TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

For:

Mr. Carles Puigdemont i Casamajó and **Mr. Antoni Comín i Oliveres**,

Residents in Avenue de L'Avocat 40, 1410 Waterloo – Belgium

- hereinafter called appellants -

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Against:

The European Parliament[1]

LODGE
AN APPEAL AGAINST THE ORDER OF THE PRESIDENT OF THE GENERAL COURT

Brought under the second paragraph of Art. 57 of the Statute of the Court of Justice of the European Union

Hereby, appellants request the Court to set aside the President's Order of 1 July 2019, in the case of *Carles Puigdemont and Antoni Comín v Parliament* (T-388/19 R), by which the President dismissed an application for interim measures, ex Arts. 278 and 279 TFEU.

The application sought, first, the suspension of the operation of several decisions of the EP which prevent the applicants from taking their seats in the Parliament as elected MEPs and, second, an order requiring the Parliament to take all the necessary measures, including the assertion of the privileges and immunities of the applicants, to enable them to take their seats in the Parliament with effects as of 2 July 2019.

[1] From now onwards EP

Further background to the dispute

In addition to the facts presented in the application and the main action, the appellants submit that the following general context should be taken into consideration.

1. The Spanish authorities have intentionally and in bad faith set out to impose a restriction on the appellants that is an act of prohibited discrimination on grounds of political opinion - as members of a national minority - in violation of Spain's international human rights obligations ex UDHR and the International Covenant on Civil and Political Rights[2] and, above all, Arts. 2, 10 and 14 TEU, Art. 1(3) of the 1976 Act, and Art. 39 of the Charter of Fundamental Rights of the EU.[3] And so are the same principles set out in Art. 25(b) of the ICCPR and Art. 3 of Protocol 1 to the ECHR which are certainly binding for the Parliament. It also follows that by so doing, the Spanish authorities have willfully and unlawfully disenfranchised all those EU citizens who voted for and elected the two appellants in clear violation of the principles of universal suffrage on which EU democracy depends.

2. If the appellants were to return to Spain in order to take the oath before the Spanish Central Electoral Commission[4], the Spanish authorities would prevent them from doing so by immediately arresting and sending them to prison, in the same way they did with Mr. Oriol Junqueras MEP -currently held in pre-trial detention. An application to lift the arrest warrant in order to enable them to take the oath has been refused. The requests to take the oath in a way that does not expose them to the immediate risk arbitrary arrest and detention in violation of their rights under the UDHR and ICCPR have also been refused.

New facts

We would like the Court to consider as part of this appeal the facts described in the application. We will strictly **add the facts that were not known neither to the appellants nor to the President when the application for interim measures was lodged:**

3. On the 24 May 2019 the former Deputy Secretary-General of the EP[5] sent a letter (**B.1**) to the President of the SCEC requesting the SCEC to send the EP, as soon as possible the relevant information about the official results of the election.

4. On 27 June 2019, after the resignation of Mr. Josep Borell, the SCEC proclaimed Ms. Estrella Durá Ferrandis as *'elected candidate'* (as had done with the appellants on 13 June 2019). Despite Ms. Estrella Durá Ferrandis only swore or affirmed allegiance to the Spanish Constitution on 1 July, the SCEC notified her election to the EP **before** that, on 27 June (B.2)

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[2] From now onwards ICCPR.

[3] From now onwards CFREU.

[4] From now onwards SCEC.

[5] Despite the fact that Rule 3(1) of the EPRoP provides that it should be the President of the Parliament itself.

5. On 1 July 2019, the Criminal Chamber of the Spanish Supreme Court requested a preliminary ruling (*see* Case C-502/19) on the scope of immunity for elected Member of Parliament Oriol Junqueras, whose name was not included either in the incomplete list of 17 June 2019. That preliminary reference was based precisely on the fact that, contrary to what the President of the General Court maintains in the Order, Mr. Junqueras is, as the appellants, an elected MEP, although he was also not included in the incomplete list of 17 June 2019.

6. On 6 August 2019, the Administrative Chamber of the Spanish Supreme Court allowed to proceed with a petition lodged against the incomplete list sent by the Spanish authorities on 17 June 2019 of which the Parliament took note. That case is pending. In any event, it does not affect the declared official results, which are final.

Procedure before the General Court and the Order under appeal

7. On 28 June 2019 the appellants brought an application for interim measures (case T-388/19 R), requesting the President of the General Court to suspend a series of the EP's decisions concerning the results of the election to the EP of 26 May 2019 and to order the EP to take all the necessary measures, to enable the appellants to take their seats in the said institution from the opening of the first sitting following the elections, on 2 July 2019, pending a ruling on the main action lodged on the same day (case T-388/19).

8. On 28 June 2019 the General Court fixed the time-limit for: "*Observations on the application for interim measures by the EP by 05/07/2019 12:00 (midday)*."

9. On 1 July 2019 –before the EP had made any observations– the President dismissed the application for interim measures, infringing appellants legitimate expectations on the proceedings based on the General Court's 28 June decision

10. The President ruled that the prima facie case requirement had not been satisfied.

Admissibility

The appeal is admissible.

Substance

11. Appellants submit **10 grounds** in support of this appeal:

- **THE FIRST GROUND OF APPEAL**

THE PRESIDENT'S DECISION IS BASED ON A MANIFEST ERROR OF ASSESSMENT AS TO THE OBJECT AND FACTS OF THE CASE, INCLUDING HIS INTERPRETATION OF SPANISH LAW

12. The contested Order totally misses the object of the application. It states repeatedly that the appellants are not *'elected candidates'* within the meaning of Art. 12 of the 1976 Act. However, neither the Parliament nor the Spanish authorities have ever called into question

that the appellants were elected on 26 May 2019 as MEPs. The President of the General Court wrongfully assumes that only those candidates who have sworn or affirmed allegiance to the Spanish Constitution are to be considered elected candidates pursuant to Spanish law.

13. The object of the dispute has never been about any of the following facts. Up to the moment, it is undisputed that:

- Appellants were declared as elected MEPs by the SCEC on 13 June 2019.[6]
- Two of the seats in the Parliament allocated to Spain still belong to the appellants.
- Pursuant to Spanish law, the proclamation is the act which formalises the electoral result, and a failure to swear or affirm allegiance to the Spanish Constitution can never lead an elected candidate to lose his or her seat.

14. As a consequence, the dispute brought before the Court primarily concerns the following aspects:

- whether the absence of a direct official communication to the EP of their election by a Member State[7] prevents elected MEPs from taking their seats.
- whether the EP should accept that a seat is declared vacant by a MS in cases not authorised or regulated by EU law.
- whether the existence of a dispute about the lack of official communication of an MEP's election and/or the lawfulness of the declaration of a vacancy of a seat allows elected MEPs to take their seat on a provisional basis.

15. The Order relies on a manifestly erroneous interpretation of the acts of the SCEC and the EP, which is also inconsistent with Spanish law, as well as with EU law. Indeed, paragraph 48 claims that the list sent by the Spanish authorities on 17 June 2019 and not the official proclamation of 13 June 2019 (as published on 14 June 2019 in the Spanish Official Journal[8]) should be considered to be the official declaration within the meaning of Art. 12 of the 1976 Act. Such interpretation is wrong because Art. 12 refers to "*results declared officially*", while

a) the decision of the SCEC on 13 June 2019 is the only act that purports to be the official declaration of the election results, as indicated by the words "*publicación de los resultados de las elecciones*" ['publication of the results of the elections'] and "*proclamación de Diputados electos*" ['proclamation of elected Members'] in the title;
b) the communication of 17 June 2019 contains no reference to the election results in Spain, but only a "*relationship*" (sic) of 50 MEPs who have taken the oath of allegiance to the Spanish Constitution, with the accompanying letter explaining that there are more "elected" MEPs who still have not done so.

16. Taking all this into account, there was no need for the EP to "disregard" the second document (as wrongly interpreted by the President) because only the 13 June 2019 SCEC

[6] Paragraph 6 of the appealed Order refers to the decision of 13 June 2019 as 'the proclamation of the elected candidates'. This is either a mistake from the President or a mistake in the translation as the said document does not say "proclamation of ELECTED CANDIDATES" but "proclamation of ELECTED MEPs" which is a substantial difference in the wording and above all in legal terms. See **A.14**.: "Diputados electos" which means Elected MEPs.

[7] From now onwards MS.

[8] From now onwards SOJ.

decision determines who was elected and who was not. The 17 June letter only communicates those MEPs who took the oath while clarifying that there are more elected MEPs.

17. The unfounded assumption that the appellants were never declared by the Spanish authorities as elected candidates (paragraphs 46 and 52) leads the President to wrongfully conclude that there is no scope for the Parliament or the General Court to analyze the lawfulness of the declaration of vacancy of their seats by the SCEC.

18. That unfounded assumption also leads the President to wrongfully conclude that there was no basis for the EP or the General Court to consider the right of the appellants to take their seats on a provisional basis, pursuant to Rule 3(2) of the EP Rules of Procedure.

19. Such a conclusion stems from the alleged lack of communication of the appellants declaration as elected MEPs. However, this is completely misguided, because an official communication of the appellants' election was included in the letter of the SCEC declaring the vacancies dated 20 June 2019.

- **THE SECOND GROUND OF APPEAL**

A FAILURE TO STATE REASONS AND A MANIFESTLY INCORRECT ASSESSMENT OF THE CONDITIONS FOR A *PRIMA FACIE* CASE

20. As defined in the case-law,[9] there is a prima facie case when the arguments put forward by the appellants cannot be dismissed at that stage in the procedure without a more detailed examination.[10] The President wrongfully considers none of the pleas in the action to be arguable (paragraph 38 of the Order).

21. The President rules on the merits of the main proceeding brought by the appellants and exceeds thereby the limit of his powers resolving an application for interim measures.

22. In paragraphs 39, 41, 42, 43, 45, 51 and 52 the Order presents a “prima facie” solution to some of the major legal or factual lines of discussion in this case (albeit this ‘solution’ is contested by appellants). However, the President will never state the reasons why the opposite solution should be ruled out as unfounded, let alone provide any reason to justify that his conclusion obvious. In fact, the Order never uses the words “unfounded” or “obvious” when discussing the pleas in law or the facts.

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[9] Case 56/89 R Publishers Association v Commission [1989] ECR 1693, paragraph 31; Case 246/89 R Commission v United Kingdom [1989] ECR 3125, paragraph 33; Case C-195/90 R Commission v Germany [1990] ECR 1-2715, paragraph 19; Case C-272/91 R Commission v Italy [1992] ECR I-457, paragraph 24; Case C-280/93 R Germany v Council [1993] ECR 1-3667, paragraph 21; Commission v Atlantic Container Line Case C-149/95 P(R), para. 26. *See* the recent judgment of 17 December 2018, *Commission* v. *Poland*, C-619/18 R, paragraph 30.

[10] Paragraph 28 of the Order rightfully states what general conditions should be met for the application to satisfy the condition that a prima facie case exists. At least one of the pleas in law should appear, at first sight, to be not unfounded. For instance, when there are major legal or factual disagreement the solution to which is not immediately obvious.

23. By resolving unfavorably the issue of whether the appellants have been elected (which was never under discussions) the President dismisses the whole application for interim measures and advances a dismissal of the main action.

24. Contrary to the conclusions of the President, several outstanding issues remain without an obvious solution, thereby proving the existence of a *prima facie* case. It is quite evident that the appellants' arguments cannot be rejected without a more thorough investigation.

25. That is the reason why the President did not correctly assess the application. The substantive obligation to state reasons has been infringed (Art. 47 of the CFREU).

26. Furthermore, the Order itself is contradictory. On the one hand, it recalls that a prima facie case exists '*where at least one of the pleas in law (...) appears, at first sight, to be not unfounded*'. But on the other hand, only one of the pleas laid down is discussed in full. There are several pleas that are not given any consideration, particularly those alleging serious violations of fundamental rights protected by the CFREU and the violation of the TEU.

a) The need to give due consideration to Human and Fundamental (Political) Rights

27. In most pleas in law, there are arguments about fundamental rights. Indeed, the appellants claim their human rights have been infringed, by reference to the CFREU and the ECHR. The infringement of their rights cannot, by any means, be attributed exclusively to the actions of the Spanish authorities. It is the EP alone that, in view of the controversies generated after they were elected as two of its Members, decided not to allow the appellants to take their seats on a provisional basis, as provided by Rule 3(2) of the European Parliaments' Rules of Procedure[11] with the implications of such a decision in terms of fundamental rights.

28. While the application contains at least 20 references to the CFREU and 7 references to the ECHR, **the appealed Order contains absolutely no reference to the notion of *fundamental rights, human rights, democracy or democratic principles*,** either direct, implicit or otherwise.

29. The case-law impact of the appealed Order cannot be underestimated. The core principles of European parliamentary democracy[12] are at stake. And so are the same principles set out in Art. 25(b) of the ICCPR, and Art. 3 of the Protocol 1 to the ECHR, which are certainly binding for the EP as well to the extent that these principles also appear in the CFREU and the TEU. Furthermore, it is also important to notice that the appellants are also claiming a violation of their rights as members of a national minority (as recognized in Art. 2 TEU) which has also not been answered in the appealed Order.

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[11] From now onwards EPRoP.

[12] As provided by Art. 2, Art. 10 and Art. 14 TEU, Art 1(3) of the 1976 Act, and Art. 39 of the CFREU

b) As to the duty of the Parliament to take note of the 'results declared officially', pursuant to Art. 12 of the 1976 Act

30. Appellants strongly contest the President's wrong interpretation of Art. 12 of the 1976 Act according to which the EP had no other choice than to rely on an incomplete list of MEP's communicated on 17 June by the Spanish authorities to the EP.[13]

31. Appellants pointed out in their application that such interpretation of Art. 12 of the Act is contra legem,[14] and that holding otherwise would be an infringement of primary EU law.[15] In any event, the solution given to this issue in the appealed Order is anything but obvious.

c) The relationship between the different pleas and the different contested acts

32. In this case, the EP has received notice of at least four different acts regarding the 26 of May election. The combined analysis of all them makes it impossible to rule out the appellants' case that they have been elected as MEPs. However, the President of the Parliament chose to ignore the evidence and rely exclusively on the list of 17 June 2019, the only one without their names.

33. The reasoning of the Order fails to give due consideration to the different nature of the different contested acts and the legal basis for the annulment of each of them. Therefore, the assumption that if the first argument does not succeed then there is no need to discuss the rest of them infringes the substantive obligation to state reasons, and thus Art. 47 of the CFREU.

- **THE THIRD GROUND OF APPEAL**

THE ORDER FAILS TO ENFORCE ART. 39 CFREU, ARTS. 2, 10 AND 14 TEU, AND ART. 1(3) OF THE 1976 ACT

34. The President's conclusion that there is no prima facie case, entirely omitting all references to fundamental rights, is a manifest error of law and is sufficient to require the decision to be set aside on appeal. By doing so the President abdicates of his obligation to enforce the CFREU, particularly when **an European institution has acted in collusion with the authorities of a MS in order to frustrate the outcome of an election on the basis of a policy that amounts to an unlawful act of discrimination.[16]** Arts. 8 and 12 of the 1976 Act cannot be interpreted without due consideration to fundamental rights.[17]

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[13] See paragraphs 70-78 of their application for interim measures.

[14] *See* par. 70 of the application for interim measures.

[15] *See* par. 71, with references to Art. 2, Art. 10 TEU and Art. 39 of the Charter.

[16] If, for example, the national authorities of a MS blocked the appointment of duly elected MEP's in the EP on the grounds of their race, religion, national or ethnic origin, or their political opinion, one cannot pretend that this kind of acts do not affect the legality of acts the EP to which they give rise, and then surely the General Court must have jurisdiction to set this aside in order to preserve the democratic order of the EU.

[17] In fact, this was one of the reasons why Council Decision of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, amended Art. 1 to include current Art. 1(3), which has the same scope as Art. 39(2) of the Charter.

35. For the purposes of an application for interim relief, it is obvious that the appellants have an arguable case that the combined actions of the Parliament and the Spanish authorities amount to an unlawful and bad faith abuse of the procedures governing the administration of the EU, which results in a gross violation of the appellants' fundamental rights.

36. It is plain that the EU Courts have an inherent jurisdiction to uphold the rule of law and the principles of European democracy. The EP is bound to respect the rights protected by the CFREU. If (as here) there are grounds to believe that an EU institution has enabled the violation of those rights through a dishonest abuse of the system by a MS, using underhand tactics that have been condemned by a competent entity appointed by the UN Human Rights Council,[18] it would be an abdication of the Court's inherent role in protecting fundamental rights and the rule of law in the EU to refuse to consider the challenge on its merits.

37. It is no answer to say that the Court retains its ultimate supervisory jurisdiction to uphold the rule of law by means of the availability of a referral from a challenge in the domestic courts. For the President in these circumstances to invoke the availability of a remedy in the national courts is to drive the analysis back to the central question of whether a MS (Spain) has acted unlawfully and in bad faith to frustrate the outcome of the EU elections. In this respect, **it is indisputable that the EP has authority to enforce the 1976 Act and the CFREU, and has failed to do so**. It is plain to any reasonable and objective observer that this is a question of democracy and fundamental rights, and it is the duty of the Court to entertain that challenge directly in order to fulfil its duty to protect and uphold fundamental rights and the rule of law against a direct attack through the bad faith of a MS, enabled by the Parliament, amounting to an **act of unlawful discrimination**.

38. The appellants are suffering an immediately obvious violation of their right to stand as candidates for the European elections and to subsequently sit as MEPs. This is a core right to the status of Union citizenship, as defined in Art. 1(3) of the 1976 Act, Art. 39 of the CFREU,[19] Art. 10 TEU,[20] and Art. 14 TEU.[21]

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[18] We must recall that the WGAD, in proceedings in which it was alleged that Spain's (executive and judicial) authorities had acted in violation of the Universal Declaration of Human Rights (UDHR) and Spain's international law commitments under the ICCPR, held in two unanimous decisions that the actions of the Spanish Government (although upheld as lawful in the Spanish courts) amount to continuing violations of the prohibition on arbitrary detention, and were infected by unlawful bias amounting to an act of prohibited discrimination on grounds of political opinion. The WGAD called upon Spain to release the prisoners (including Mr. Junqueras MEP) immediately; to conduct an independent investigation in order to hold accountable those public officials responsible for the discrimination and human rights violations caused by their arbitrary imprisonment; and to award them compensation. So far Spain has refused to comply with the WGAD petitions.

[19] *See* paragraphs 47, 49, 55, 71, 81, 109 and 122 of the appellants' application for interim measures.

[20] *See* par. 57, 58, 71, 81 and 135 of appellants' application.

[21] *See* par. 59 of the appellants' application.

39. The decisions of the EP have not paid due consideration to those rights. The appealed Order does not even mention them. On top of all that, Art. 12 is not interpreted and enforced in accordance with EU primary law, as it will be discussed below.

40. Further, Art. 52(2) of the CFREU only accepts that limitations may be imposed on the exercise of the CFREU rights as long as they are provided by law and respect their essence.[22]

41. The behaviour of the EP infringes Art. 39 of the CFREU and Art. 10 and 14 TEU. And so is the contested Order, which also breaches the right to effective judicial protection provided for in Art. 47 of the CFREU when dismissing interim judicial protection for the appellants. By stepping over Art. 39 of the CFREU, and Art. 10 and 14 TEU, and by ruling that the plea of appellants is unfounded, the president reduces the Statute of MEPs again to that of being representatives of the MSs, and not direct representatives of the EU citizens.

42. Appellants hence argue for a primary EU law-compliant interpretation of Art. 12. In the alternative, if the Court would be of the opinion that appellants' interpretation of Art. 12 of the Act cannot be followed, the Court must leave Art. 12 unapplied. Doing otherwise would violate the core rules set out in Art. 39 of the CFREU, and Art. 10 and 14 TEU.

- **THE FOURTH GROUND OF APPEAL**

THE ORDER FAILS TO APPLY A CORRECT DEFINITION OF *'RESULTS DECLARED OFFICIALLY'* (ART. 12 OF THE 1976 ACT) AND *'ELECTORAL PROCEDURE'* (ART. 223(1) TFEU AND ART. 8 OF THE 1976 ACT)

43. Art. 12 of the 1976 Act provides that the Parliament *'shall take note of the results declared officially by the Member States'.* The contested Order refers up to eight times to the concepts of *'results', 'elected candidates'* and *'official declaration', 'within the meaning'* or *'for the purposes'* of Art. 12 of the 1976 Act. Therefore, it is crucial to properly define what are to be deemed the *'results declared officially'* [in Spanish: *'resultados oficialmente **proclamados**'*][23] to establish whether the appellants have a prima facie case. Nevertheless, it is not for the Court, at this stage, to rule on the merits about what are to be considered the *'results declared officially'*, but to rule on whether the appellants have an arguable case.

44. The Order rules that there is no doubt that the results published in the SOJ on 14 June 2019, including the proclamation of elected MEPs of 13 June 2019, cannot be deemed as the *'results declared officially'* by Spain, even though this is the only document that uses the word *'proclamados'*, the exact word used in Art. 12 of the Spanish version of the 1976 Act.

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[22] '*Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*'

[23] *See* Spanish version of the original 1976 Act, published in the SOJ of 1 January 1986, page 481 (**B.3**)

45. Paragraph 41 of the Order states the aforementioned is not the *'final step concluding the national [electoral] procedure leading to the official communication of the results'* but *'an important and necessary step'*. To the extent that the President identifies the concept of *'results declared officially'* with the *'final step'* of the electoral procedure, the appellants agree. **In a democracy, the final step of the electoral procedure shall be the official results. The *'results'*** shall be the expression of the will of the people, ascertained by a free and fair election conducted by direct universal suffrage (art 1 of the 1976 Act, and 39 of the CFREU). Member States are not sovereign to give this concept a different meaning.

46. To consider that there are other steps between the counting of the votes (and the distribution of the seats in accordance with the results of that counting) and the communication of the results to the EP would empower the authorities of the MSs to change the result of the elections in a way not compatible with EU law. In other words, if the results of the election are not communicated by the MS literally as declared then the integrity of the Parliament as a democratic legislative assembly is severely at risk.

47. For this reason, the appellants strongly disagree with the reasoning of the President according to which the results published on 14 June 2019 would not be the *'final step'* of such electoral procedure, subject to any disputes based on national law in accordance with Art. 12.

48. Insofar as the *'results declared officially'* by the MSs are the *'final step'* of the electoral procedure, the EP cannot be bound by anything else. In defining the scope of the electoral procedure, it is crucial to take into account Arts. 223(1) and (2) TFEU, as will be discussed below. The counting of the votes and distribution of the seats puts to an end the '*electoral procedure*'.

49. Case-law of the Court has indicated that when it comes to deciding who will be the MEPs, MSs only *'have the task of organising the elections, in accordance with the procedure laid down by their national provisions, and also, in that connection, of counting the votes and making the official declaration of the electoral results*' (Order in Case T-215/07 Donnici v Parliament, paragraph 74).

50. The *'results declared officially'* shall include, of course, the attribution of seats and the names of all the elected MEP, but the *'results'* are not limited to the names of the elected MEP. **The word "*result*" in Art. 12 of the 1976 Act must be understood as the numerical result of the votes cast and counted on election day**, and the order of elected candidates.[24]

51. This interpretation is borne out, not only by the systematic interpretation of Arts. 8 and 12 of the 1976 Act, together with Art. 223 TFEU and Arts. 10 and 14 TEU, but also by the

[24] This is actually what other MS do. *See,* for instance, the notification of the results of France (**B.4**)

preparatory works of the 1976 Act,[25] and its different linguistic versions.[26] This also follows from Rule 3(3) of the EPRoP, which explicitly refers to *'the full results of the election.'*

52. The President, in the contested Order, identifies the incomplete list sent by the Spanish authorities on 17 June 2019 with the *'results declared officially'* with no valid reasoning whatsoever. On the contrary, it is implied that this is the obvious solution to the controversy.

53. The President uses three arguments to make the case that there is no doubt that the results published on 14 June 2019, are not the *'final step'* of the electoral procedure of which Parliament has to take note. These arguments are clearly misguided and are unfounded too. The Order does not only infringe Art. 12 of the 1976 Act, but also its Art. 8, in connection with Art. 223(1), and Art. 223(2) TFEU. It also infringes Art. 39 of the CFREU, Art. 1(3) of the 1976 Act and Arts. 10 and 14 TEU.

a) Contentious-electoral petitions

54. As to the argument in paragraphs 40 and 41 of the Order that, since the proclamation of 13 June 2019 is subject to the lodging of contentious-electoral petitions, it is not to be deemed as the *'results declared officially'* by Spain, that line of argument is not pertinent.

55. The argument is not pertinent because elected Members have the right to take up their seats from the opening of the first sitting following the elections[27] despite the fact that there might be pending disputes on the results. In fact, this argument is at odds with the case-law of the Court of Justice. It does not follow from the fact that the results of the election may be contested that elected candidates cannot take up their seats in Parliament, and even less that his or her election has not been declared.[28]

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[25] In its original version, the 1976 Act used the concept *'results declared officially'* only once, in Art. 11 (which is current Art. 12). But **it is clear from the preparatory works of the 1976 Act, that such concept was associated with the numerical results of the votes casted.** In a preliminary version of the 1976 Act prepared by the group *ad hoc* in charge of the elaboration of the 1976 Act, that concept was referred to the same concept included in a preliminary version of Art. 9(3), which foresaw that the official results of the election would be officially declared on the same date in the whole Community. Even though that preliminary Art. 9(3) was not finally adopted in the final version of the 1976 Act, the association in that preliminary version makes clear that the results declared officially shall include the **numerical result of the votes cast and counted on election day**, which leads to the attribution of seats to the elected candidates. *See*, to this effect, the report of 23 January 1976 of the group *ad hoc* entrusted with the drafting of the 1976 Act (pages 7 and 9, on Arts. 9(3) and 11) (**B.5**)

[26] This is clearly reflected **in the Dutch version of Art. 12**, which is as authentic as the English version and has the same legal force as the English version. In the Dutch version, the word "*resultaat*" is not used, but instead the word "*uitslag*" is used. Furthermore, in the Dutch version the word "*declared*" is not used. Instead the word "*bekendgemaakt*" is used, which means "*announced*". **The same goes with the German version of Art. 12**, where the word "Wahlergebnisse" is used instead of "*Ergebenisse*". Furthermore, the word "*declared*" is not used. Instead the word "*bekanntgegebenen*' is used, which means "*announced*". The Court of Justice has emphasized the importance of the different language versions for the interpretation of EU law. *See* Cilfit Case 283/81 paragraphs 16, 17, 18, 19 and 20

[27] Art. 5(2) of the 1976 Act and Rule 3(1) of the EPRoP.

[28] The *Donnici* case is a good example of this. Mr. Occhetto was declared as elected candidate by the Italian authorities on 8 May 2006 (see, to that effect, judgment of 30 April 2009, *Italy and Donnici* v *Parliament*,

56. In any event, the argument would not be relevant either since there are no pending contentious-electoral petitions against the proclamation of 13 June 2019. In fact, no contentious-electoral petition was ever lodged against the proclamation of 13 June 2019.[29] Hence, **that proclamation of elected MEPs is final**.

b) Swearing or affirmation of allegiance to the Spanish Constitution

57. As to the argument in paragraphs 40 and 41 of the Order that, since elected candidates are supposed to swear or affirm allegiance to the Spanish Constitution, the appellants are not elected candidates up to the moment the SCEC accepts such swearing or affirmation, and thus the proclamation of 13 June 2019 would not be the *'results declared officially'* of which the Parliament has to take note, that line of argument is not pertinent either. In fact, with that line of argument the President is rewriting domestic law.

58. According to Spanish law, swearing or affirming allegiance to the Spanish Constitution is not a requirement to acquire the status of elected candidate. This was settled long ago by the Spanish Constitutional Court.[30] (**B.6**)

59. As it is clear from the wording of the proclamation of 13 June 2019, swearing or affirming allegiance to the Spanish Constitution is an act that takes place once the *'results'* have been officially declared, and the elected candidates have been proclaimed. Hence, it is not part of the *'electoral procedure'* within the meaning of Art. 8 of the 1976 Act and Art. 223(1) TFEU, regardless of whether this requirement is compatible with EU law. **Being an elected candidate is, in this case, a pre-existing and not contested legal situation.**

60. In so far as the President treats the swearing of allegiance to the Spanish Constitution as part of the electoral procedure, and as a necessary requirement to become elected Member

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C-393/07 and C-9/08, paragraph 16). Against that decision, Mr. Donnici lodged a contentious petition that was not decided in his favor until 29 March 2007 (see, to that effect, judgment of 30 April 2009, *Italy and Donnici* v *Parliament*, C-393/07 and C-9/08, paragraph 21). When the petition was decided in favor of Mr. Donnici, the Italian authorities declared Mr. Donnici as elected candidate and annulled Mr. Occhetto's mandate. But the fact that a contentious petition was lodged against the declaration of Mr. Occhetto as elected candidate, of course, did not mean that Mr. Occhetto was not an *'elected candidate'* within the meaning of Art. 12 of the 1976 Act when he was declared as such by the Italian authorities on 8 May 2006. A fortiori, it could not mean that, at that time, the Parliament could disregard such declaration because a contentious petition had been lodged before the Italian judicial authorities by Mr. Donnici.

[29] Indeed, it is the incomplete list of 17 June 2019 of which the Parliament took note the one that has been challenged before the Supreme Court of Spain, in a case that is pending. But not through a contentious-electoral petition, because those can only be lodged against the proclamation of elected Members. In any event, if the President's argument was valid, then he should have refused the Parliament's decision to take note on that incomplete list on this same ground. It is clear that he did not.

[30] '*Both the law (Art. no. 108 Organic Act 5/1985) and the parliamentary regulations introduced this obligation as a formal requirement that those that have received the popular mandate must comply with in order to fully carry out the role of representatives or senators.* ***Possible non-compliance with this does not, as a consequence, deprive them of the role of representative or senator, for which there is no other qualification than the popular vote****, but instead prevents them from carrying out the responsibilities of that role and, with that, the rights and powers attached to that role.*' (Judgment 119/1990 of the Spanish Constitutional Court).

for the purposes of the 1976 Act, he exceeds the jurisdiction of the Court, breaching Art. 8 of the 1976 Act and Arts. 223(1) and (2) TFEU.[31] The President is creating a new requirement to become an *'elected candidate'* not foreseen in Art. 12 of the 1976.

61. The SCEC itself, on 27 June 2019, notified to the President of the EP the declaration of Ms. Estrella Durá Ferrandis as *'elected candidate'* **before** she swore allegiance to the Spanish Constitution on 1 July 2019. **This proves how misguided was the conclusion drawn in the Order of 1 July 2019** and that the EP do not treat the appellants equally.

c) The incomplete list sent by the Spanish authorities on 17 June 2019

62. To the extent that paragraph 43 of the Order states that the incomplete list sent by the Spanish authorities on 17 June 2019, which excludes the appellants, must be deemed as the *'results declared officially'*, and hence the appellants cannot be considered *'elected candidates'*, such an argument is circular reasoning[32] without substance. It is not clear whether the Order considers that the appellants are not included in the incomplete list because they are not *'elected candidates,'* or are not *'elected candidates'* because they are not included in the list. However, the argument being the former or the latter makes a big difference.

63. Actually, the whole argument in the Order can be summed up in that such an incomplete list, and not the proclamation of 13 June 2019, shall be considered the *'results declared officially'* by Spain. However, the President does not explain how or on what basis such an incomplete list can be subsumed under the concept of *'results declared officially.'*

64. Indeed, what is immediately obvious is that the incomplete list of 17 June 2019 cannot be deemed as the *'results declared officially'* of the election, on which the Parliament has to rely on. **If the interpretation of the President was true, Spain would not have declared the full final results of the election yet.** The interpretation that in the 26 May election only 748 MEP were elected instead of 751 is also at odds with Art. 5(2) of the 1976 Act.

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[31] **In accordance with the case-law of the Spanish Constitutional Court that has just been cited, it is apparent that the swearing or affirmation of the Spanish Constitution is a provision that has to do with the *'the regulations and general conditions governing the performance of the duties of its Members'* (Art. 223(2) TFEU), not with the electoral procedure (Art. 223(1) TFEU and Art. 8 of the 1976 Act)**, inasmuch as, under Spanish law, those who do not swear or affirm allegiance to the Constitution do not lose their status as elected Members because of that. In interpreting Arts. 223(1) and (2) TFEU, is essential to take into account that current Art. 223(2) TFEU was introduced only in the Treaty of Amsterdam and was not in force as a separate legal basis at the time the 1976 Act was adopted. **A clear distinction has to be made between the two legal basis, since no referral to domestic law as in Art. 8 of the 1976 Act is applicable to Art. 223(2) TFEU.**

[32] The President's argument is a clear example of circular reasoning (*circulus in demonstrando*), a logical fallacy: to the President's view, the appellants would not be *'elected candidates'* because they are not included in the incomplete list of 17 June 2019, but also the incomplete list of 17 June 2019 would not include the appellants, according to the President, because they are not *'elected candidates'*. This shows how, in fact, this argument is no different than the previous one, according to which the appellants would not be *'elected candidates'* up to the moment the Spanish authorities accept their affirmation of the Spanish Constitution.

65. The incomplete list has nothing to with what was requested to the Spanish authorities by the Deputy Secretary-General of the Parliament on 24 May 2019.[33] The only official document which includes the information requested by the EP is the one published on the 14 June 2019 in the SOJ. **Not even the Spanish authorities present the communication of 17 June 2019 as the *'results declared officially'* by Spain, as the President wrongfully does.** The communication of 17 June 2019 is just a list of the elected candidates whose swearing or affirmation of allegiance to the Spanish Constitution has been accepted by the SCEC. But that does not mean that those who are not in the list for whatever reason have been deprived of the status of elected Members. In fact, the communication explicitly states that there are others *'elected candidates'* than the ones in the list. This list was never intended to reflect the full results of the election, as it did not include the total 54 candidates elected in Spain.

66. The interpretation of the President is also contrary to the case-law of this Court, which makes a clear difference between the *'declaration'* of the results, including the declaration of a candidate as elected MEP, and the *'communication'* of such declaration to the EP. There is no doubt that what is legally binding for the Parliament is the official declaration of results, not the communication. This is particularly clear in *Donnici.*[34] Art. 12 does not stipulate that the results of the elections must come from a separate individual direct communication from MSs to the Parliament. Art. 12 of the Act does not regulate any kind of "*communication*" by MSs, as wrongfully indicated in paragraph 41 of the Order.

67. Certainly, it follows from the principle of sincere cooperation (Art. 4(3) TEU) that MSs shall notify the *'results declared officially'* to the Parliament. But a MS's failure to communicate the election of candidates to the Parliament cannot deprive them of their right to take up a seat in the Parliament without a severe fundamental rights violation. When and if a

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[33] In that letter what the EP requested from Spain was: *'**The names of the elected EP members**, if so that new MEPs can take possession of their seats in Parliament since the opening of the first session to be held after the elections. **The official notification of each MS, based on the full results of European elections held in that country, you must specify the names of Elected candidates, along with their ranking according to the voting results**. In view of the relevant provisions of Art. 7 of the Act of 20 of September 1976 concerning the election of deputies to the EP by direct universal suffrage, competent authorities must take measures necessary to avoid any incompatibility with the position as Member of the EP at the time of notification to Parliament*.'

[34] In Donnici the Court held: *'Following that declaration, on 8 May 2006 the National Electoral Office **declared** Mr Occhetto elected as Member of the EP **and on the same day communicated** his name to the Parliament as substitute for Mr Di Pietro'* (*see*, to this effect, judgment of 30 April 2009, *Italy and Donnici* v *Parliament*, C-393/07 and C-9/08, paragraph 16). In the same judgment, the Court held: *'On 29 March 2007, the National Electoral Office took note of the judgment of the Consiglio di Stato and **declared** Mr Donnici to have been elected as Member of the EP for the Italy South constituency, and accordingly revoked Mr Occhetto's mandate. **That declaration was notified** to the EP, which took note of it in the minutes of the plenary session of 23 April 2007 pursuant to which Mr Donnici took his seat in the Parliament, but only provisionally and subject to the Parliament's subsequent decision regarding the verification of his credentials'* (*see*, to this effect, judgment of 30 April 2009, Italy and Donnici v Parliament, C-393/07 and C-9/08, paragraph 21).

MS fails to notify the electoral results properly, the Parliament cannot be bound by that violation of the principle of sincere cooperation.

68. It does not follow from Art. 12, nor from the case-law of the Court, that the Parliament is bound by whatever communication is received from the competent authorities of a MS. The opposite would mean that government parties could decide for whatever reason, to delete elected candidates from the list they submit to the EP and impose those they like instead.[35] **The EP is only bound by the official declaration of results,** not any communication.

69. As will be developed later, this interpretation it is also an interference with the power of verification of credentials. Parliament cannot rule on disputes arising out of the provisions of the 1976 Act if it does not take note of the actual results of the election.[36]

- **THE FIFTH GROUND OF APPEAL**

THE PRESIDENT APPLIES AN UNREASONABLE CONCEPT OF *'ELECTED CANDIDATE'*

70. Inasmuch as paragraphs 46 and 52 of the Order hold that there is no *'official declaration of the Spanish authorities of the applicants as elected candidates',* the President suggests that EU law has an autonomous concept of *'elected candidate'* or *'elected Member'* that is different from the one under Spanish law. However, no provision of the 1976 Act even uses the concept of *'elected candidate'*.

71. There is no doubt under Spanish law that the appellants became *'elected candidates'* when its election was proclaimed on 13 June 2019. Both the proclamation of 13 June 2019 and the communication of 20 June 2019, which indicates that the appellants' seats should be left vacant (A.25), are clear on that. Both explicitly refer to the appellants as *'elected candidates'* or '*elected Members*' for the purposes of Spanish law. Under Art. 13 of the 1976 Act no vacancy can be established where no previous mandate existed. The establishment of a vacancy would be meaningless if the appellants were not *'elected candidates'*. The President manifestly disregards this.

72. In denying that the appellants are 'elected candidates', the President seems to adopt the position that an "elected or declared MEP" is only a "sworn MEP". However, the idea that

[35] To accept such a situation will open the door for other MS government parties to omit their political opponents from the list they submit to the Parliament for arbitrary reasons or, as in this case, to omit the names of the elected and so proclaimed MEPs representing national minorities which is a central point in this dispute: the rights of the national minorities to be represented in the EP. It is not immedidately obvious that if a MS, after the publication of the electoral results, were to exclude elected candidates because – for instance - they do not prove to have a white skin, being heterosexual, catholic, or whatever they may decide to be acceptable, the Parliament would have to comply with that national practice and the elected candidates concerned would not be allowed to lodge an appeal to the Court of Justice.

[36] The results shall be the basis for any ruling on those eventual disputes.

MEPs are not elected until they have taken the oath of allegiance is at odds with both Spanish law and EU law. Alternatively, the Order may be affirming that someone is only an elected MEP when the Parliament has been officially and directly informed. This is without basis too.

73. Art. 224 of the Spanish Electoral Law confirms the same interpretation when, before regulating in paragraph 2 the oath of allegiance to the Constitution, it says in paragraph that "***the Central Electoral Commission shall proceed not later than the twentieth day after the election, to the counting of votes on a national level, to the assignment of seats to each list of candidates and to the proclamation of elected candidates***."[37]

74. It is therefore obvious, pursuant to the Spanish Electoral Law, that the official results were declared, the appellants were assigned their seats and ***were proclaimed elected candidates***. That is why in the decision communicated to the EP on 20 June 2019 they are treated as "***members of the EP***" with "***assigned seats***". And it is also obvious that they retain "***their seats***" because no other candidates are designated, nor can they be designated under Spanish law, to fill those seats, as it would be expected in the case of proper vacancies. Hence, pursuant to Art. 13 of the Act, the seats cannot be vacant.

75. As it is clear from the communication of the Spanish authorities of 20 June 2019 and Art. 224(2) LOREG, the establishment of a vacancy requires that the election has been declared. This is also clear from Art. 13(1) and (3) of the 1976 Act. The Order manifestly disregards the logical consequence of the communication of 20 June 2019: if a MS is declaring a vacancy, it is because someone was elected. Election is a pre-condition for the declaration of a vacancy, which implies the end of a mandate. For a mandate to end, it must have started before.[38]

76. Inasmuch as the appellants are elected candidates for all relevant purposes, the conclusions of paragraphs 52, 53, 54 should be exactly the opposite:

- There was scope for the Parliament to verify the appellants' credentials.
- There was scope for the Parliament to verify whether the fact that the appellants did not appear at the session on 17 June 2019 to swear or affirm their allegiance to the Spanish

[37] This is also clear from the wording of Art. 224(2) LOREG itself: '*Within five days from such proclamation,* ***the elected candidates*** *must swear or affirm allegiance to the Constitution before the Central Electoral Commission. On expiry of said term the Central Electoral Commission is to declare the vacancy of* ***seats assigned to Members of the European Parliament*** *having failed to swear or affirm their allegiance to the Constitution, as well as the suspension of any prerogatives to which they may be entitled on account of* ***their mandate****, as long as they do not make the aforesaid oath or affirmation*.'

[38] Art. 13(1): *'A seat shall fall vacant* ***when the mandate of a member of the European Parliament ends*** *as a result of resignation, death or withdrawal of the mandate.'* Art. 13(2): *'Where the law of a Member State makes explicit provision for the withdrawal of the mandate of a member of the European Parliament,* ***that mandate shall end*** *pursuant to those legal provisions. The competent national authorities shall inform the European Parliament thereof.'*

Constitution results in the vacancy, within the meaning of Art. 13 of the 1976 Act, of the corresponding seats in the Parliament.

● There was also scope for the Parliament to accord to the appellants, on a provisional basis, a seat in Parliament until their credentials have been verified.

77. The same position is also confirmed by **the preliminary referral of the Supreme Court of Spain (Case C-502/19), as it is based on the fact that elected Members that have not sworn or affirmed allegiance to the Spanish Constitution *are* elected Members**. This decision is an example of how the appellants' case is perfectly arguable.

78. The result of the decisions of the EP is a situation in which, despite the fact that Art. 3(2) of the European Council Decision 2018/937 (EU), provides that Spain shall elect 54 MEPs, there are currently 3 vacant seats (or non-elected seats, according to the President) and only 748 full MEPs in the Parliament.

● **THE SIXTH GROUND OF APPEAL**

THE ORDER FAILS TO ENFORCE THE APPELLANTS' RIGHT TO TAKE THEIR SEATS FROM THE DATE OF THE FIRST SITTING AND UNTIL A RULING HAS BEEN GIVEN ON THE DISPUTES LODGED BEFORE THE PARLIAMENT AND THE SPANISH COURTS, THUS INFRINGING RULE 3(2) OF THE EPRoP, IN CONNECTION WITH ART. 5(2) OF THE 1976 ACT

79. Paragraph 54 of the contested Order concludes that, because there was no scope for the Parliament to verify the appellants' credentials or the declaration of vacancy of their seats, *'consequently'* there was also no scope for the Parliament to accord to the appellants, on a provisional basis, a seat in Parliament '*until their credentials have been verified'*.

80. Such an argument is not pertinent. It is clearly a *non sequitur*. At the beginning of their mandate all elected MEPs always take their seats before their credentials have been verified. And in case of any dispute, without distinction, Rule 3(2) of the EPRoP obliges the Parliament to allow all MEPs to take up their duties until there is a ruling on such disputes. This provision relates to Art. 5(2) of the 1976 Act, which establishes a 5-year term for MEPs.

81. Rule 3(2) of the EPRoP clearly specifies that it applies '*until such time as Members' credentials have been verified <u>or a ruling has been given on **any** dispute</u>'* (our emphasis). This means that this provision a) is not only applicable during the verification of credentials, and b) it is not limited to disputes which are for the Parliament to resolve. The President seems to omit this crucial points, thus unreasonably and unlawfully reducing the scope of this Rule.

82. As long as the appellants were elected, and so was unquestionably declared by the SCEC on 13 June 2019, and then published by the SOJ on the next day, the appellants have

the right to take their seats in Parliament in accordance with Rule 3(2) of the EPRoP. The contested Order violates this right of the appellants.

83. The right of elected MEPs pursuant to Rule 3(2) to take their seats until such time a ruling has been given on any dispute is undeniably an expression of the fundamental right to stand for election and to sit in Parliament once elected, enshrined in Art. 39(2) of the CFREU.

84. The Parliament's decision to deny the right under Rule 3(2) of the EPRoP and not to allow the appellants to take their seats amounts to a breach attributable to the EP of the fundamental right to stand for election and to sit in Parliament once elected.

85. The President's misinterpretation of Rule 3(2) clearly infringes EU primary law, in particular Art. 39 of the CFREU, Arts. 10 and 14 TEU. If Rule 3(2) could only be interpreted in this way then it would be contrary to primary EU law.

86. The appellants are fully aware that it is not up to the Parliament to rule on disputes which arise out of the provisions of domestic laws alone and that the verification of credentials is a long process which only began after the competent Committee was formed. In this sense, it is clear that they never expected to obtain a final and definitive ruling from either the EP or the General Court about their right to sit as full MEPs, effective on 2 July 2019

87. However, in contrast with the act of taking note of the electoral results, in which the Parliament cannot exercise any discretion according to the relevant case-law, there are no reasons to limit the Parliament's discretion with regard to Rule 3(2). Particularly in a case such as this, without competing claims on the same seats -i.e., there is no dispute between two or more contenders. In fact, the Order's interpretation of this Rule would allow MSs to strip the EP of this power altogether.

88. Finally, it is important to note that a decision by the Parliament to allow the appellants to take their seats on a provisional basis would in no way overrule or contest the decisions of the Spanish authorities. Such an interim decision would not even have anticipated the final position of the Parliament on the dispute. This means, in essence, that **it was not necessary for the Parliament or the General Court to depart from the case-law of the Court in order to grant the appellants a provisional seat, pursuant to Rule 3(2).**

- **THE SEVENTH GROUND OF APPEAL**

THE ORDER STRIPS THE EP OF ITS POWER ON THE VERIFICATION OF CREDENTIALS

89. In Paragraphs 52 and 53 of the Order wrongly conclude that there was no scope for the Parliament to verify the applicants' credentials or to rule on the compatibility of the vacancy with Art. 13 of the 1976 Act. These conclusions are misguided. There is no dispute as to

whether the appellants have been officially declared as elected candidates. Moreover, these conclusions of the President interfere with the power of verification of credentials, which is an exclusive competence of the EP.[39]

90. It is undisputed that the EP has the power to rule on disputes which may arise out of the 1976 Act, other than those arising out exclusively of the national provisions to which the Act refers.[40] In doing so, it is only subject to the limitations provided in Art. 12 of the 1976 Act.[41]

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[39] Of course, the Court of Justice has the power to review the acts of the Parliament on the verification of credentials of its elected MEPs. But **the verification of credentials was neither the object of the application for annulment nor of the application for interim measures, since the Parliament has not verified the credentials of any of its newly elected Members yet, and the Parliament has not ruled yet on the dispute brought by the appellants in accordance with Art. 12 of the 1976 Act**. **In this sense, the President's conclusions are *ultra petita*.**

[40] **The conclusion in the *Donnici* case according to which *'it is clear from the wording itself of Article 12 of the 1976 Act that that article does not confer on the Parliament the power to settle disputes which arise out of Community law as a whole'*** (see, to this effect, judgment of 30 April 2009, C-9/08, *Donnici and Italy* v *Parliament*, paragraph 54) **is misguided and must be overruled.** What is clear from the wording of Art. 12 of the 1976 Act is exactly the opposite: that only the disputes based exclusively on national provisions are explicitly excluded from the disputes to be settled by Parliament. This is also the interpretation under Rule 3(3) of the EPRoP. Furthermore, it is apparent from the preparatory works of the 1976 Act that the division of powers was never intended to be, as the *Donnici* judgment erroneously assumes, between disputes based on national law and disputes based on the 1976 Act, but between disputes based exclusively on national law and disputes based precisely on Community law as a whole. *See*, to this effect, the report of 19 November 1975 of the group *ad hoc* entrusted with the drafting of the 1976 Act (page 15) (**B.7**) The fact that, at the time of the adoption of the 1976 Act, that was the only instrument of EU law on the electoral procedure does not affect that conclusion. **It cannot be overlooked that the Court of Justice has held that national provisions on electoral procedure are implementing provisions of Art. 1(3) of the 1976 Act and, in general, of EU law as a whole** (*see*, to this extent, judgment of 6 October 2015, C-650/13, *Delvigne*, paragraph 33). Indeed, the conclusion in the *Donnici* judgment that the Parliament is only entrusted to rule on disputes based on the 1976 Act, but not on EU law as a whole, raises several practical interpretative problems. This is particularly true with regard to Art. 1(3) of the 1976 Act, which as a very similar wording to Art. 39(2) of the Charter. As a result, is the EP competent to rule on disputes based on Art. 1(3) of the Act, but national courts on disputes based on Art. 39(2) of the Charter? **Is Parliament supposed to rule on disputes based on the 1976 Act disregarding the Charter?** Are national courts able to rule on disputes based on Art. 1(3) of the 1976 Act at all? How that division of powers is supposed to work? Also, isn't Parliament competent to rule on disputes based, for instance, on Art. 2(2) of the Statute of Members of the European Parliament? To say the least, these issues are far from being clear.

[41] **The procedure of verification of credentials, where it exists, is a procedure in which the Parliament itself is entrusted with the competence to validate the mandate of its elected MEPs, thus validating the election itself.** Most of the current 28 MSs do not have systems in which parliaments are entrusted with the verification of credentials. However, for the purposes of the interpretation of Art. 12 of the 1976 Act, **it cannot be overlooked that, at the time of its adoption, all of the founding MSs of the Community** (Belgium, Italy, Germany, Luxembourg, and the Netherlands), **except for France** (which eliminated the procedure in 1958), **had in place systems of parliamentary verification of credentials** [in French: *vérification des pouvoirs*]**, regarding their own national elections. Denmark, who joined the Community in 1973, had such a system in place too. All of them still do. In fact, the provisions in their national constitutions are very similar to Art. 12 of the 1976 Act.** *See* Art. 48 of the Constitution of Belgium: *'Each House verifies the credentials of its Members and judges any dispute that can be raised on this matter.'* Art. 66 of the Constitution of Italy: *'Each House verifies the credentials of its Members and the causes of disqualification that may arise at a later stage.'* Art. 41(1) of the Basic Law of the Federal Republic of Germany: *'Scrutiny of elections shall be the responsibility of the Bundestag. It shall also decide whether a Member has lost his seat.'* Art. 57(1) of the Constitution of Luxembourg: *'The Chamber verifies the credentials [pouvoirs] of its members and judge the disputes which arise on the subject.'* Art. 58 of the Constitution of the Netherlands: *'Each House shall examine the credentials of its newly appointed members and shall decide with due reference to rules to be established by Act of Parliament any disputes arising in connection with the credentials or the election.'* Art. 33 of the Constitution of

91. Certainly, the Parliament is not allowed to disregard the *'results declared officially'* by the MSs, as the verification of credentials by the EP shall rely on them. To hold otherwise would be as much as disregarding the free will of the EU citizens expressed in the elections. However, for the purposes of exercising its exclusive competence to rule on disputes arising out of the 1976 Act, the Parliament cannot be bound, and is not bound by whatever communications sent by the MSs, but only by the *'results declared officially.'*

92. By interpreting Art. 12 this way, no disputes would ever arise without a communication by the MSs. In other words, national authorities would be able to strip the Parliament from its powers to rule on disputes (as provided by Art. 12) solely by failing to communicate the relevant official results of the election.[42]

93. Furthermore, by accepting an interpretation like this the elections would not be ultimately decided by European citizens but by the authorities of MSs. If confirmed, it will lead to a situation incompatible with Arts, 10(1) and (2), 14(2) and (3) TEU, in which a MS can ban their opponents or restrict the civil and political rights of the representatives of national or other minorities in violation of Art. 2 TEU.

94. In fact, the Order is depriving the appellants of the remedy provided for in Art. 12 of the 1976 Act before the EP, whose decisions, of course, can be challenged before the Court of Justice. Thus, the Order breaches not only Art. 39(2) of the CFREU, but also Art. 13 of the ECHR and Art. 47 of the CFREU.

95. The appellants' case is that such points are very much debatable, and hence the application for interim measures does meet the requirement that a *prima facie* case exists.

- **THE EIGHTH GROUND OF APPEAL**

THE PRESIDENT'S INTERPRETATION OF ART.12 OF THE 1976 ACT INFRINGES PRIMARY EU LAW. IF ART. 12 CAN ONLY BE INTERPRETED IN SUCH A WAY, THEN THIS ARTICLE IS CONTRARY TO PRIMARY EU LAW AND SHALL BE DISREGARDED TO DECIDE ON THE INTERIM RELIEF SOUGHT

96. If Art. 12 of the 1976 Act, as implied in the Order, is to be construed so that the *'results declared officially'* are deemed to be whatever list of names the MSs decide to

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Denmark: *'The Folketing itself shall determine the validity of the election of any Member and decide whether a Member has lost his eligibility or not.'*

[42] An example of how wrong is this reasoning are Arts. 7(1) and (2) of the 1976 Act, in connection with Rules 3(1) and (2) of the EPRoP. Certainly, it is for the competent authorities of the MSs to establish whether a person is a member of the Government of a MS, or a member of a national parliament. However, the lack of notification by a MS of the fact that an elected candidate or a Member of the EP holds an office incompatible under Arts. 7(1) or (2) of the 1976 Act does not deprive of purpose the power of Parliament to establish a vacancy, when that is the case. Rule 3(2) provides that the Parliament is allowed to rely on sources available to the public to establish that vacancy. The same shall be valid for the official declaration of results, regardless of its actual notification by the MS.

communicate to the Parliament (and indeed MSs are allowed to decide who will be in such a list, or send an incomplete one, irrespective of the actual official results of the election), that list being binding for the Parliament, then Art. 12 of the 1976 Act is not compatible with Art. 39(2) of the CFREU and Arts. 10 and 14 TEU.

97. Before the Treaty of Lisbon, it was debated whether the 1976 Act was primary or secondary law. After the Treaty entered into force, it is clear that it is secondary law, since Art. 223(1) TFEU provides that the provisions necessary to the election shall be adopted *'in accordance with a special legislative procedure'*.[43]

98. Thus**,** the Court of Justice is able to rule on the compatibility of the provisions of the Act with the Treaties and the CFREU. The right to effective judicial protection provided for in Art. 47 of the CFREU, which includes the right to interim judicial protection of the appellants' rights, in connection with Art. 39(2) of the CFREU, commands on the courts, including the General Court and the Court of Justice, to provisionally disregard those provisions of secondary law that may be against primary law when such provisions are capable of breaching the rights protected in the CFREU**.**

99. **From the case law of the Court of Justice, it is clear that, in the context of applications for interim measures, national courts may disregard national regulations based on Union law when meeting the requirements.[44] So can do the General Court and the Court of Justice, if necessary, with EU secondary law based on EU primary law without prejudice of the final decision on the merits.**

100. Apart from the fact that infringements on primary EU law can be raised by the General Court of its own motion, appellants have made this clear themselves in their application, where they refer to Art. 39(2) of the CFREU, Arts. 10 and 14 of TEU. These provisions are capable of being directly applicable. As primary EU law, the CFREU and the European Treaty on European Union prevail over secondary legislation such as Art. 12 of the Act.

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[43] **This is not only the position of the appellants, but also the position of the Legal Service of the Council.** *See* Opinion of the Legal Service of the Council of 15 March 2016 **(B.8)**, which provides the following:
'5. Under the previous regime it was therefore clear that the Electoral Act was an act of the Member States, and that the Union's competence was limited to submitting, in accordance with a specific procedure, a recommendation for the adoption of that act. Consequently, in previous opinions, the LS qualified the electoral Act from a legal point of view as an international agreement between MSs, having the same force as the Treaties and therefore not subject to the legality review of the Court of Justice.
6. On the contrary, the current version makes it clear that it is up to the Council to lay down the necessary provisions for the election of the EP, in accordance with a special legislative procedure which provides for the consent of the EP and, as an additional condition for entry into force, approval by the Member States in accordance with their constitutional requirements. ***The Electoral Act is therefore now an act of secondary legislation, albeit of a special nature, whose legality requires compliance with the provisions of the Treaties and which is subject to the review of the Court of Justice'*** (page 3).

[44] *See*, to this effect, the judgments of 19 June 1990, C-213/89, *Factortame*, of 21 February 1991, C-143/88, *Zuckerfabrik*, of 9 November 1995, C-465/93, *Atlanta.*

101. In his interpretation of Art. 12 of the Act, the Order infringes primary law. Whereas an interpretation of Art. 12 in accordance with the primary EU law is possible, this interpretation must take precedence over any other interpretation. But if, according to the General Court, the interpretation of Art. 12 shall be that the Parliament is bound by any list of new Members, either complete or incomplete, communicated by the national authorities, regardless of the fact of whether that list has something to do with the results of the elections, then such provision is against Arts. 10 and 14 TEU and 39(2) of the CFREU and must be disregarded, even in the context of an application for interim relief, inasmuch as the right of effective judicial protection of Art. 47 CFREU includes the right to interim judicial protection of the political rights of the appellants.

- **THE NINTH GROUND OF APPEAL**

SUBSIDIARY, THE COMMUNICATION OF 17 JUNE TO THE PARLIAMENT IS A PREPARATORY ACT TO THE CONTESTED DECISIONS OF THE PARLIAMENT AND THEREFORE THE CJEU DOES HAVE THE POWER TO RULE OVER THE LEGALITY OF THE REQUIREMENT OF TAKING A PLEDGE

102. Subsidiary, if one would accept that the list sent on 17 June 2019 by the Spanish authorities has to be considered as the *'results declared officially'* for the purposes of Art. 12 of the 1976 Act (*quid certe non*), then appellants raise the following points: The communication of 17 June is a preparatory act to the decision of the Parliament to let the appellants take their seats in the Parliament. The Court of Justice has the power to determine whether the legality of the Parliament's decisions is affected by any defects rendering unlawful the Spanish acts preparatory to that decision.

103. Appellants refer to Case C-219/17, *Silvio Berlusconi Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia, Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, 19 December 2018.

104. This case is more recent than the *Donnici v Parliament* case, and it diminishes the role of national courts in favour of the CJEU, referring to Art. 263 TFEU (which also concerns the Parliament)[45], and Art. 4(3) TEU[46]. As a consequence when a decision of an EU institution is

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[45] Art. 263 TFEU confers upon the CJEU exclusive jurisdiction to review the legality of acts adopted by the EU institutions, one of which is the European Parliament.

[46] Art. 4(3), 1st paragraph TEU contains the principle of loyal cooperation between the MSs and the Union. Art. 4(3), 2nd paragraph TEU states that MSs have to ensure compliance with the obligations arising from the Treaties or from the acts of the institutions of the Union. Applied to this Case: The Spanish authorities have to ensure that the content of their communication of elected members to the EP complies with EU law.

contested, the CJEU has the power to examine the national acts who were preparatory to that decision of the EU institution on its legality and compliance with EU law.

105. Furthermore, at least with regard to the decision not to allow the appellants to take their seats on a provisional basis, pursuant to Rule 3(2), the Parliament enjoyed full discretion. Thus the Court should treat it as equivalent to the contested acts in *Berlusconi*, and not equivalent to those in *Donnici*. It is also the case that the latter was decided prior to the adoption of the CFREU, to which Rule 3(2) has an obvious link for the reasons set out under the seventh ground of appeal

106. The requirement of taking a pledge of allegiance to the national constitution is contrary to the fundamental rules that the election of MEPs is by direct universal suffrage and free and fair, and that MEPs are directly elected as representatives the Union citizens, not as representatives of the MS of their nationality.

107. The right to stand as a candidate for these elections and to subsequently sit as an MEP is a core right to the status of Union citizenship, as defined in Art. 39 of the CFREU[47] Art. 10 TEU[48] and Art. 14 TEU[49] .

108. Appellants have made this clear in their application for the General Court, where they refer to Art. 39 of the CFREU, Art. 10 and 14 of TEU. These articles are capable of being directly applicable.

109. Furthermore, Art. 52 (2) CFREU only accepts that limitations may be imposed on the exercise of the Charter rights as long as they are provided by law and respect their essence[50].

110. Finally, in line with Art. 39 of the CFREU, Art. 10 and 14 TEU, Art. 6 (1) of the 1976 Act and the Art.s 2(1) and 3(1) of the Statute for Members of the EP, state that MEPs must exercise their mandate personally and unbound.

111. As construed by the Spanish electoral legislation, it is impossible to see how the requirement to swear allegiance to the national constitution in order to take a seat in the EP would be compatible with Art. 39 of the CFREU, and Art. 10 and 14 TEU, or with Art. 6(1) of the Act and Art. 2(1) and 3(1) of the Statute, or how it satisfies the conditions of Art. 52 (2) of the Charter. The requirement undermines the essence of a fundamental right in the EU legal order. In addition, the necessity to appear in person in front of the SCEC in Madrid in circumstances where the privileges and immunities of the appellants are infringed and not

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[47] See par. 47, 49, 55, 71, 81, 109 and 122 of the application for interim measures to the General Court.

[48] See par. 57, 58, 71, 81 and 135 of appellants application.

[49] See par. 59 of the appellants application.

[50] `*Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*.´

asserted by the EP, and the rejection of an alternative method of pledging allegiance while based in another MS, contradicts the principle of proportionality and equality. The only objective of this strict application of the Spanish election legislation is to prevent the elected Catalan politicians to take their seats in the EP.

112. Appellants contest that it is not up to the Court of Justice to rule on the lawfulness of the obligation to take a pledge of allegiance to the Spanish Constitution, and to take that pledge in Madrid, as stated in paragraphs 46 and 47 of the contested Order.

113. The acts of the Parliament are poised by preparatory acts of the Spanish authorities that are against the primary EU law as stated above, and therefore the acts of Parliament themselves are contra legem as well. The CJEU jurisdiction even excludes any jurisdiction of national courts in respect of those acts, and it is irrelevant in that regard whether or not appellants have sought legal actions before a national court as well.[51]

- **THE TENTH GROUND OF APPEAL**

AS ARGUED ABOVE, THERE IS A PRIMA FACIE CASE. THE PRESIDENT WRONGFULLY REFUSED TO EXAMINE THE REQUIREMENT OF URGENCY AND THE BALANCING OF INTERESTS.

114. It has to be noted that appellants only received a written decision from the EP by registered postal mail the 28 June, which confirmed in writing that they would not be allowed to take their seats in the EP the 2 July. Appellants immediately filed their action for annulment and their application for interim measures.

115. The President did not investigate the condition of urgency and did not take into account that appellants continue losing the possibility to vote or to weigh on the discussions and voting behaviour of fellow parliamentarians, including the election of the President of the Commission. With regard to the sessions that have already passed, these kind of damage cannot be repaired anymore. These damages will keep occurring for each session of the plenary sitting and of the committees of the EP to come whereby appellants stay barred from taking their seats. The requirement of urgency and balancing of interests is still fulfilled.

116. The President did not take into account that for instance on 3 July the composition of all the Parliament's committees was decided, and that appellants therefore lost the right to be candidates for chairman or vice-chairman. This sort of damages cannot be repaired anymore.

117. Given all the legal arguments the appellants gave in this appeal, it is clear that there is at least a prima facie case. As indicated above, the requirement of urgency and the balancing of interests is also met. Hence the Court should order the requested interim measures.

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[51] See Case C-219/17, o.c., paragraph 57

Evidence presented and proposed

118. Appellants refer to the documents listed as annexes to the application lodged before the General Court, as well as some additional documents annexed to this appeal.

119. In addition to this, appellants submit the contested Order from the President of the Court (**A.42**).

120. Under index B, appellants add the documents that were not known to the appellants when the application for interim measures was lodged on 28 June 2019.

Form of order sought

On the basis of the foregoing, appellants request the Court of Justice to:

1. Set aside the Order of the President of the General Court of 1 July 2019*, Carles Puigdemont and Antoni Comín v Parliament* (T-388/19 R)
2. While pending a ruling on the main action: to order and enforce in whole the interim measures as requested in the appellants' application for interim measures of 28 June 2019.
3. Order the EP to pay the costs of these appeal proceedings

In Luxembourg, 1 September 2019

For the appellants,

Mr. Paul BEKAERT Mr.Ben EMMERSON Mr.Gonzalo BOYE Mr.Simon BEKAERT

ANNEX INDEX

A

Appellants refer to the annex index to the application for interim measures for the General Court (annexes A.1-A.42). In addition, appellants submit an English translation of the following annexes:

A2 Paul Bekaert practicing Lawyer certificate

A3 Ben Emmerson practicing Lawyer certificate

A4 Gonzalo Boye practicing Lawyer certificate

A5 Simon Bekaert practicing lawyer certificate

A6 Spanish Electoral Commission's decision 28.4.19, excluding Mr. Puigdemont, Mr. Comín and Ms. Ponsatí from the electoral list of candidates.

A7 Appeal against the decision of de Spanish Electoral Commission by the applicants Mr. Puigdemont and Mr. Comín (as well as Ms. Ponsatí), as well as their coalition's representatives, on the 2 May 2019.

A14 Decision of the Spanish Electoral Commission officially declaring the results of the elections held on May 26 (13.6.2019).

A18 Mr. Puigdemont's pledge of allegiance to the Spanish Constitution through a written statement done in front of a public notary through their legal representatives.

A19 Mr. Comín's pledge of allegiance to the Spanish Constitution through a written statement done in front of a public notary through their legal representatives

A21 Journal of Spanish Senate sessions of 21.5.2019 (page 15) accepting written statement as a way of pledging allegiance to the Spanish Constitution.

A22 Report United Nations Working Group on Arbitrary Detention issued on 24.4.2019.

B

B1 Former Deputy Secretary-General of the European Parliament (Markus Winkler) letter of 24 June 2019

B2 Proclamation of Estrella Dura Ferrandis as an elected candidate

B.3 Spanish version of the original 1976 Act, published in the SOJ of 1 January 1986, page 481

B.4 Notification of the results of France

B.5 Report of 23 January 1976 of the group *ad hoc* entrusted with the drafting of the 1976 Act

B.6 Spanish Constitutional Court Judgement Nº 119/1990

B.7 Report of 19 November 1975 of the group *ad hoc* entrusted with the drafting of the 1976 Act

B.8 Opinion of the Legal Service of the Council of 15 March 2016