2021, Vol. 10, Issue 1

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WHAT ARE THE ULTIMATE SOURCES FOR PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION? COMMENT ON THE JUDGEMENT OF THE COURT OF JUSTICE, CASE C-502/19 JUNQUERAS VIES

Abstract: The judgment of the Court of Justice of the EU in the case of Mr Junqueras Vies has been significant in many respects. It has split the mandate of Members of the European Parliament from the parliamentary functions fulfilled by them. It has also extended the scope of parliamentary privileges and immunities of MEPs as a result of extensive reading of the provisions of the Protocol on Privileges and Immunities of the EU. The present comment argues that such an extensive interpretation had only been possible because the CJEU found in its judgment that the principle of representative democracy created a 'context' in which the Court re-read the respective provisions on the immunities of MEPs. As a result of the above, it seems the CJEU has found yet another basis for the EU's immunities, functioning independently of Article 343 TFEU. Contrary to the EU's immunities which are based on Article 343 TFEU and operate according to the principle of functional necessity, which is characteristic for traditional international organisations, immunities based on the principle of representative democracy operate according to 'constitutional' logic, which is characteristic for states. As the EU is evidently neither a traditional international organisation nor a state, simultaneous operation of these

two sources for its privileges and immunities may prove to be difficult. In particular, EU citizens may start to wonder why the EU, the functioning of which is based on the principle of representative democracy, enjoys privileges and immunities characteristic for traditional intergovernmental organisations.

Keywords: European Union, Court of Justice of the EU, privileges and immunities

1. Introduction

Whereas state immunity is based on reciprocity and the principles of sovereignty and equality of states, scholarly literature underscores that the rationale for the immunity of international organisations is a functional necessity.[1] As a result, international organisations enjoy privileges and immunities as long as they are necessary for the fulfilment of their objectives and functions. This principle was confirmed with respect to the EU by the CJEU in the *Zwartveld* case, where the Court said that 'the privileges and immunities which the Protocol grants to the European Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities'.[2]

In EU law, the principle of functional necessity has been reflected in Article 343 TFEU, which provides that 'The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, [...]'.[3] This provision further states that the conditions under which the Union enjoys its immunities are laid down in Protocol (No 7) on Privileges and Immunities (PPI) of

[1] J. Klabbers, *An Introduction to International Institutional Law*, Cambridge University Press, Cambridge 2013, pp. 131-137; M. Möldner, *International Organizations or Institutions, Privileges and Immunities*, Max Planck Encyclopedia of Public International Law, April 2011, para. 12.

[2] *Zwartveld and Others*, Case no. C-2/88 Imm., Order of 13.7.1990, ECLI:EU:C:1990:315, para. 19.

[3] M. Athen, O. Dörr, *AEUV Art. 343 Kommentar*, [in:] E. Grabitz, M. Hilf, M. Nettesheim (eds.), 'Das Recht der Europäischen Union', München 2020.

the EU of 8.4.1965.[4] The final sentence of Article 343 TFEU adds that the same shall apply to the European Central Bank (ECB) and the European Investment Bank (EIB).

There are many examples of the CJEU's decisions which demonstrate its reliance on Article 343 TFEU and the provisions of PPI as far as EU privileges and immunities are concerned. These cases deal, respectively, with taxes put on EU institutions concerning the supply of electricity and gas,[5] the applicability to EU staff of the provisions of Member State social welfare law,[6] determination of the domicile for tax purposes of the spouse of an EU official[7] and the inviolability of archives of EU institution.[8]

This note argues however that there is yet another source for privileges and immunities of the EU discernible in the case-law of the CJEU. In case C-502/19,[9] the Court found an ultimate basis for immunities of Members of the European Parliament (MEPs), not in Article 343 TFEU but in the 'principle of representative democracy'.[10] Relying on the 'principle of representative democracy' instead of functional necessity is all the more striking when we realize that in his opinion prepared in that case, Advocate General (AG) Szpunar does not even mention the existence of Article 343 TFEU.[11]

This comment evaluates the judgment of the CJEU in case C-502/19 and aims at presenting the possible consequences of invoking the 'principle of representative democracy' within EU law as a potential basis for its privileges and immunities. For this purpose, the present comment first describes the facts of the case and presents the main findings of the AG's opinion and of the judgment of the CJEU.

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[4] Protocol (No. 7) on the Privileges and Immunities of the European Union, OJ 7.6.2016, C-202, p. 266.

[5] *Commission v. Belgium*, Case no. C-163/14, Judgment of 14.1.2016, ECLI:EU:C:2016:4.

[6] *Land Hessen v. Florence Feyerbacher*, Case no. C-62/11, Judgment of 9.7.2012, ECLI:EU:C:2012:486.

[7] *Lotta Gistö*, Case no. C-270/10, Judgment of 28.7.2011, ECLI:EU:C:2011:529.

[8] *European Commission v. Republic of Slovenia*, Case no. C-316/19, pending at the time of writing. Opinion of advocate general J. Kokott delivered on 3.9.2020, ECLI:EU:C:2020:641. On the background of that case. see M. Avbelj, *The European Central Bank in national criminal proceedings*, 'European Law Review' 2017, vol. 42, no. 4, pp. 474-490.

[9] Junqueras Vies, Case no. C-502/19, Judgement of the Court of Justice of 19.12.2019, ECLI:EU:C:2019:1115.

[10] Paras. 63 and 83 of the judgment.

[11] *Junqueras Vies*, Case no. C-502/19, Opinion of Advocate General M. Szpunar of 12.11.2019, ECLI:EU:C:2019:958.

2. Facts of the case

Mr Junqueras, the applicant in the main proceedings, was Vice-President of the Autonomous Government of Catalonia, Spain, when, in 2017, the Catalan Parliament adopted several laws relating to Catalan independence and the holding of the referendum on self-determination.[12] Following the adoption of these laws, Mr Junqueras (along with several others) was charged in criminal proceedings for rebellion, civil disobedience and misappropriation of funds and was consequently put on provisional detention according to a decision adopted on 2.11.2017.[13] While in detention, he stood successfully as a candidate in the elections for the Congress of Deputies (on 28.4.2019) and was suspended from his parliamentary mandate by the decision of the administrative board of the Congress of Deputies adopted on 24.5.2019. During the criminal proceedings brought against him, Mr Junqueras Vies also stood successfully as a candidate in the elections for the European Parliament (EP) held on 26.5.2019. Following his request for special authorisation to leave prison in order to appear before the Central Electoral Board and swear to abide by the Spanish Constitution, he was denied doing so by the order of the Supreme Court of 14.6.2019. As a result, the Central Electoral Board declared his seat in the EP vacant and suspended all of the prerogatives that Mr Junqueras Vies might enjoy from his mandate. The order given by the Supreme Court on 14.6.2019 was subsequently challenged by Mr Junqueras Vies on the ground that he enjoyed the immunities provided for in Article 9 of the PPI of the EU.[14] Since the decision on that challenge required the interpretation of provisions of EU law, the Supreme Court decided to refer to the CJEU with a request for a preliminary ruling.

The three questions put to the CJEU by the Spanish court related, in principle, to the interpretation of Article 9 PPI.[15] The Supreme Court asked in particular whether a person elected to the EP while in provisional detention is entitled to some parliamentary immunities even before the commencement of the inaugural session of the EP. If the answer was

[12] On the background of the conflict in Catalonia, see: C.A. Tzagas, *The Internal Conflict in Spain: The case of Catalonia,* 'International Journal of Latest Research in Humanities and Social Science', 2018, vol. 1, no. 8, pp. 58-63.

[13] Paras. 17-19 of the judgment.

[14] Paras. 19-28 of the judgment.

[15] Para. 40 of the judgment.

affirmative, the Supreme Court asked whether the broad interpretation of the term 'sessions' continues to apply to the newly elected member notwithstanding the temporary interruption of his expectation of taking his seat. Lastly, the referring court asked that if immunity should apply, was the court obliged to release the person remanded in custody (MEP-elect) absolutely ('almost automatically') to allow for travel to the EP or whether this should undergo a balancing exercise of a relative nature, between the rights and interests resulting from the interests of justice and due process on one hand and, on the other, 'those relating to the concept of immunity, as regards the need to ensure the functioning and independence of the [European] Parliament and the elected representative's right to hold public office?'.

3. The Advocate General's opinion

In his opinion, given on 12.11.2019, AG Szpunar begins by explaining the origins of parliamentary immunity, which was institutionalised for the first time in the United Kingdom at the end of the XVI century.[16] He then continues with describing the evolution of this immunity in countries of continental Europe (France first of all) and concludes that even though the principle of the rule of law protects members of parliaments in modern states, there has still been a need for maintaining parliamentary immunity as it guarantees the independence of members of parliaments and *ipso facto* the independence of parliaments, including the EP.[17]

With respect to the facts of the case at issue and the questions put forth by the referring court, AG Szpunar proposed that the official declaration of election results marked the acquisition of a mandate of MEP.[18] Contrary to the Commission's opinion, communication of the election results to the EP by the Member States constitutes a purely technical act which cannot entail a constitutive effect for acquiring a mandate.[19] In relation to the first question put forth by the referring court, AG Szpunar reminded that the CJEU had already stated that the term 'during the sessions of the Assembly' included in the Article 9 paragraph 1 PPI is to be interpreted as meaning

[16] Paras. 1-2 of the opinion.
[17] Paras. 7-11 of the opinion.
[18] Para. 49 of the opinion.
[19] Para. 51 and para. 70 of the opinion.

that the EP 'must be considered to be in session, even if is not actually sitting, until the decision is taken closing its annual or extraordinary sessions'.[20] In effect, the sessions of the EP begin from the moment of the opening of the first sitting of the new Parliament.[21]

Regarding the interpretation of Article 9 PPI, AG Szpunar said that the immunity provided for in paragraph 1 of that provision[22] protects MEPs from the moment of the opening of the first session of the EP, even if they were unable to or prevented from taking part in it.[23]

Since, according to the AG, the third question asked by the referring court related to the interpretation of Article 1 paragraph 2 of the PPI[24] (so-called 'travelling immunity'), AG Szpunar analysed the nature and character of the immunity arising from that provision.[25] As regards the material scope of the 'travelling immunity', the AG recognised it as being precisely the same as the scope of immunities provided for in Article 9 paragraph 1 of the PPI.[26] Since, pursuant to the case-law of the CJEU, 'travelling immunity' protects MEPs after the sessions of Parliament[27], it may equally be used before the session begins, because MEPs are supposed to travel to take part in it.[28]

4. Judgment of the Court of Justice

In its judgment, the CJEU reminded that the functioning of the EU is to be founded on the principle of representative democracy, and in implementing that principle, MEPs 'are to be elected for a term of five years by direct

[20] *Wybot*, Case no. C-149/85, Judgment of 10.7.1986, ECLI:EU:C:1986:310, dictum.

[21] Para. 80 of the opinion.

[22] Article 9 paragraph 1 of the PPI provides that 'During the sessions of the European Parliament, its Members shall enjoy: a) in the territory of their own State, the immunities accorded to members of their parliament: b) in the territory of other Member States, immunity from any measure of detention and from legal proceedings'.

[23] Para. 84 of the opinion.

[24] Article 9 paragraph 2 of the PPI provides that 'Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament'.

[25] Paras. 85-95 of the opinion.

[26] Para. 87 of the opinion.

[27] *Wybot*, Case no. C-149/85, para. 25.

[28] Para. 90 of the opinion.

universal suffrage in a free and secret ballot'.[29] The Court concluded then from Article 14 paragraph 3 TEU that the status of MEPs arises from being elected in a way provided for in that provision, 'while the term of office of the members of that institution constitutes the main attribute of that status'.[30]

The second important issue to be explained by the CJEU was: when does a candidate taking part in elections to the EP becomes a Member of that institution? The CJEU agreed with the AG's opinion and ruled that the acquisition of a status of MEP (for the purposes of Article 9 of the PPI) 'occurs because of and at the time of the official declaration of the election results carried out by the Member States'.[31] The CJEU, however, made a distinction between the acquisition of the status of MEP and the term of his/her office 'which does not begin until the opening of the first session of the 'new' European Parliament held after the election […]'.[32] The CJEU then concluded from the Article 9 of the PPI that since immunities are granted to MEPs, they are therefore granted to those who have acquired the status of an MEP (as a result of an official declaration of the election results by the Member States).

Since Mr Junqueras was prevented from travelling to the place where the first sitting of the new parliamentary term was going to take place, the CJEU had to explain which of the privileges and immunities could be applied in his case. According to Article 9 of the PPI, during the sessions of the EP, its Members shall enjoy two kinds of immunities: First, in the territory of their own State, the immunities accorded to members of their parliament; Second, in the territory of other Member States, immunity from any measure of detention and legal proceedings. In addition to this, Article 9 paragraph 2 of the PPI states that immunity shall also apply to MEPs while they are travelling to and from the place of meeting of the EP.[33] The CJEU had already determined that the EP sits continuously in sessions for 12-month periods and its sessions start with the constituent meeting (after the elections) and end only when 'new' EPs gather at its inaugural meeting. For this reason, the CJEU opted to apply the second paragraph of Article 9 (travelling immunity), as Mr Junqueras was prevented from

[29] Paras. 63-64 of the judgment.
[30] Para. 65 of the judgment.
[31] Para. 71 of the judgment.
[32] Para. 74 of the judgment.
[33] See above footnote no. 21.

taking part in the EP's inaugural meeting. The CJEU argued the travelling immunity applies to MEPs while they are travelling to and from the place of meeting of the EP and, therefore, *inter alia* 'when they are travelling to the first sitting held after the official declaration of the election results, in order to allow the new parliament to hold its inaugural session and to verify the credentials of its Members'.[34] Scholarly literature underscores in this context that by relying on the second paragraph of Article 9 PPI ('travelling immunity'), the Court wanted to close 'the immunity gap', since the scope of immunities provided for members of national parliaments differs significantly in EU countries.[35] Moreover, some EU Member States do not even provide members of their national parliaments with the necessary immunities, which creates unacceptable discrimination at an EU level.

As result, the CJEU said that a person such as Mr Junqueras, who was officially declared elected to the EP while under provisional detention in the context of proceedings in respect to serious criminal offences, but who was prevented from complying with certain requirements resulting from national law following such a declaration and from travelling to the EP in order to take part in its first session, must be regarded as enjoying the immunity resulting from Article 9 paragraph 2 of the PPI.[36] The existence of this type of immunity 'entails that the measure of provisional detention imposed on the person concerned must be lifted, in order to enable that person to travel to the European Parliament and complete the necessary formalities there'[...].[37] The CJEU, however, said that if the competent national court considers that the measure of provisional detention should be maintained after the person concerned acquired the status of MEP, it has to request the EP to waive that immunity as provided for in Article 9 paragraph 3 of the PPI.[38]

[34] Para. 80 of the judgment.

[35] S. Hardt, *Fault Lines of the European Parliamentary Mandate: The Immunity of Oriol Junqueras Vies: ECJ 19 December 2019, Case C-502/19, Junqueras, ECLI:EU:C:2019:1115*, 'European Constitutional Law Review' 2020, vol. 16, no. 1, pp. 180-181.

[36] Para. 87 of the judgment.

[37] Para. 94 of the judgment.

[38] Para. 94 of the judgment.

5. Comments

The judgment of the Court in *Junqueras Vies* raises several questions, both of great importance as well as of a general nature. Scholarly literature, for example, underscores the significance of the *Junqueras* judgment for the preliminary rulings procedure and the application of the loyalty principle in the European judicial dialogue between the Spanish Supreme Court and the CJEU, or the legitimacy of the mandatory oath of MEPs concerning the Spanish Constitution (which unfortunately has not been addressed by the CJEU).[39] The present comment aims to draw the reader's attention to four other issues which have not been raised in scholarly literature as of yet.

Firstly, by splitting membership in the EP from the parliamentary mandate, the CJEU created a 'new' EP existing from the moment of publication of electoral results by the Member States. The 'new' EP consists of members who enjoy privileges and immunities but do not hold a parliamentary mandate until the day of the EP's first sitting.[40] It must, however, be reminded that the 'old' EP still exists at the same time, because the 'powers of the outgoing European Parliament shall cease upon the opening of the first sitting of the new European Parliament'.[41] Parallel functioning of the 'new' and 'old' parliaments regularly takes place after successive elections in some Member States (e.g. Poland) and is anything but unusual.[42] At the EU level, 'two' EPs existing side by side is a novelty, and it remains to be seen whether their coexistence will be smooth or become a source of conflict.

Secondly, all individual privileges and immunities (parliamentary immunities including) contravene the fundamental principle of equality of all citizens, which, in the case of parliamentary immunities, is justified

[39] C. Fasone, N. Lupo, *The Court of Justice on the* Junqueras *saga: Interpreting the European parliamentary immunities in light of the democratic principle*, 'Common Market Law Review' 2020, vol. 57, no. 5, pp. 1538-1552.

[40] This period started in May 2019 and finished on 2.7.2019.

[41] Act concerning the election of members of the European Parliament by direct universal suffrage, OJ 8.10.1976, L-278, p. 5, Article 5.

[42] Article 105 paragraph 2 of the Constitution of the Republic of Poland provides that 'From the day of announcement of the results of the elections until the day of the expiry of his mandate, a deputy shall not be subjected to criminal accountability without the consent of the Sejm'.

by the need to protect the members of parliaments.[43] Forasmuch as parliamentary immunities diverge from the principle of equality, each of their manifestations in positive law must be interpreted restrictively.[44] In *Junqueras*, however, the CJEU adopted a very extensive reading of Article 9 PPI and found within it parliamentary immunities that had not been expressed there directly.[45] In his opinion, AG Szpunar admitted that because the normative environment of Article 9 PPI has changed significantly since it was adopted, the interpretation of that provision should not still be anchored in the 'age of coal and steel', but it should rather follow the evolution of the normative and institutional environment.[46] While such an extensive reading of Article 9 of the PPI serves well to ensure the effectiveness of the right to stand as a candidate at elections guaranteed in Article 39 paragraph 2 of the Charter of Fundamental Rights (CFR)[47], it seems to be in contradiction with the principle of equality laid down in Article 20 of the CFR, which provides that everyone is equal before the law.

Thirdly, in its judgment, the CJEU underscored that Article 10 paragraph 1 TEU provides that the functioning of the EU is to be founded on the principle of representative democracy, 'which gives concrete form to the value of democracy referred to in Article 2 TEU […]'.[48] In this regard, the CJEU referred to its earlier judgment in the case *Puppinck and others v. Commission*, given on the same day as the judgment in Mr Junqueras' case.[49] Nevertheless, it is striking that neither Article 10 paragraph 1 TEU nor the *Puppinck* judgment call representative democracy a principle.

[43] *Parliamentary Immunity: Background Paper prepared by the Inter-Parliamentary Union*, September 2006, p. 20.

[44] P. Radziewicz, *Art. 105 Immunitet poselski* [Article 105 Parliamentary Immunity], [in:] P. Tuleja (ed.) 'Konstytucja Rzeczypospolitej Polskiej. Komentarz' [Constitution of the Republic of Poland. Commentary], WKP 2019.

[45] As one Commentator notes: '[…] the judgment strengthens the legal position of members-elect by interpreting Article 9 of the Protocol (No. 7) on Privileges and Immunities of the Union widely (and with the considerable judicial creativity) […]', see S. Hardt, *Fault Lines* …, p. 3.

[46] Para. 107 of the opinion.

[47] Para. 86 of the judgment.

[48] Para. 63 of the judgment.

[49] *Puppinck and others v. Commission*, Case no. C-418/18 P, Judgment of 19.12.2019, ECLI:EU:C:2019:1113.

The principle of democracy has had a long history in the case-law of the CJEU.[50] As early as in 1980, the CJEU invoked a 'fundamental democratic principle' to enable judicial review,[51] which, in its subsequent case-law, became known as the 'principle of democracy' on which the Union is founded[52] and 'which is common to the Member States and on which the European edifice is founded'.[53] In the *Junqueras* judgment, the principle at issue further evolved into the 'principle of representative democracy', since it is unlikely that the CJEU intended to establish a new general principle of law different from the 'principle of democracy'.[54] The reason why the CJEU decided to add the adjective 'representative' to the previously established 'principle of democracy' is unclear, although it may well be caused by its extensive use in scholarly literature[55] or the CJEU's will to further strengthen the political independence of EP *vis-à-vis* EU Member States.

The principle of democracy has already been used by the CJEU in its case-law to safeguard judicial scrutiny and parliamentary independence,[56] as well as parliamentary immunity and the rule of law.[57] This comment argues that the principle of representative democracy, proclaimed by the CJEU in *Junqueras*, further expanded the scope of the EU's privileges and immunities. The principle at issue was used by the CJEU in order

[50] K. Lenaerts, *The principle of democracy in the case law of European Court of Justice*, 'International & Comparative Law Quarterly', 2013, no. 2, pp. 271-315, G.F. Mancini, D.T. Keeling, *Democracy and the European Court of Justice*, 'Modern Law Review' 1994, vol. 57, no. 2, pp. 175-190.

[51] *Roquette Frères*, Case no. 138/79, Judgment of 29.19.1980, ECLI:EU:C:1980:249, para. 33. See also A. von Bogdandy, *The European lesson for the international democracy: the significance of articles 9-12 EU Treaty for international organizations*, 'European Journal of International Law' 2012, vol. 23, no. 2, p. 318.

[52] *UEAPME v. Council*, Case no. T-135/96, Judgment of 17.6.1998, ECLI:EU:T:1998:128, para. 89.

[53] *Martinez v European Parliament*, joined cases T-222/99, T-327/99 and T-329/99, Judgment of 2.10.2001, ECLI:EU:T:2001:242, para. 194.

[54] In his paper, published in 2013, Judge Lenaerts (who presided over the Grand Chamber of the CJEU ruling in *Junqueras Vies*) used those two terms interchangeably, see K. Lenaerts, *The principle of democracy…*, at p. 281. Lenaerts also called representative democracy a 'concept'. *Ibidem* at p. 289.

[55] See e.g. J.M. Porras Ramirez, *Article 10 [Representative Democracy],* [in:] H.J. Blanke, S. Mangiameli (eds.), 'The Treaty on European Union (TEU): A Commentary', Berlin Heidelberg 2013, p. 418.

[56] *Martinez v European Parliament…*, paras. 194-211.

[57] K. Lenaerts, *The principle of democracy…,* pp. 290-293.

to create a 'context' which enabled the CJEU to declare that although the concept of 'Member of the European Parliament' has nowhere been defined in EU law, the status of an MEP 'arises from being elected by direct universal suffrage, while the term of office of Members of that institution constitutes the main attribute of that status'.[58] As a result, the principle of representative democracy enabled the CJEU to enlarge the personal scope (*ratione personae*) of EU immunities on those who, prior to its judgment in *Junqueras*, had not been protected by immunities (i.e. members elect). Moreover, according to the principle of representative democracy, the EP not only must be properly elected, but it also 'must be protected, in the exercise of its tasks, against hindrances or risks to its proper operation'.[59] This further allowed the CJEU to state that those who have been elected MEPs should be allowed to take the steps necessary to take their seats[60], which, as a consequence, means that they enjoy immunities under Article 9 paragraph 2 PPI (travelling immunity). In this way, owing to the principle of representative democracy, the CJEU was able to enlarge the material scope (*ratione materiae*) of EU travelling immunity to situations which, prior to its judgment, had not been protected by it.

Fourthly, it must also be noted that the CJEU refined that the immunities granted to MEPs are intended to ensure the independence of the EP in the performance of its tasks, as the 'European Court of Human Rights [ECtHR] noted as regards different forms of parliamentary immunity established in democratic political systems […]'.[61] By referring to ECtHR's case-law concerning the immunity of national parliamentarians (*Karácsony and Others v. Hungary*, *Uspaskich v. Lithuania*), the CJEU practically equated the position of EP with the positions of national parliaments. It should be reminded, however, that in *Karácsony and Others v. Hungary*, the ECtHR stated that the long-standing practice for States to confer varying degrees of immunity on members of their parliaments 'pursues the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. Different forms of parliamentary immunity may indeed serve to protect the effective political democracy that constitutes one of the cornerstones of the Convention

[58] Paras. 62-65 of the judgment.
[59] Para. 83 of the judgment.
[60] Para. 86 of the judgment.
[61] Para. 84 of the judgment.

system, particularly where they protect the autonomy of the legislature and the parliamentary opposition [...]'.[62]

None of the above seems to apply to the EP, as the sole aim of its privileges and immunities is the performance of the tasks of the EU and its protection from interference by Member States. There is no separation of powers within the EU to be protected by parliamentary immunities since the EU's institutional framework operates according to the principle of institutional balance. There is no need to protect effective political democracy by parliamentary immunities within the EU since the EU is rather far from constituting one. To state clearly – parliamentary immunities within democratic systems arise from the need to protect parliaments and their members from interference by other branches of government but not from interference by other States. The protection of the EP from interference by other 'branches of EU government' (EU institutions) may be better safeguarded not by the EP's privileges and immunities but by the system of judicial complaints (Articles 263 and 265 TFEU).

We may, obviously, respond that the EU is *sui generis*, and since, according to Article 10 paragraph 1 TEU, its functioning is to be founded on representative democracy, the immunities of the EP may (at least partly) derive from the principle of representative democracy and may be very similar to those enjoyed by the national parliaments. The problem is, however, that in the EU, there still exists a significant number of privileges and immunities which operate according to the traditional 'international logic' and which are based on the principle of functional necessity enshrined in Article 343 TFEU. According to the knowledge of the present author, there is no political system based on the principle of representative democracy where the highest police body was exempted from excise duties included in the price of purchased alcoholic beverages and motor fuels as there is with respect to Europol.[63] There is (probably) no democratic system where the staff members of some of its organs had the right to acquire one motor vehicle per household per every three years for personal use without VAT and/or duty.[64]

[62] *Karácsony and Others v. Hungary,* Applications nos. 42461/13 and 44357/13, Judgment of 17.5.2016, ECLI:CE:ECHR:2016:0517JUD004246113, para. 138.

[63] Agreement between the Kingdom of the Netherlands and the European Police Office (Europol) concerning the headquarters of Europol of 15 October 1998, Tractaatenblad, 1998, No. 241, Article IX(2)(e).

[64] Host Agreement on site and support, privileges and immunities between the Government of the Czech Republic and the European Global Navigation Satellite System

This inherent tension between traditional 'international logic' of EU privileges and immunities based on Article 343 TFEU, as well as the provisions of PPI, and EU immunities based on the principle of representative democracy has already been noticed in scholarly literature. As one author wrote in 2017, 'as a consequence of the fact the EU is no longer a classical international organisation and that its originally international *modus operandi* has evolved into a constitutional one, the EU and its institutions, including the ECB, need not and cannot any longer enjoy the same level of privileges and immunities as classical international organisations do'.[65] It seems that the judgment in *Junqueras* exacerbated this tension even more.

6. Conclusion

The judgment at issue has had very little (if any) impact on the situation of Mr Junqueras Vies. Its importance, however, is noticeable with regard to the Member States, as well as to the citizens of the EU.

As the judgment commented upon enlarges the scope of privileges and immunities of the EP beyond what is provided for in the provisions of PPI, *ipso facto* it restricts the Member States' competences relating to the electoral process and makes the EP less dependent upon them. The basis for such an enlargement of immunities has been found by the CJEU in the principle of representative democracy, on which the EU is founded. As a result, the CJEU has once again infused EU immunities with a 'constitutional logic', which is suitable for States rather than for international organisations.

According to the judgment commented upon, there are two possible sources for immunities of the EU: functional necessity (characteristic for international organisations which are rather distant and extraneous for citizens of their Member States) and the principle of representative democracy (characteristic for States which exercise public authority *vis-á-vis* their citizens). If these two systems for EU immunities work in parallel at the same time, then it may happen that the citizens of the EU may perceive the EU as if it were a State, though one which is as distant and extraneous to them as international organisations are. This could

Agency (GNSS), Sbírka mezinárodních smluv č. 74/2012, p. 1626, Article 13(6).

[65] M. Avbelj, *The European*..., p. 484.

potentially undermine the credibility of the EU in the eyes of its citizens and endanger the realisation of the process of creating an ever-closer union among the peoples of Europe.

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