from 'any measure of detention and from legal proceedings.

(c) Travelling to and from the meeting of Parliament

Article 10 of the PPI additionally confers immunity on Members '*while they are travelling to and from the place of meeting of the European Parliament.*' This, too, should be regarded as a 'Community immunity', irrespective of the protection accorded by national legislation.

(d) *Flagrante delicto*

The final paragraph of Article 10 sets out a conventional exception to the privilege of parliamentary immunity, insofar as it states that immunity 'cannot be claimed where a Member is found in the act of committing an offence'.

IV. The procedure for waiving parliamentary immunity

Article 10 of the PPI confers on the European Parliament the right to waive the immunity of individual Members. It emphasises the institutional purpose of this prerogative, which seeks to safeguard the independence and normal functioning of the parliamentary institution.

The procedure for waiving the immunity of an MEP referred to in the third paragraph of Article 10 of the PPI must be based on Community law. Since Community law contains no specific provision concerning the waiving of immunity, it is up to the European Parliament to determine the nature of the procedure. Rule 6 of the Rules of Procedure is the only procedural provision existing on the subject. Parliament's practice over the years has led to the establishment of a series of basic guidelines applying to the procedure for waiving a Member's immunity.

A request submitted to Parliament is valid where drawn up and forwarded by the authorities which, under the relevant national legislation, are entitled to submit and forward a similar request to the parliament of the Member State concerned.

Provided that the independence of Parliament and of its members is not adversely affected, the precise moment at which, in the context of the preparation of legal proceedings, a request for waiver of immunity is to be drawn up prior to initiation of the judicial action is to be determined by the national law of the Member States.

(a) Dual Mandates

In the case of members holding a dual mandate, Parliament acts in accordance with a decision adopted by the committee responsible at the beginning of the parliamentary term following the first direct elections and has traditionally waited for the decision of the national parliament concerned. Although the procedures in question are independent of each other, it has been considered desirable, for both political and practical reasons, to await the national parliament's position on a request before considering it. This practice accounts for the delay which sometimes characterises Parliament's decisions.

(b) Parliamentary committee's right to obtain detailed information

The introduction in May 1992 of further provisions revising the Rules of Procedure, now enable a committee to ask for information not set out in the original request for waiver of immunity and the member concerned to submit such information. These provisions reinforce the legitimacy of the parliamentary committee's right to obtain detailed information concerning each case examined and to have at its disposal for this purpose all the information which it deems necessary for it to reach a decision.

On several occasions, the European Parliament has based its refusal to waive a Member's immunity on the grounds that the national authorities in question had failed in their duty to cooperate under Article 5 of the EEC Treaty and not provided certain information which had been requested as being indispensable for the consideration of the requests concerned.

(c) Confidentiality

The committee responsible has so far considered requests for waiver of immunity at meetings held in camera. The purpose of this practice is to ensure confidentiality, in the interests of both the member concerned and of the committee itself and its members, in such a way as to ensure a free and unbiased debate, with particular regard to cases of this nature.

(d) Obligation not to pronounce guilt or innocence

Paragraph 5 enshrines the conventional principle, whereby the committee is not empowered to pronounce on the guilt or innocence of the Member concerned, since this is a matter for the judicial bodies.

(f) The precise action to be taken by committee

The procedure for considering action is detailed in part 6 of Rule 6 of the Rules of Procedure:

'6. The report of the committee shall be placed at the head of the agenda of the first sitting following the day on which it was tabled. No amendment may be tabled to the proposal(s) for a decision.

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

Without prejudice to Rule 122, the Member whose immunity is subject to the request for a waiver shall not speak in the debate.

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

After Parliament has considered the matter, an individual vote shall be taken on each of the proposals contained in the report. If any of the proposals are rejected, the contrary decision shall be deemed adopted.'

(g) Notification of authorities

The procedure concludes with the immediate notification of the decision to the national authorities concerned. However, in cases where the decision taken involves the waiving of immunity, the President of Parliament is obliged to ask to be kept informed of the progress of the legal proceedings in question.

V. Parliamentary practice

Parliamentary practice has now developed and consolidated a set of principles and criteria intended to serve as guidelines for the committee responsible.

These principles are based in part on the case-law of the European Court of Justice. They may be summarised in the following section:

(a) Purpose of parliamentary immunity

Parliamentary immunity is not to be seen as a privilege benefiting individual Members; it is designed to guarantee the independence of Parliament and its Members vis-à-vis other bodies. Accordingly, the date of the alleged offences is entirely relative. They may be prior to or subsequent to the election of the member. What is paramount is the protection of the parliamentary institution through that of its Members.

(b) Renunciation of immunity

Keeping its focus on the institution, not the individual, the renunciation of parliamentary immunity by an individual Member has no legal effect.

(c) Autonomous nature of immunity in the European Parliament and in Member State parliaments

Outcomes of decisions taken on requests for waiver of immunity created a coherent notion of parliamentary immunity which should, as a matter of principle, be independent compared with the various practices in the national parliaments. If that were not the case, the disparities between members of one and the same parliament would be accentuated on the grounds of their nationality. The Committee on the Rules of Procedure currently thinks that the ground must be

prepared for a genuine European Parliament immunity, one which is in principle autonomous, while retaining the references to national parliaments set out in the Protocol on privileges and immunities.

The application of these principles has resulted in a constant element in Parliament's decisions, one which has become a fundamental criterion for consideration of the action to be taken on individual requests for waiver of immunity. In all cases where the charges against a Member are related to the exercise of a political activity, immunity is not to be waived. However, if the charges relate to what may be considered 'particularly serious' activities, immunity will be waived.

Between the date when direct elections to the European Parliament were introduced and February 2001, a total of 92 requests for waiver of parliamentary immunity were considered. Parliament decided to waive immunity in 18 cases, i.e. 19.5% of the total.

There are three groups of cases in which the committee has refused to accept the interpretation that the acts imputed to the Member fell within the sphere of his political activities:

- a) In all cases where the acts were considered to constitute a threat to individuals or to democratic society. Examples: support for persons guilty of terrorist acts; membership of criminal organisations; drug-trafficking; participation in demonstrations equipped with dangerous objects which could constitute a threat to the lives of others;
- b) In all cases of defamation where the injured party or parties were considered to have been denigrated as individuals rather than as representatives of an institution (administrative bodies, media organs, etc.). Examples: verbal and written attacks on an individual police officer directed at him personally rather than at the police as such; a written attack on a journalist directed at him personally without reference to the press in general or to a particular newspaper;
- c) In all cases involving a clear-cut breach of the criminal law or of administrative rules or provisions, where there was no connection whatever with any political activity. Examples: failure to report a road accident; insulting police officers after being found driving with irregular number plates; nepotism involving financial favours; accounting fraud.

The acts in respect of which a request for waiver of a Member's immunity was submitted and accepted by Parliament include the following: provision of assistance to criminals to enable them to escape justice; membership of a criminal organisation and drug- trafficking; possession at a demonstration of objects liable to cause injury to persons and property; parking in a prohibited area; encouragement and support for the reconstitution of a dissolved fascist party; failure to report a road accident; insulting a representative of law and order; insult or defamation directed against individuals or groups; financial offences involving embezzlement and fraud; libellous material published in a newspaper; abuse of powers, embezzlement, use of and complicity in the drawing up of bogus documents; denying the Holocaust at a press conference held to mark the launch of a book on the member's life and political activities; aggravated fraud.

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