

By Registered Mail

By Fax: +33(0)3 88 1 74860 and +32(0)2 28 46974 and +352 / 4300 24842

Brussels, 9 October 2019

To the President of the European Parliament,

To the Members of the Bureau,

To the Chairman of the Committee on Legal Affairs,

Subject: Re-submission of the dispute about credentials and request pursuant to Rule 3(2) of the Rules of Procedure.

Dear Sir/Madam,

We are the counsellors of elected Members of the European Parliament Mr. Carles Puigdemont i Casamajó and Mr. Antoni Comín i Oliveres.

We write you further to our dispute lodged before the Committee on Legal Affairs on 24 June 2019 pursuant to Article 12 of the 1976 Electoral Act and Rule 3(3) of the Rules of Procedure of the European Parliament.

To the extent that the dispute lodged on 24 June 2019 before the Committee seemingly has not been forwarded to the Committee on Legal Affairs (the committee responsible pursuant to Rule 3), we respectfully request that this letter be considered as a formal re-submission of the dispute dated 24 June 2019 (see document attached).

Also, we would like to stress our utmost concern about the fact that more than four months after the election, the Spanish authorities have not yet notified the official results of the election of 26 May 2019, including the full list of elected Members of the European Parliament, without the Parliament having taken action to defend its integrity as a democratic legislative assembly.

In the meantime, we urge you to note that Rule 3(2) of the Rules of Procedure of the European Parliament clearly state that ***“until such time as Members’ credentials have been verified or a ruling has been given on any dispute, (...), they shall take their seat in Parliament and on its bodies and shall enjoy all the rights attaching thereto.”***

We therefore call upon the Committee to take all the necessary measures to enable Mr. Carles Puigdemont and Mr. Antoni Comín to take their seats in the European Parliament in accordance with Rule 3(2) of the Rules of Procedure, until a ruling has been given on this dispute.

On behalf of our clients,

Paul BEKAERT
Attorneys at Law

Simon BEKAERT

Gonzalo BOYE

Ben EMMERSON

**APPLICATION ON THE PROCESS OF TAKING NOTE BY PARLIAMENT OF THE RESULTS
DECLARED OFFICIALLY BY SPAIN AND ON THE COMMUNICATION BY THE SPANISH
AUTHORITIES OF 20 JUNE 2019**

Brussels, 24 June 2019

- Re-submitted 9 October 2019 -

In accordance with Article 12 of the 1976 Electoral Act and Rule 3(3) of the Rules of Procedure, we refer a dispute arising out of the provisions of the 1976 Electoral Act on the process by which Parliament has taken note of the results declared officially by Spain, and on the effects, under the 1976 Electoral Act, of the communication by the Spanish authorities of 20 June 2019, and in particular on its effects on the composition of the European Parliament.

- Having regard to Article 12 of the 1976 Electoral Act, which provides that *“the European Parliament shall verify the credentials of members of the European Parliament. For this purpose it shall take note of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers.”*
- Having regard to Rule 3(3) of the Rules of Procedure, which provides that *“on the basis of a report by the committee responsible, Parliament shall verify credentials without delay and rule on the validity of the mandate of each of its newly elected Members and also on any disputes referred to it pursuant to the provisions of the Act of 20 September 1976, other than those which, under that Act, fall exclusively under the national provisions to which that Act refers.”*
- Having regard to Rule 3(3) of the Rule of Procedure, which further adds that *“the committee's report shall be based on the official notification by each Member State of the full results of the election, specifying the names of the candidates elected and those of any substitutes, together with their ranking in accordance with the results of the vote.”*
- Having regard to the judgment of the Court of Justice of 7 July 2005, *Le Pen*, C-208/03.
- Having regard to the judgment of the Court of Justice of 30 April 2009, *Donnici and Italy v Parliament*, C-393/07 and C-9/08.
- Having regard to the judgment of the Court of Justice of 6 October 2015, *Delvigne*, C-650/13.
- Having regard to Article 1(3) of the 1976 Electoral Act, which provides that *“elections shall be by direct universal suffrage and shall be free and secret.”*

- Having regard to Article 5(1) of the 1976 Electoral Act, which states that “*the five-year term for which members of the European Parliament are elected shall begin at the opening of the first session following each election.*”
- Having regard to Article 6(1) of the 1976 Electoral Act, which states that “*Members of the European Parliament (...) shall not be bound by any instructions and shall not receive a binding mandate.*”
- Having regard to Article 6(2) of the 1976 Electoral Act provides that “*Members of the European Parliament shall enjoy the privileges and immunities applicable to them by virtue of the Protocol of 8 April 1965 on the privileges and immunities of the European Communities.*”
- Having regard to Article 8 of the 1976 Electoral Act, which provides that “*subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.*”
- Having regard to Article 13(1) of the 1976 Electoral Act, which reads as follows: “*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.*”
- Having regard to Rule 4(7) of the Rules of Procedure, which provides that “*where acceptance or termination of office appears to be based on material inaccuracy or vitiated consent, Parliament may declare the appointment under consideration to be invalid or may refuse to establish the vacancy.*”

A. As to the power of Parliament to settle disputes referred to it pursuant to the provisions of the Act of 20 September 1976, other than those which, under that Act, fall exclusively under the national provisions to which that Act refers

1. The Court of Justice held in *Donnici* that “*the Parliament’s specific power to settle disputes brought before it, which is set out in the second part of the second sentence of that article, is also limited ratione materiae only to disputes ‘which may arise out of the provisions of [the 1976 Act] other than those arising out of the national provisions to which the act refers’*” (see, to that effect, judgment of 30 April 2009, *Donnici and Italy v Parliament*, C-393/07 and C-9/08, EU:C:2009:44, paragraph 53.)

2. The Court of Justice further held that “*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. According to the clear wording of that article, it applies only to ‘disputes which ... arise out of the provisions of this act’*” (see, to that effect, judgment of

30 April 2009, *Donnici and Italy v Parliament*, C-393/07 and C-9/08, EU:C:2009:44, paragraph 54.)

3. Certainly, there are situations in which a dispute may arise out both of the 1976 Electoral Act and of the national provisions to which the act refers. Because of this, the Decision of the European Parliament of 13 December 2016 on the general revision of Parliament's Rules of Procedure amended Rule 3(3) of the Rules of Procedure to clarify that the power of Parliament to rule on disputes do not apply to those disputes that “*fall exclusively under the national provisions to which that Act refers,*” but it does to those that fall both under the national provisions and under the 1976 Electoral Act.

B. As to the process by which Parliament takes note of the results declared officially by Spain under Article 12 of the 1976 Electoral Act, in connection with the right to stand for election and to exercise office

4. On 13 June 2019, the competent Spanish authorities, in accordance with Article 12 of the 1976 Electoral Act, officially declared the results of the elections to the European Parliament of 26 May 2019, and ordered their publication on the Spanish Official Gazette, effective on 14 June 2019. In such publication, Mr. Puigdemont and Mr. Comín were officially declared by the Spanish authorities elected Members of the European Parliament.

5. The Spanish authorities have not notified the Parliament the full results of the election in Spain, specifying the names of the candidates elected and those of any substitutes, together with their ranking in accordance with the results of the vote, as provided in Rule 3(3) of the Rules of Procedure. They have only notified an incomplete list of names of elected Members, which does not include the applicants.

6. Pursuant to Article 12 of the 1976 Electoral Act, Parliament is obliged to take note of the “*results declared officially by the Member States.*”

7. The Court has already held that “*the use of the expression ‘take note’ in the context of the 1976 [Electoral] Act must be interpreted as indicating the Parliament’s complete lack of discretion in the matter*” (see, to that effect, judgment of 7 July 2005, *Le Pen v Parliament*, C-208/03 P, EU:C:2005:429, paragraph 50, and judgment of 30 April 2009, *Italy and Donnici v Parliament*, C-397/07 and C-9/08 P, EU:C:2009:44, paragraph 55.)

8. In particular, the Court of Justice held that “*by virtue of Article 12 of the 1976 [Electoral] Act, the Parliament was required to take note of the declaration made by the National Electoral Office and did not have the power to depart from it on account of the alleged irregularities affecting that national measure.*”

9. Accordingly, Article 12 of the 1976 Electoral Act does not allow the European Parliament to depart from the results declared officially by Spain, as published in the Spanish Official Gazette on 14 June 2019.

10. The applicants are aware that Rule 3(1) of the Rules of Procedure of the European Parliament (*“the President shall invite the competent authorities of the Member States to notify Parliament without delay of the names of the elected Members”*), Rule 3(2) (*“Members whose election has been notified to Parliament”*), and Rule 3(4) (*“The committee’s report shall be based on the official notification by each Member State of the full results of the election, specifying the names of the candidates elected and those of any substitutes, together with their ranking in accordance with the results of the vote”*) refer to the notification of the results declared officially by the Member States.

11. However, pursuant to Article 12 of the 1976 Electoral Act, Parliament shall take note of the results officially declared by the Member States. Neither the Rules of Procedure of the European Parliament that were in force when the 1976 Electoral Act was adopted, nor the Rules of Procedure that entered into force after the first election to the European Parliament in 1979, made any reference to a notification of the names of the elected Members by the Member State.

12. Although such notification may be read as an expression of the principle of sincere cooperation between the Union and the Member States, which shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties in accordance to Article 4(3) TEU, in case of a discrepancy between the notification and the results officially declared by a Member State, the latter shall prevail.

13. As held by the Court of Justice, ***“pursuant to the principle of hierarchy of norms, the Parliament may not rely on a provision of its Rules of Procedure and its alleged practice in this area to interpret (...) the 1976 [Electoral] Act in a manner which is contra legem”*** (see, to that effect, the judgment in *Italy and Donnici v Parliament*, paragraph 47.)

14. This case is a clear example of how holding otherwise would amount not only to a violation of the political rights of the elected Members and the citizens to which they represent (Article 10(2) TEU), but would undermine one of the most precious values on which the Union is founded: representative democracy (Articles 2 and 10(1) TEU.)

15. The European Parliament has breached its obligation under Article 12 of the 1976 Electoral Act, by taking note of an incomplete list of elected Members presented by Spain which, as the Parliament itself concedes, does not include the 54 elected Members in Spain (as it shall according to Article 3(2) of the European Council Decision (EU) 2018/937 of 28 June 2018), and by failing to take note of the results officially declared by Spain (which are those published in the Spanish *Official Gazette* of 14 June 2019) before the opening of the first session following the election.

16. By doing so, the Parliament not only has disregarded those obligations under the 1976 Electoral Act, but also its most elemental duties under Rule 3(1) of the Rules of Procedure, which provides that *“the President shall invite the competent authorities of the Member States to notify Parliament without delay the names of the elected Members so that all Members may take their seats in Parliament with effect from the opening of the first sitting following the elections.”*

17. Since, as the European Parliament concedes, the Spanish authorities have sent a list of names that does not include the names of all the elected Members, the President of the Parliament should have sent another request to the competent authorities of the Member States *“to notify without delay the names of the elected Members so that all Members may take their seats in Parliament with effect from the opening of the first sitting following the elections,”* as provided in Rule 3(1).

18. In case the competent authorities of Spain disregarded its obligation of sincere cooperation in accordance with Article 4(3) TEU, the European Parliament, as established in Article 12 of the 1976 Electoral Act, had the responsibility of taking note of the results officially declared by Spain as published in the Spanish Official Gazette on 14 June 2019, in order not to infringe the right to stand for election of the applicants and the rights of the citizens of the Union they represent.

19. By not doing so, Parliament has relied on the provisions of its Rules of Procedure and its alleged practice in this area to interpret the 1976 Electoral Act in a manner which is *contra legem* (see, to that effect, the judgment in *Italy and Donnici v Parliament*, paragraph 47,) infringing the political rights of the applicants and of the citizens of the Union they represent in accordance to Article 14(3) TEU.

20. This is a dispute that clearly falls under the powers of Parliament to settle disputes arising out of the 1976 Electoral Act in accordance to what the Court of Justice held in *Donnici*. Thus, Parliament shall rule on this dispute, in accordance with Article 12 of the 1976 Electoral Act, by taking note of the results declared officially by Spain on 13 June 2019 as published in the Spanish Official Gazette, and thus confirming the mandates of Mr. Carles Puigdemont i Casamajó and Mr. Antoni Comín i Oliveres.

C. As to the potential effects of the communication by the Spanish authorities of 20 June 2019 under different provisions of the 1976 Electoral Act, in connection with the right to stand for election and to exercise elected office

C1. As to the potential effects of the Spanish authorities' communication pursuant to Articles 5(1), 8 and 12 of the 1976 Electoral Act

21. Article 8 of the 1976 Electoral Act provides that *“subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.”*

Pursuant to Article 12 of the 1976 Electoral Act, Parliament “*shall take note of the results declared officially by the Member States.*”

22. What is to mean the referral to the “*electoral procedure*” under Article 8 of the 1976 Electoral Act might be somehow ambiguous, but reading that provision in conjunction with Article 12 of the 1976 Electoral Act, eliminates that potential ambiguity. Without prejudice of the right of the Member States to rule on the disputes that “*fall exclusively under the national provisions to which that [Article 8 of the 1976 Electoral] Act refers,*” the electoral procedure ends with the results declared officially by the Member States, as provided for in Article 12 of the 1976 Electoral Act.

23. When the 1976 Electoral Act wants to refer to provisions of the Member States aspects related to the status of the Members of the European Parliament which are not part of the electoral procedure itself, such as the additional incompatibilities as provided for in Article 7(3) or withdrawals of mandates as provided for in Article 13(3) of the 1976 Electoral Act, it does so with a clear referral to the national provisions of the Member States.

24. Holding that the referral to national law under Article 8 of the 1976 Electoral Act allows Member States to establish additional requirements for elected Members to take up their duties as Members of European Parliament once the official results of which the European Parliament is obliged to take note have been declared, other than the ones established under Article 7(3) of the 1976 Electoral Act, would even call into question the powers of the European Parliament to also establish such requirements.

25. Article 5(1) of the 1976 Electoral Act also provides that “*the five-year term for which members of the European Parliament are elected shall begin at the opening of the first session following each election.*” If the European Parliament accepts that the Spanish authorities’ communication of 20 June 2019 has legally binding effects, the representatives of hundreds of thousands of citizens of the European Union will not be present in the European Parliament as from the opening of the first session following each election, thus undermining the functioning of the Union as a representative democracy, as provided for in Article 10(1) TEU.

26. It is also important to recall that under the third paragraph of Rule 3(3), “*the validity of the mandate of a Member may not be confirmed unless the written declarations required under this Rule and Annex I to these Rules of Procedure have been made.*” Even more, pursuant to Rule 3(2) of the Rules of Procedure, Members cannot take up their duties at all if they have not declared in writing, before taking their seats in Parliament, that they do not hold any office incompatible with that of Member of the European Parliament within the meaning of Article 7(1) or (2) of the 1976 Electoral Act.

27. If Parliament holds that such requirements fall under the referral to the national provisions of the Member States of Article 8 of the 1976 Electoral Act, then there would be no legal basis for the European Parliament to verify such requirements.

28. Therefore, since the Spanish authorities' communication of 20 June 2019 exceeds the referral to the national provisions of the Member States of Article 8 of the 1976 Electoral Act, as long as such referral does not empower Member States to establish additional requirements for elected Members to take up their duties as Members of European Parliament once the official results of which the European Parliament is obliged to take note under Article 12 of the 1976 Electoral Act have been declared, other than the ones established under Article 7(3) of the 1976 Electoral Act, the Spanish authorities' communication of 20 June 2019 cannot produce any binding effect on the Parliament.

C2. As to the potential effects of the Spanish authorities' communication pursuant to Article 6(2) of the 1976 Electoral Act

29. Article 6(2) of the 1976 Electoral Act provides that *"Members of the European Parliament shall enjoy the privileges and immunities applicable to them by virtue of the Protocol of 8 April 1965 on the privileges and immunities of the European Communities."* Such provision shall be understood as referred to current Protocol (No 7) on the privileges and immunities of the European Union.

30. Article 9 of Protocol (No 7), third paragraph, provides that *"immunity (...) shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members."*

31. In its communication of 20 June 2019, the Spanish authorities notified the Parliament a declaration of suspension (*sic*) of our clients' privileges and immunities as elected Members of the European Parliament. Such unprecedented declaration constitutes a clear invasion of the right of the European Parliament to waive the immunity of its elected Members under the third paragraph of Article 9 of Protocol (No 7) on the privileges and immunities of the European Union. The decision to waive the immunity of its elected Members is of the sole competence of the European Parliament.

32. The European Parliament has consistently held that *"as regards the duration of immunity, (...) immunity is considered to take effect when the results of the election are announced and to cease at the end of a Member's term of office"* (see, to that effect, the Donnez report of 10 October 1986 (A2-121/86).

33. This position was confirmed by the European Parliament decision on the request for upholding of the immunity and privileges of Francesco Musotto (2002/2201(IMM)), which provided that *"in view of its purpose, Articles 9 and 10 of the Protocol on the privileges and immunities must be interpreted in such a way that these provisions are effective from the time of publication of the results of the elections to the European Parliament."*

34. This is a dispute that clearly falls under the powers of Parliament to settle disputes arising out of the 1976 Electoral Act in accordance to what the Court of Justice held in *Donnici*. As long as the power to suspend or waive the immunity of its elected Members is of the sole competence of the European Parliament under Article 6(2) of the 1976 Electoral Act, in connection with Article 9 of Protocol (No 7), the Spanish authorities' communication of 20 June 2019 cannot produce any binding effect on the Parliament.

C3. As to the potential effects of the Spanish authorities' communication pursuant to Article 13 of the 1976 Electoral Act

35. Article 13(1) of the 1976 Electoral Act, in its current version after the entry into force of Council Decision 2002/772/EC of 25 June 2002 and 23 September 2002 provides that *“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.”* Accordingly, Article 13(3) of the 1976 Electoral Act provides that *“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.”*

36. This constitutes a clear change compared to the situation before the entry into force of such Council Decision. In its original version, Article 12(2) of the 1976 Electoral Act provided that *“where a seat falls vacant pursuant to national provisions in force in a Member State, the latter shall inform the Assembly, which shall take note of that fact.”*

37. After the entry into force of Council Decision 2002/772/EC of 25 June 2002 and 23 September 2002, under Article 13(1) and (3) of the 1976 Electoral Act, the Member States lack absolute discretion to establish vacancies. Only when the law of a Member States 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.

38. This is not the case here. Regardless of the validity of the Spanish authorities' communication of 20 June 2019 under Spanish law, which is not a question to be settled by Parliament, the Spanish authorities' communication includes a declaration of suspension (*sic*) of the mandate which clearly does not fall in any of the categories provided for in Article 13(1) of the 1976 Electoral Act, as long as it does not constitute a withdrawal of the mandate under that provision. Even in case such declaration of suspension (*sic*) could have been effective under Article 12(2) of the 1976 Electoral Act in its original version, it cannot produce any binding effect on the composition of the Parliament after the entry into force of Council Decision 2002/772/EC, under the current version Article 13 of the 1976 Electoral Act.

39. This is a dispute that also falls under the powers of Parliament to settle disputes arising out of the 1976 Electoral Act, in this case arising out of Article 13, in accordance to what the Court of Justice held in *Donnici*.

C4. As to the potential effects of the Spanish authorities' communication pursuant to Article 6(1) of the 1976 Electoral Act

40. The Court of Justice held in *Delvigne* that Article 39(2) of the Charter “according to the explanations relating to the Charter (...) Article 39(2) takes over the basic principles of the electoral system in a democratic State” (see, to that effect, judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paragraph 41.)

41. In accordance with the case-law of the Court of Justice, Article 1(3) of the 1976 Electoral Act has substantially the same content as Article 39(2) of the Charter, as acknowledged by the Court of Justice in *Delvigne* (see, to that effect, judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paragraph 44.)

42. Whereas Article 1(3) of the 1976 Electoral Act has the same scope as Article 39(2) of the Charter, that is, protecting the essence of the right to stand for election and the right to sit as a Member, Parliament shall have the power to settle disputes arising out of Article 1(3) of the 1976 Electoral Act too.

43. The draft report on the verification of credentials of 19 November 2014, undersigned by Pavel Svoboda, Chairman of the Committee of Legal Affairs, stated, as regards the provision on which the Spanish authorities base their communication, that “*in certain Member States, the newly elected Members of the European Parliament are required to swear an oath of fidelity to the national constitution before their election is officially notified to Parliament, failing which the national authorities deem the seat of the Members concerned vacant and their parliamentary prerogatives suspended,*” concluding that “*such a requirement may not be compatible with the Act of 20 September 1976, in particular Article 6(1) thereof.*”

43. Article 6(1) of the 1976 Electoral Act provides that “*Members (...) shall not be bound by any instructions and shall not receive a binding mandate.*” This provision is to be read in the wider context that, after the entry into force of the Treaty of Lisbon, in accordance with Article 14(2) TEU, the Members of the European Parliament are “*representatives of the Union's citizens.*”

44. Thus, the intention by the Spanish authorities that the Members of the European Parliament are required an oath of fidelity to the national Constitution to become full Members of the European Parliament is also not compatible with a parliamentary mandate, such as the mandate of Members of the European Parliament, which is to be exercised freely and independently, in accordance with Article 1(3) of the 1976 Electoral Act and its Article 6(1).

45. The applicants are aware that, in *Donnici*, the Court of Justice held that “*Article 6 of the 1976 Act does not apply to measures which have as their object the withdrawal of an elected candidate.*” However, there are three reasons that differentiate this case from *Donnici* with regard to Articles 1(3) and 6(1) of the 1976 Electoral Act:

46. First, that in *Donnici* the European Parliament was calling into question the ruling on a dispute settled by the judicial authorities of a Member State. This is not the case here, where it is up to the Parliament to settle the dispute on the effects of a communication of the Spanish authorities under the 1976 Electoral Act. Second, that *Donnici* was decided before *Delvigne* established that Article 1(3), as Article 39(2) of the Charter, “*takes over the basic principles of the electoral system in a democratic State.*” And third, that *Donnici* was a case of an actual withdrawal of the mandate under the national provisions to which Article 8 of the 1976 Electoral Act refers. In this case, we are before a declaration of suspension (*sic*) of the mandate, including an intended suspension of the privileges and immunities under national law not provided for in the 1976 Electoral Act, which does apply to the exercise of a mandate, therefore Article 1(3) and 6(1) of the 1976 Electoral Act are applicable to this case.

47. Thus, also because of this, the Spanish authorities’ communication of 20 June 2019 cannot produce any binding effect on the composition of the Parliament.

Because of all these reasons, we respectfully request the European Parliament:

- 1. To take note of the results declared officially by Spain on 13 June 2019, as published on the Spanish Official Gazette of 14 June 2019.**
- 2. To declare that the communication of the Spanish authorities of 20 June 2019 cannot produce any binding effect on the composition of the European Parliament, in accordance with Articles 1(3), 5(1), 6(1) and (2), 8, 12 and 13 of the 1976 Electoral Act, and Rule 4(7) of the Rules of Procedure.**
- 3. To confirm the mandates of Mr. Carles Puigdemont i Casamajó and Mr. Antoni Comín i Oliveres and verify their credentials as Members of the European Parliament, pursuant to Article 12 of the 1976 Electoral Act, in accordance with the results officially declared by Spain on 13 June 2019, as published in the Spanish *Official Gazette* on 14 June 2019.**

On behalf of our clients,

Paul BEKAERT

Simon BEKAERT

Gonzalo BOYE

Ben EMMERSON

Attorneys at Law