TO THE GENERAL COURT OF THE EUROPEAN UNION

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LODGE

OBSERVATIONS ON THE DEFENDANT'S PLEA OF INADMISSIBILITY AND APPLICATION FOR A DECLARATION THAT THERE IS NO LONGER NEED TO ADJUDICATE

In Case T-388/19

against the **European Parliament**

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I. INTRODUCTION

1. Parliament's plea of inadmissibility ('**Parliament's plea**') and the application for a declaration that there is no longer any need to adjudicate ('**Parliament's application**') ask the General Court to confirm the *faits accomplis* by Parliament, through several formal and informal acts, to prevent the applicants from taking their seats as elected Members of the European Parliament, despite having been voted by more than a million EU citizens, without a judicial review on the substance of its contested acts.

2. In summary, Parliament's plea tries to convince the General Court that the lack of discretion of the Parliament when taking note of the results declared officially by a Member States is as an indication that there is not a reviewable act adopted by Parliament. Such line of argument cannot succeed. It is clear that, when Parliament, instead of taking note of the actual results of the election as declared by a Member State, departs from those results and treats as such an incomplete list of names that cannot be deemed as the results of the election, such a decision not only has legal effects, but also is capable of affecting the interests of the applicants by bringing about a distinct change in their legal position. Thus, it may be the subject of an action of annulment.

3. It is also necessary to point out that in the Parliament's plea there are many arguments which, even though they are presented as referring to the admissibility of the action, in reality they refer to the substance of the case. For this reason, the applicants' observations in response also need to (and hence will) include arguments about the

substance of the action. To the extent that Parliament's plea relies on the Order of 1 July 2019, these observations will discuss the reasoning of the President in that decision.

4. At this stage, the applicants respectfully draw the attention of the General Court to the fact that Parliament has exceeded the maximum number of pages for an objection of inadmissibility, excluding the schedule of annexes. The applicants respectfully leave it up to the discretion of the Court to draw the appropriate conclusions from this formal shortcoming of Parliament's plea and application.

II. NEW FACTS THAT ARE RELEVANT FOR THE PURPOSES OF PARLIAMENT'S PLEAS

5. After the applicant lodged their action of annulment before the General Court on 28 June 2019, several events have come to the knowledge of the applicants (of which the defendant is aware) that are relevant to the outcome of the Parliament's plea and application, and also for the main action. Those events are the following:

6. First, the Spanish Central Electoral Commission notified the European Parliament, on 27 June 2019, the proclamation of Ms. Estrella Durá Ferrandis as elected Member of the European Parliament **before** she had either sworn or affirmed allegiance to the Spanish Constitution.[1] (**C.1**) This is relevant as long as it proves that, as argued by the applicants,[2] swearing or affirming of allegiance to the Spanish Constitution is a requirement pursuant to Spanish law that (regardless of whether or not it is compatible with EU law) does not belong to the "electoral procedure" for the purposes of Art. 8 and 12 of the 1976 Act.

7. Second, on 1 July 2019 (the same date in which the Order of 1 July 2019 was adopted by the President of the General Court), the Criminal Chamber of the Spanish Supreme Court lodged a preliminary referral before the Court of Justice of the European Union on the situation of elected Member of the European Parliament, Mr. Oriol Junqueras (**C.2**). This is relevant because Mr. Junqueras was also covered by the communication of the Spanish Electoral Commission of 20 June 2019 (**A.33**), and thus is in the same legal situation as the applicants.

8. In fact, the preliminary referral is extremely relevant because it is the Spanish Supreme Court itself (**C.2**) that confirms and acknowledges that, contrary to what the President of the General Court concluded in his Order of 1 July 2019, Mr. Junqueras Vies (and thus the applicants in the present procedure) is an elected, and so proclaimed, Member of the European Parliament, despite the fact that Mr. Junqueras (like the applicants) was not allowed to appear in person before the Spanish Central Electoral Commission on 17 June 2019 to swear or affirm allegiance to the Spanish Constitution. The first question of the preliminary reference by the Spanish Supreme Court is perfectly clear on this, and absolutely disproves the conclusion of the President of the General Court that the applicants have not been declared elected candidates.[3]

[1] Ms. Durá Ferrandis took the oath in a session before the Spanish Central Electoral Commission.
[2] Paragraph 168 of the Application. This will be developed
[3] See paragraphs 43 and 46 of the Order of the President of 1 July 2019.

9. The European Parliament is aware of this at least since several weeks before it lodged its plea of inadmissibility before the General Court. It is of public knowledge that Parliament has intervened in the procedure before the Court of Justice (Case C-502/19). In fact, the Committee on Legal Affairs decided to submit observations to the Court of Justice on that case on 3 September 2019.

10. Third, on 9 October 2019 the applicants re-submitted its dispute before the Committee on Legal Affairs of the European Parliament (**C.3**)

11. Fourth, that a hearing on the *Junqueras Vies* case (C-502/19) was held at the Court of Justice of the European Union on 14 October 2019. In such hearing, Parliament answered questions raised by Judges and the Advocate General of the Court of Justice that are also relevant to this procedure. The answers to those questions during that hearing, inasmuch as they show the position of the Parliament and the Kingdom of Spain, are also relevant for the purposes of this case.

12. These Observations will take into account such events and facts, which were not known to the applicants at the time the application was lodged. The existence of new facts, to be taken into consideration by the General Court, is also admitted in the Parliament's plea.[4]

III. ON THE PLEA OF INADMISSIBILITY AND THE PRELIMINARY CONSIDERATIONS OF THE DEFENDANT AS TO THE SUBJECT MATTER AND SCOPE OF THE APPLICATION FOR ANNULMENT

III.1. *On the Parliament's allegations on the letter of the President of 27 June 2019*

13. Parliament starts its plea by introducing confusion as to the subject matter and the scope of the application, in particular regarding all the contested acts that are not the "exceptional" Decision of the President of the Parliament of 29 May 2019.

14. To say the least, Parliament's plea lacks the necessary clarity and unambiguity as to the exact nature of its claims. In particular, Parliament claims, at the same time:

    a) That such acts do not exist;[5]
    b) That such acts have not been "explicitly" adopted;[6]
    c) That such acts would be "sufficiently covered" by the letter of the President of 27 June 2019 ('**the letter of 27 June 2019**').[7]
    d) That there are "actions or positions" of Parliament which are "reflected" in the letter of 27 June 2019.[8]

15. It is not without reason that, when recapping in its plea the five acts that are contested by the applicants, Parliament only mentions the letter of 27 June 2019 with regard to the fifth contested act (despite the fact that such letter was mentioned in the application as

[4] See paragraph 27 of the Parliament's plea.
[5] Paragraph 11 of the Parliament's plea.
[6] Paragraph 8 of the Parliament's plea.
[7] Paragraph 14 of the Parliament's plea.
[8] Paragraph 61 of the Parliament's plea.

confirmation of the existence of other contested acts too). For instance, Parliament quotes the second contested act (Parliament's decision *"not to take note of the results officially declared by Spain of the election to the European Parliament of 26 May 2019, and the subsequent decision to take note of a different and incomplete list of elected Members notified on 17 June 2019 by the Spanish authorities, which does not include the applicants,* ***as confirmed by the letter without legal basis of the President of the Parliament of 27 June 2019,***)[9] avoiding to quote this last *"as confirmed."*[10]

16. The omission by Parliament of these "*as confirmed*" when quoting the contested acts (other than the fifth) is used by the defendant to conclude (for some reason that is not clearly understandable) that the letter of 27 June 2019 is only relevant for the fifth act. Indeed, Parliament even seems to conclude that the letter itself is the fifth act, although it is apparent from the application that the fifth contested act is **not** the letter itself (the letter is **the confirmation** of the existence of the contested acts). It is clear that the fifth contested act is the President's refusal to assert, pursuant to Rule 8 of the Rules of Procedure, the immunities of the applicants under Art. 9 of Protocol (No 7).

17. It is under these assumptions that Parliament claims that the letter of 27 June 2019 would not be a challengeable act due to its informative nature.[11] As regards to this claim, it has to be clarified that the applicants have never presented the letter of 27 June 2019 as an act itself, but as the confirmation, or evidence, of the existence of the contested decisions (excluding the act whose existence is demonstrated by the Decision of 29 May 2019). This is, again, absolutely clear in the application.[12]

18. In any event, it is immaterial whether the letter of 27 June 2019 is considered to be an act itself that (as Parliament claims) "covers"[13] or "reflects"[14] the contested decisions, or a letter that serves only to remind the applicants of the existence of those contested acts, as was the applicants' understanding (and was also the case with the letter of the President of the Parliament in *Durand*).[15]

19. The deliberate lack of transparency of Parliament's decision-making process, which obviously is the sole responsibility of Parliament, cannot be used by Parliament against the applicants. The alleged failure to identify essential facts or evidence of the contested acts would be, in any event, the direct consequence of the way Parliament has conducted itself in the present case. For instance, the "exceptional" Decision of 29 May 2019 was adopted through an e-mail from the President of the Parliament sent to the political opponents of the applicants at the request of those political opponents (**B.1**); Parliament took note of the incomplete list of 17 June 2019 sent by the Spanish authorities through a "communication" of the Direction-General for the Presidency that was not made public (**A.36**), and Parliament confirmed the existence of the contested acts through informal means (the letter sent by the President to the applicants on 27 June 2019). (**A.47)**

[9] Pages 5 and 42 of the Application of 28 June 2019.
[10] Paragraph 2 of the Parliament's plea.
[11] Paragraph 65 of the Parliament's plea.
[12] Paragraph 40 of the Application of 28 June 2019.
[13] Paragraph 14 of the Parliament's plea.
[14] Paragraph 61 of the Parliament's plea.
[15] Order of the General Court of 12 June 2019, Case T-702/18, *Durand* v *Parliament*, para. 35.

20. What is relevant for the purposes of the admissibility of this action (other than the fact that the contested acts have legal effects that are capable of affecting and indeed have affected the interests of the applicants by bringing about a distinct change in their legal position) is that the contested acts do exist, were decided by Parliament, and by the time the applicants brought their application, were within the prescribed time-limit.

21. In fact, what Parliament holds is that such acts *"have never explicitly been adopted by Parliament."*[16] Thus, it is the applicants' understanding that Parliament does not deny the existence of such acts, nor does the Parliament deny the effects and consequences of such acts, despite its assertion in other parts of the plea, but just its *"explicit"* adoption.

22. As recalled in the application,[17] General Court has held that *"the fact that the existence of a measure intended to produce legal effects vis-à-vis third parties was revealed by means of a press release or that it took the form of a statement does not preclude the possibility of finding that such a measure exists or, therefore, the jurisdiction of the European Union Courts to review the legality of such measure pursuant to Art. 263 TFEU, provided that it emanates from a institution, body, office or agency of the European Union."*[18]

23. Even more relevant is what the General Court decided in *Durand*, in which the Court held that *"**although the Conference of Presidents of the Parliament did not explicitly take a decision not to submit the request of 7 February 2018 to the plenary of the Parliament, it is clear from the minutes that the non-submission of the proposal to the plenary was, according to it, the inevitable and intentional consequence of the adoption of the two decisions taken on 15 March 2018.**"*[19]

24. As also held in *Durand*, *"Art. 265 TFEU refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from the desired or considered necessary by the persons concerned."*[20]

a) As to the existence and reviewability of the second and third contested acts

25. However, due to the lack of clarity of the Parliament's plea referred above,[21] and since Parliament does not merely deny the reviewable nature of the second and third contested acts, but even its existence,[22] the applicants also need to address Parliament's claim that such acts do not exist. Since it is beyond question that the second and third contested acts are closely connected, we will address the issue of their existence altogether. To say the least, Parliament's denial of the existence of the second contested act is surprising for the following reasons:

[16] Paragraph 8 of the Parliament's plea.
[17] Paragraph 60 of the Application of 28 June 2019.
[18] See, to this effect, order of the General Court of 28 February 2017, *NM* v *Council*, T-257/16, para. 41, and judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, para. 14.
[19] See, to this effect, order of of 12 June 2019, *Durand and Others* v *Parliament*, T-702/18, para. 22.
[20] Order of the General Court of 12 June 2019, Case T-702/18, *Durand* v *Parliament*, para. 21.
[21] Paragraphs 14 to 19 of these Observations.
[22] Paragraph 11 of the Parliament's plea.

26. First, because it is clear from the case-file that Parliament took such decision, as referred in the application for annulment.[23]

27. Second, because the opening of the first session of the newly elected European Parliament took place on 2 July 2019, as Parliament itself confirms in its plea of inadmissibility.[24] Such opening could not have taken place if Parliament hadn't done some sort of activity for the purposes of taking note, as required by Art. 12 of the 1976 Act, of the elected Members of the European Parliament. Taking note of the results declared officially by the Member States is a necessary pre-condition to be able to hold such session, even for practical reasons (*i.e.* Parliament has to issue the accreditations of its Members). It is public that the 51 Members of the European Parliament elected in the constituency of Spain that were included in the list notified to Parliament by the Spanish Central Electoral Commission are acting as Members of the European Parliament.

28. Third, because Parliament itself confirms, in its plea, that *"the President received (...) the list of those candidates who had been elected as Member of the 9th European Parliament in Spain and who had, to that date, fulfilled the requirement of swearing or affirming allegiance to the Spanish Constitution,"*[25] and that *"upon receipt of the aforementioned official notification of 17 June 2019, the suspension of the accreditation of the candidates elected in Spain was immediately lifted in relation of those incoming Members whose names were listed in that official notification."*[26] **Thus, it is clear that Parliament did not take note just of *"those candidates who had been elected as Member of the 9th European Parliament in Spain,"* as it was obliged to, but of those that, in addition of having been elected, to the view of the Spanish Central Electoral Commission, *"had, to that date, fulfilled the requirement of swearing or affirming allegiance to the Spanish Constitution."***

29. In any event, a clarification has to be made as to the second contested act. Although such act has an obvious connection with Parliament's power of verification of credentials and with its power to rule on disputes that may arise out of the provisions of the 1976 Act, the scope of the application, as to the second contested act, is limited to decide on whether Parliament has breached its duty to take note of the results of the election as declared by Spain. Only when Parliament completes the verification of the credentials of its new Members and rules on the dispute brought by the applicants pursuant to Art. 12 of the 1976 Act, will those acts (which are independent of the decision not to take note of the applicants' election) be open to challenge before this General Court.

30. As regards the third contested act, it is also Parliament itself that confirms, in its plea, that *"the President of the European Parliament received a further notification from the President of the Central Electoral Commission of Spain*[27] *transmitting a communication concerning the candidates in the European Elections in Spain who had not acquired the status of Member of the European Parliament. That communication cited the names of*

[23] See the evidence referred to in paragraph 62 of the Application of 28 June 2019.
[24] Paragraph 54 of the Parliament's plea.
[25] Paragraph 39 of the Parliament's plea.
[26] Paragraph 41 of the Parliament's plea.
[27] In fact, it was not a notification by the President, but by the Vice President of the Spanish Central Electoral Commission and we have never been informed, nor has it been made public why the said communication was not signed by the President of the Spanish Central Electoral Commission as it should have been..

the applicants, and stated that their seats were 'declared vacant' until the fulfilment of the relevant national requirement of swearing or affirming allegiance to the Spanish Constitution," and holds that *"in view (...) in particular of [the notification] received on 20 June 2019, the suspension of the accreditation process remained in place* vis-à-vis *the applicants pending further notice from the competent Spanish authority."*

31. Despite the fact that Parliament states in its plea that as a result of such communication of the Spanish authorities *"the suspension of the accreditation process remained in place* vis-à-vis *the applicants,"*[28] in practice Parliament did more than that. Parliament has since considered the seats of the applicants as vacant. In fact, Parliament's use of quotation marks as regards the *"declaration of vacancy"*[29] of the seats of the applicants is a form of acknowledgement that **t**he Spanish authorities had no authority to do so under Art. 13 of the 1976 Act, thus acknowledging that it has been Parliament itself that has left the seats of the applicants vacant with no legal basis whatsoever. The process and conditions to declare the vacancy of a seat is clearly established in Art. 13 of the 1976 Act and this process has not been followed by the Parliament nor has the Parliament acted in accordance with the consequences of such a declaration of vacancy, as the seats remain empty. It is public that Parliament has left vacant three seats of the European Parliament (including the seats of the applicants) since the opening session of the 9th European Parliament on 2 July 2019.

32. Actually, the counsel of the Parliament herself acknowledged, during the hearing at the Court of Justice on the *Junqueras Vies* case, on 14 October 2019, that Parliament considers the seat of Mr. Junqueras Vies (therefore, also the seats of the applicants) to be *"vacant."* Since, pursuant to Art. 13 of the 1976 Act, no vacancy can be established where no previous mandate exists, it is clear that such Parliament position is at odds with Parliament's claim (and the President of the General Court conclusion in his Order of 1 July 2019) that the applicants cannot be considered elected Members. The establishment of a vacancy would be meaningless if the applicants were not *"elected candidates"*. Election is a pre-condition for the declaration of a vacancy, which implies the end of a mandate, according to the wording of Art. 13(1) of the 1976 Act. For a mandate to end, it must have started before.

33. The letter of 27 June 2019 is a confirmation and acknowledgment, as solid evidence, that both the second and the third contested acts exist and were adopted by Parliament, regardless of its form, as provided in the action for annulment. There is not a failure to act in the sense of Art. 265 TFEU, as the Parliament pretends.[30] As held by the General Court in *Durand*,*"Art. 265 TFEU refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a different measure from that desired or considered necessary by the persons concerned."*[31]

34. This is not a situation in which Parliament has failed to take a decision or to define a position. Parliament has taken a clear position according to which the incomplete list notified by Spain on 17 June 2019 *"of those candidates who had been elected as Member*

[28] Paragraph 43 of the Parliament's plea.
[29] Paragraph 40 of the Parliament's plea.
[30] Paragraph 9 of the Parliament's plea.
[31] Order of the General Court of 12 June 2019, Case T-702/18, *Durand* v *Parliament*, para. 35.

of the 9th European Parliament and who had, to that date [according to the Spanish authorities] fulfilled the requirement of swearing or affirming allegiance to the Spanish Constitution" would be the results of the election for the purposes of Art. 12 of the 1976 Act. According to that view, which is misguided, and breaches the fundamental rights of the applicants pursuant to Art. 39(2) of the Charter, Parliament would not be obliged to take note of the results of the election as published in the Spanish Official Journal of 14 June 2019, but of such incomplete list instead. In this way, **according to the European Parliament, "elected Members" would be those who have sworn allegiance to the Spanish Constitution and have been included in the incomplete list notified by Spain but not those actually elected and proclaimed by the electoral authorities**.

35. Such unlawful interpretation, and thus the Parliament's decision to take note of such incomplete list disregarding the actual results declared officially by Spain, as published in the Spanish Official Journal of 14 June 2019, and the decision to leave vacant the seats of the applicants, are illegal acts that exist, as it was confirmed by the letter of 27 June 2019. Those acts breach Arts. 12 and 13 of the 1976 Act, in connection with Art. 39(2) of the Charter of Fundamental Rights, Art. 223 TFEU, and Art. 8 of the 1976 Act.

36. Key to this point is the fact that the only official results declared in Spain are those published in the Spanish Official Journal of the 14 June 2019 and not the incomplete list notified to the European Parliament. Such incomplete list has never been published in the Spanish Official Journal. **Indeed, if those published on 14 June 2019 were not the final results, then that would mean that Spain, in November, lacks the full results of an election that was held in May.**

37. Even if conceded that the "communication" of 17 June 2019, or the letter of 27 June 2019, or the aforementioned acknowledgements by the Parliament, are not an "explicit" decision, it is clear that, for the purposes of *Durand*, the decision not to take note of the results as published on the Spanish Official Journal on 14 June 2019 was the intended consequence of the decision to treat the list notified by the Spanish authorities on 17 June 2019 as the 'results declared officially' for the purposes of Art. 12 of the 1976 Act.[32]

38. Certainly, as provided in the case-law of the Court of Justice, and as recalled in the plea of inadmissibility,[33] Parliament, when taking note of the election results in accordance with Art. 12 of the 1976 Act, is not allowed to depart from the actual results declared officially by the Member States. Had Parliament limited itself to take note of the actual results officially declared by Spain (which in this case are those declared by the Spanish Central Electoral Commission on 13 June 2019, as published in the Spanish Official Journal on 14 June 2019), as required by Art. 12 of the 1976 Act, the issue could be raised as to whether that decision was open challenge, in particular as to whether such a decision would be able to bring about a distinct change in the applicants' legal position.

39. However, the problem in this case is that Parliament has not relied on the results declared by the national authorities. Parliament has decided to depart from the results declared officially by Spain, has refused to take note of such results as declared by the Spanish Central Electoral Commission on 13 June 2019, and published in the Spanish Official

[32] Order of the General Court of 12 June 2019, Durand and Others v Parliament, T-702/18, para. 22).
[33] Paragraphs 73, 74, and 75 of the Parliament's plea.

Journal on 14 June 2019, and has not taken note of the real list of candidates that were elected as Members of the 9th European Parliament in Spain, but of a mere incomplete list including only those elected Members that, according to the Spanish authorities, *"to that date, had fulfilled the requirement of swearing or affirming allegiance to the Spanish Constitution, in accordance with the relevant national law."*

40. It is clear from the case-law in *Donnici* that when Parliament departs from the results declared by the Member State, such act is, of course, a reviewable act. In fact, it is an unlawful act. Parliament's claim that has not departed from the 'results declared officially' [in Spanish: *'resultados oficialmente **proclamados**'*][34] (**C.13**) by Spain is simply not true. The incomplete list of which Parliament has taken note cannot be deemed as the results declared by Spain. And in any event, this is an issue that has to be settled in a decision on the substance of the case.

41. Such practical situation is the result of Parliament having breached its obligation under Art. 12 of the 1976 Act. Such decision by Parliament was capable of affecting, and indeed dramatically affected the interests of the applicants and more than a million EU citizens that voted for them, and did bring about a distinct change in the legal position of the applicants. Thus, such decision is a reviewable act. This is extremely relevant for the sake of clarity. While certainly Parliament is not (legally) allowed to bring a change in the legal position of the applicants when taking note of the results declared officially by the Member States inasmuch as it plays by the rules, Parliament has brought a change in the legal position of the applicants *precisely* because it has (illegally) done what was not (legally) allowed to do. Parliament has not played by the democratic rules.

42. Parliament has brought a change in the legal position of the applicants because it has taken note of an incomplete that are *not* the results declared officially by Spain (not even the communications of the Spanish authorities say that such incomplete list are the results of the election). Thus, Parliament has brought a change in the legal position of the applicants because it has decided **not** to take note of the results declared officially by Spain, something that was **not** (legally) allowed to do. Instead, Parliament decided to take note of a different and incomplete list of some, but not all, elected Members notified on 17 June 2019 by the Spanish authorities.

43. For the purposes of this action, the confirmation by Parliament, in its plea, that it chose to take note of an incomplete list that did **not** include all the elected Members in Spain, but only those elected Members that, in addition, according to the Spanish authorities, *"to that date, had fulfilled the requirement of swearing or affirming allegiance to the Spanish Constitution, in accordance with the relevant national law*,*"*[35] is key, inasmuch as it shows that the *prima facie* conclusions of the Order of 1 July 2019, on what are to be considered the results declared officially by the Member States, were misguided.

44. In fact, the *prima facie* conclusions of the then President of the General Court in his Order of 1 July 2019 were disproved by the Spanish Supreme Court itself as soon as on the same 1 July 2019. On that date, the Spanish Supreme Court sent a preliminary referral to the Court of Justice of the European Union, **on the grounds that Mr.**

[34] *See* Spanish version of the original 1976 Act, published in the Official of 1 January 1986, page 481 (**C.13**)
[35] Paragraph 39 of the Parliament's plea.

Junqueras was indeed an elected Member, about whether Mr. Oriol Junqueras was covered by the immunities provided for in Art. 9 of Protocol (No 7) (**C.2**).

45. Such decision by the Spanish Supreme Court (**C.2**) is key to understand that the acquisition of the condition of elected Member of Parliament is **not** subject to swearing or affirming allegiance to the Spanish Constitution, contrary to the *prima facie* conclusion of the President of the General Court in his Order of 1 July 2019.

46. As recalled by Advocate General Szpunar in the hearing of the *Junqueras Vies* case (C-502/19) before the Court of Justice, in a question to the representative of the Kingdom of Spain, the judgment of the Spanish Constitutional Court of 21 June 1990 clearly stated that possible non-compliance with the formal requirement of swearing or affirming allegiance to the Constitution does not deprive an elected Member *"of the role of representative (...), 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."*[36] (**C.4**)

47. Other than the reasons already mentioned, the *prima facie* conclusion of the President of the General Court in his Order, which confirmed the position of the Parliament according to which the incomplete list notified by the Spanish authorities on 17 June 2019 would be the *"results declared officially"* by Spain is also wrong for the following reasons:

48. The Order rules that there is no doubt that the results published in the Spanish Official Journal on 14 June 2019, including the proclamation of elected Members 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 (**C.13**).

49. Paragraph 41 of the Order of 1 July 2019 states that such proclamation would not be 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 applicants 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**.

50. 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 Parliament would empower the authorities of the Member States 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 Member States literally as declared then the integrity of the Parliament as a democratic legislative assembly is severely at risk.

[36] Judgment 119/1990 of the Spanish Constitutional Court, of 21 June 1990 (**C.4**)

51. For this reason, the applicants strongly disagree with the reasoning in the Order of 1 July 2019 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.

52. Insofar as the *"results declared officially"* by the Member States are the "final step" of the electoral procedure, the European Parliament 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.[37] The counting of the votes and distribution of the seats puts to an end the "electoral procedure".

53. Case-law of the Court has indicated that when it comes to deciding who will be the Members of the European Parliament, Member States 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).

54. The *"results declared officially"* shall include, of course, the attribution of seats and the names of all the elected MEPs, 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.[38]

55. 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 preparatory works of the 1976 Act,[39] and its different linguistic versions.[40] This also follows from Rule 3(3) of the Rules of Procedure of the European Parliament which explicitly refers to *"the full results of the election."*

56. The President, in his Order which has been contested, identifies the incomplete list sent by the Spanish authorities on 17 June 2019 with the *"results declared officially"* with no

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[37] To this purpose, *see* paragraph 64 and footnote 47 of these Observations.

[38] This is actually what other Member States do. *See,* for instance, the notification of the results by France (**C.5**)

[39] 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) (**C.8**)

[40] 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

valid reasoning whatsoever. In particular, 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.

57. It cannot be overlooked that, according to the case-law of the Spanish Constitutional Court, and contrary to the conclusions of the Order of 1 July 2019 of the President of the General Court, the proclamation of elected Members is indeed the *"final step"* of the electoral procedure. This is clear, among others, in the Order of the Spanish Constitutional Court of 11 January 2000, which clearly provides that *"the electoral procedure ends with such proclamation [of elected candidates]"* (**C.7**)[41] Swearing allegiance to the Spanish Constitution is **not** part of the electoral procedure, according to the case-law of the Constitutional Court (**C.4**).[42]

Contentious-electoral petitions

58. 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.

59. The argument is not pertinent because elected Members have the right to take their seats from the opening of the first sitting following the elections[43] 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 their seats in Parliament, and even less that his or her election has not been declared.[44]

60. In any event, the argument would not be relevant either since there are no pending contentious-electoral petitions against the proclamation by the Spanish authorities of 13

[41] Order of the Spanish Constitutional Court 13/2000, of 11 January 2000 (Auto del Tribunal Constitucional 13/2000, de 11 de enero de 2000, FJ 2) (**C.7**)

[42] As recalled above (paragraph 46 of these Observations), under the case-law of the Spanish Constitutional Court, not swearing or affirming allegiance does not deprive an elected candidate of his or her status as Member.

[43] Art. 5(2) of the 1976 Act and Rule 3(1) of the Rules of Procedure of the European Parliament.

[44] 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*, 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.

June 2019. In fact, no contentious-electoral petition was ever lodged against the proclamation of 13 June 2019.[45] Hence, **that proclamation of elected Members is final**.

Swearing or affirmation of allegiance to the Spanish Constitution

61. 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 applicants are not elected candidates up to the moment the Spanish authorities accept such swearing or affirmation, and thus the proclamation of 13 June 2019 would not be the *"results declared officially"* by Spain, that line of argument, as referred above, is not pertinent either. In fact, with that line of argument the President is rewriting domestic law.

62. As explicitly acknowledged by the counsel of Parliament at the request of Advocate General Szpunar during the hearing of the *Junqueras Vies* case[46] before the Court of Justice on 14 October 2019, **there are no precedents of a situation like the one that Mr. Junqueras Vies and the applicants are facing in this case: elected Members being prevented from taking up their seats in Parliament because of Parliament's decision to take note of an incomplete list of Members as if such incomplete list was to be deemed the "results declared officially" for the purposes of Art. 12 of the 1976 Act, with the practical consequence of Parliament having to work with a composition different than the one decided by the European Council in accordance with Art. 14(2) TEU.**

63. As it is clear from the wording of the proclamation of 13 June 2019, swearing 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 or not. Being an elected candidate is, in this case, a pre-existing and not contested legal situation.

64. Insofar as the President treats the swearing of allegiance to the Constitution as part of the electoral procedure, and as a necessary requirement to become elected Member 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.[47] The President is creating a new requirement to become an *"elected candidate"* not foreseen in Art. 12 of the 1976 Act.

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[45] 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.

[46] Case C-502/19, *Junqueras Vies*

[47] **In accordance with the case-law of the Spanish Constitutional Court** that has just been cited (doc. **C.4**), **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.**

65. As insisted before, the Spanish Electoral Commission 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 (**C.1**).

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

66. 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 applicants, must be deemed as the *'results declared officially'*, and hence the applicants cannot be considered *'elected candidates'*, such an argument is circular reasoning[48] without substance. It is not clear whether the Order considers that the applicants 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 incomplete list. However, the argument being the former or the latter makes a big difference.

67. Actually, as referred above, 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.'* 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.

68. The incomplete list has nothing to with what was requested to the Spanish authorities by the Deputy Secretary-General on 24 May 2019 (**C.6**).[49] The only official document which includes the information requested is the one published on the 14 June 2019 in the Spanish Official Journal. **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 of allegiance to the Spanish Constitution has been accepted by the Spanish Electoral Commission. 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

[48] The President's argument is a clear example of circular reasoning (*circulus in demonstrando*), a logical fallacy: to the President's view, the applicants 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 applicants, 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 applicants would not be *'elected candidates'* up to the moment the Spanish authorities accept their affirmation of the Spanish Constitution.

[49] 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*.'

the ones in the list. That list was never intended to reflect the full results of the election, as it did not include the total 54 candidates elected in Spain.

69. 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.*[50] Art. 12 does not stipulate that the results of the elections must come from a separate individual direct communication from Member States to the Parliament. Art. 12 of the Act does not regulate any kind of "*communication*" by Member States, as wrongfully indicated in paragraph 41 of the Order.

70. Certainly, it follows from the principle of sincere cooperation (Art. 4(3) TEU) that Member States shall notify the *'results declared officially'* to the Parliament. But a Member State'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 Member State fails to notify the electoral results properly, the Parliament cannot be bound by that violation of the principle of sincere cooperation.

71. 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 Member State. The opposite would mean that government parties could decide for whatever reason, to delete elected candidates from the list they submit to the Parliament and impose those they like instead.[51] **Parliament is only legally bound by the official declaration of results,** not any communication.

72. Thus, it is clear that Parliament did <u>not</u> take note of the *results* declared officially by Spain, including the full and official list of elected Members as published in the Spanish Official Journal on 14 June 2019, but of those that *"to that date, had fulfilled the requirement of swearing or affirming allegiance to the Spanish Constitution, in accordance with the relevant national law."*

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[50] 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).

[51] To accept such a situation will open the door for other Member State Government 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 immediately 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.

73. The conclusion is simple: if Parliament had to take note of the results declared officially by Spain (in which the applicants were included), but took note of a different and incomplete list that did not include the applicants, Parliament breached the law, thus changing the legal position of the applicants. Legal position which was the direct consequence of the results of the election, and therefore of the wish of the EU citizens that voted in Spain in the election to the European Parliament of 26 May 2019.

74. Thus, it is clear that Parliament did make a choice: it did *not* take note of the *results* declared officially by Spain, including the official list of all elected Members, but only of an incomplete list that could not be deemed as the *results* declared officially by Spain, because it did *not* include all the elected Members in Spain.

75. No matter whether the "results declared officially" and the "electoral procedure" are autonomous EU law concepts or concepts that have to be interpreted in accordance with national law, it is clear that the list notified by the Spanish authorities on 17 June 2019 is not the results declared officially for the purposes of Art. 12 of the 1976 Act, in connection with Art. 223(1) TFEU, Art. 8 of the 1976 Act, and Art. 224 of the Spanish Electoral Law. The results declared officially in Spain are those published in the Spanish Official Journal the past 14th of June 2019 and this is not arguable nor has it been contested.

d) As to the existence and reviewability of the fourth contested act

76. The fourth contested act is a direct consequence of the Parliament's refusal to take note of the results declared officially by Spain.

77. Again, it is public that Parliament refused to guarantee the applicants the right pursuant to Rule 3(2) of the Rules of Procedure of the European Parliament. This is clearly confirmed by the letter sent to the applicants by the President of the Parliament on 27 June 2019. Parliament cannot claim that has failed to take a position. It has clearly taken a position on this issue, and thus such decision is an act that is open to challenge.

78. The power to accord on a provisional basis a seat in Parliament until the credentials have been verified is under the exclusive authority of Parliament, and Parliament has refused to accord it. As provided in the application for annulment, such power has existed in the Rules of Procedure of the European Parliament since 1958.[52] According to Rule 3(2), the only requirements to grant such right are that the Members' credentials have not yet been verified, or that a ruling is still pending on **any** disputes. That is exactly the case of the applicants, which have pending disputes before the Committee of Legal Affairs, the General Court and the Spanish Supreme Court. Thus, the act exists and is reviewable.

e) ***As to the existence and reviewability of the fifth contested act***

79. Parliament seems not to claim that the fifth contested act is non-existent,[53] although, in the plea, does not refer at any time to its content. It is clear that Parliament has taken a

[52] Paragraph 155 of the Application.
[53] In fact, it is not mentioned in paragraph 11 of Parliament's plea.

position as to the request of the applicants to the President to assert their immunity pursuant to Rule 8 of the Rules of Procedure of the European Parliament, refusing to assert it. The letter of 27 June 2019 is a confirmation, again, of the existence of such act.

80. As regards the reviewable nature of the fifth contested act, the applicants refer to the relevant parts of its application for annulment.[54]

81. However, it has now to be added that the preliminary referral by the Criminal Chamber of the Spanish Supreme Court (**C.2**) (which is pending before the Court of Justice of the European Union) on the immunities of elected Member of the European Parliament Mr. Oriol Junqueras (of whose election Parliament has also refused to take note pursuant to Art. 12 of the 1976 Act) is a confirmation of the reviewable character of the President's refusal to assert the immunities of the applicants. The first question of the preliminary reference is, precisely, on whether Mr. Oriol Junqueras, who, as the applicants in the present case, was proclaimed elected Member of the European Parliament by the Spanish Central Electoral Commission on 13 June 2019, is covered by the immunity pursuant to Art. 9 of Protocol (No 7). Thus, Parliament adopted a clear reviewable decision on that issue when the President decided not to assert the applicants' immunities, as confirmed by the letter of 27 June 2019.

IV. ON THE NEED TO ADJUDICATE THE CONTESTED "EXCEPTIONAL" DECISION OF THE PRESIDENT OF 29 MAY 2019

82. According to Parliament, there would be no need to adjudicate the "exceptional"[55] Decision of its President of 29 May 2019.[56] Few paragraphs later, Parliament clarifies that there would be no (longer) need to adjudicate such act, as it would no (longer) procure any advantage to the applicants.[57]

83. As to the relevant background,[58] Parliament forgets to mention that such "exceptional" decision of the outgoing President of the Parliament, which was addressed at preventing the applicants from taking their seats in Parliament with effect from the opening of the first sitting following the elections, was adopted at the request of other Spanish Members of the European Parliament. Parliament claims in paragraph 36 that the Decision was necessary because the results were not final ("counting was still ongoing"), which is patently false, as the counting of the votes finalized on the election night.

84. In particular, it was done at the request of Mr. Esteban González Pons (Partido Popular, EPP), Ms. Iratxe García-Pérez (Partido Socialista Obrero Español, S&D) and Mr. Javier Nart (Ciudadanos, ALDE), as Parliament itself acknowledges in an email that has been produced by Parliament itself in its plea (defendant's annex **B.1**).[59] The "exceptional" Decision of 29 May 2019 was never communicated to the applicants by the President.

[54] Paragraphs 183 to 202 of the Application.
[55] The adjective "exceptional" is used by the Parliament itself. Paragraph 36 of the Parliament's plea.
[56] Paragraph 46 of the Parliament's Plea.
[57] Paragraphs 53 and 57 of the Parliament's Plea.
[58] Parliament starts explaining its behavior on this issue from paragraph 35 of the Parliament's plea.
[59] See Document B.1 attached to the Parliament's plea.

85. To this extent, it cannot be overlooked that Mr. Esteban González Pons (Partido Popular, EPP) and Mr. Javier Nart (Ciudadanos, ALDE) were, at that time, the leaders of the delegations to the European Parliament of the two political parties that, in April and May, had sought that the applicants were not able to run to the election to the European Parliament. To that effect, we attach the applications of such parties before the Spanish Central Electoral Commission seeking to exclude Mr. Puigdemont and Mr. Comín as candidates in the election of 26 May 2019 (**C.9** and **C.10**).

86. Parliament claims that, inasmuch as the opening of the first session of the newly elected European Parliament took place on 2 July 2019, the applicants would no (longer) have an interest in challenging the Decision of 29 May 2019, and the annulment of such decision would not procure an advantage to the applicants.[60]

87. That line of reasoning is inconsistent with the case-law of the Court of Justice, and cannot succeed. **There is a need to adjudicate the contested "exceptional" Decision of 29 May 2019 and to address the merits of the contested act.**

88. As the Court of Justice did in *Apesco,*[61] it must be emphasized that the action was brought within the time-limit prescribed by Art. 263 TFEU. Moreover, the applicants have an interest in challenging the Decision of 29 May 2019 in order to prevent a repetition of such arbitrary behavior by Parliament in the future.

89. The Court of Justice held in *Xeda*,[62] *"the applicants may in particular retain an interest in obtaining a declaration of illegality of that act for the period during which it was applicable and produced its effects, such a declaration retaining an interest at the very least as the basis for a possible action for damages"* (see, to that effect, Joined Cases C‑68/94 and C‑30/95, *France and Others* v *Commission* [1998] ECR I‑1375, par. 74).

90. Holding otherwise would mean that Parliament could adopt any illegal decision provided that it has only a temporary effect. Namely, as long as, by the end of the time-limit for Parliament to submit a plea of inadmissibility on an eventual application for annulment, such act has exhausted its legal effects or no longer applies). Holding that such acts are not subject to judicial review would open the door to Parliament to take illegal decisions which at no point would be open to review.

V. ON THE PLEA OF INADMISSIBILITY ON THE REQUEST OF SPECIFIC EVIDENCE & PRODUCTION OF NEW EVIDENCE

91. On the request of specific evidence, the action for annulment is clear as to the identification of the documents requested, in accordance with the case-law of the Court. The relevance of those documents and of the hearing of the witnesses is also clear from the application of annulment.

92. However, some clarifications have to be made:

[60] Paragraphs 53 and 54 of the Parliament's plea.
[61] Judgment of the Court of Justice of 26 April 1988, Case C-207/86, *Apesco*, para 16.
[62] Judgment of the Court of Justice of 27 June 2013, Case C-149/12, *Xeda*, para. 32

a) As to the minutes and transcription of the meeting of the Parliament's Bureau held on 17 June 2019, those minutes were published, after the application for annulment was lodged, in the Register of Public Documents of the European Parliament, so there is no longer need for the defendant to produce the document, and is hereby attached to these observations (**C.11**).

b) As to the duly signed copy of the Legal Note written by Mr. Freddy Drexler on 15 April 2019, even though the defendant does not want to produce the document, it was released to the press. Thus, the applicants have had access to such document through the press, and is therefore attached (**C.12**).

c) As to the copies of the written communications held between the President of the Parliament and its Cabinet with the representatives of the Spanish People's Party (EPP) and the Spanish Ciudadanos Party (ALDE) during May and June 2019; the production by the Parliament of the President's email of 30 May 2019 (**B.1**) makes clear the need for the production of the email to what that one was answering to. Otherwise the information on the reasons that obliged the Parliament to take the "exceptional" Decision of 29 May 2019 are not clear and are not complete.

d) As to the request for hearing witnesses, it is clear that all of the witnesses requested by the applicants are relevant to the result of the case because of the specific particulars of this case. Witnesses are necessary because of the deliberate lack of transparency of the defendant. It is important to recall that the contested acts have been adopted mostly through informal means, with a deliberate lack of transparency (*i.e.* the "exceptional" Decision of 29 May 2019 was adopted through an e-mail from the President of the Parliament sent to the political opponents of the applicants at the request of those political opponents (**B.1**); Parliament took note of the incomplete list of 17 June 2019 sent by the Spanish authorities through a "communication" of the Direction-General for the Presidency that was not made public either (**A.36**), Parliament confirmed the existence of the contested acts through informal means (the letter sent by the President to the applicants on 27 June 2019) (**A.47**).

93. Since it has come to the knowledge of the applicants that, during the hearing before the Court of Justice of the European Union held on 14 October 2019 on the preliminary reference of the *Junqueras Vies* (C-502/19), Parliament confirmed that it considers the seat of elected Member Mr. Oriol Junqueras to be "vacant" (and therefore also the seats of the applicants in this case), and since Parliament also confirmed in such hearing that there are no precedents of Parliament considering an incomplete list of elected Members to be declared official results of the election, the applicants respectfully request the General Court the recording of such hearing to be brought to the Court as evidence.

VI. FORM OF ORDER SOUGHT

94. On the basis of the foregoing, the applicants request the General Court of the European Union to:

a) Refuse the Parliament's plea of inadmissibility and the application for a declaration that there is no longer any need to adjudicate raised by the Parliament.
b) In the alternative, reserve its decision until it rules on the substance.

4 November 2019,

Paul BEKAERT Ben EMMERSON Gonzalo BOYE Simon BEKAERT

VII. LIST OF ANNEXES

Annex number	Description	Number of pages (incl. cover)	Placement in this document (page and paragraph)
C.1	Proclamation of Ms. Estrella Durá Ferrandis as elected Member of Parliament.	2	p. 3 par. 6 p. 14 par. 65
C.2	Preliminary reference lodged by the Criminal Chamber of the Spanish Supreme Court before the Court of Justice of the European Union on the situation of the elected Member of the European Parliament Mr. Oriol Junqueras Vies, and Spanish Supreme Court resolution of 1 July 2019.	38	p. 3 par. 7 p. 3 par. 8 p. 10-11 par. 44 p. 11 par. 45 p. 18 par. 81
C.3	Re-submission of the dispute about credentials and request pursuant to Rule 3(2) of the Rules of Procedure.	15	p. 4 par. 10
C.4	Spanish Constitutional Court Judgement Nº 119/1990 of 21 June 1990	40	p. 11 par. 46 p. 13, par. 57 p. 14, par. 64, footnote 47
C.5	Notification of the results by France.	27	p. 12 par. 54, footnote 38

C.6	Former Deputy Secretary-General of the European Parliament (Markus Winkler) letter of 24 May 2019.	3	p. 15 par. 68
C.7	Spanish Constitutional Court resolution of 11 January 2000 (ATC 13/2000)	7	p. 13 par. 57
C.8	Report of 23 January 1976 of the group ad hoc entrusted with the drafting of the 1976 Act.	16	p. 12 par. 55, footnote 39
C.9	Request submitted by the political party "Partido Popular" requesting to exclude Mr. Puigdemont and Mr. Comín as candidates in the election of 26 May 2019.	10	p. 18-19 par. 85
C.10	Request submitted by the political party "Ciudadanos" requesting to exclude Mr. Puigdemont and Mr. Comín as candidates in the election of 26 May 2019.	6	p. 18-19 par. 85
C.11	Minutes and transcription of the meeting of the Parliament's Bureau held on 17 June 2019.	39	p. 19 par. 92
C.12	Legal Note written by Mr. Freddy Drexler on 15 April 2019.	5	p. 20 par. 92
C.13	Spanish version of the original 1976 Act, published in the SOJ of 1 January 1986.	4	p. 10 par. 40, footnote 34 p. 11, par. 48
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