

Subject: Note on EP elections in Spain and immunity of MEPS

I. Introduction

1. On 25 March 2019, the Legal Service received a request from the President for a note on EP elections in Spain and immunity of newly elected MEPs.
2. The request concerns the legal situation of candidates running for EP elections in Spain who are presently subject to national criminal proceedings. Of particular interest is the extent to which these candidates may claim parliamentary immunities. This note focuses on the main elements of both EU and Spanish law given that the electoral procedure is governed by the national electoral law. It should be recalled that the actual procedural steps would depend on the concrete circumstances in which they were taken and that the subsequent decisions of the different actors involved cannot be fully anticipated at this stage.
3. As regards parliamentary immunities in the EU, it is important to underline that only Article 9 of the Protocol of the Privileges and Immunities of the European Union is relevant for this analysis. The protection of opinions expressed in the exercise of an MEP's duties by virtue of Article 8 PPI only starts with the mandate. The situation at stake refers, however, to facts taking place before the beginning of the European mandate and for which national proceedings are still pending.

II. Assessment. Parliamentary immunity and procedure for the acquisition of the parliamentary mandate in the EP for candidates elected in Spain

a) Procedural steps to acquire the status of MEP for candidates elected in Spain

4. Article 210 bis of the Organic Law on the Electoral Regime provides that persons condemned to a prison sentence cannot run for elections, if the judgement is no longer subject to appeal or, in the context of certain crimes including rebellion, even if the judgement is subject to appeal. *A contrario*, persons subject to preventive measures or under arrest can run for the EP elections if the other general conditions are met.
5. According to Article 224 of the Organic Law on the Electoral Regime:
 - “1. The Central Electoral Committee shall proceed, no later than 21 days after the election, to the vote count at national level, the attribution of seats for each candidacy and to the proclamation of the elected persons.
 2. Within five days of their proclamation, elected candidates shall pledge their oath of allegiance to the Constitution before the Central Electoral Committee.”
6. In practice, the Central Electoral Committee has understood this provision as the need for the physical presence of the candidate at the Central Electoral Committee in Madrid to proceed to the pledge of office. This is a constitutive requirement for the inclusion of the person in the list to be communicated to the EP in accordance with Article 12 of the Act on Direct Elections and Rule 3 RoP. In this regard, it must be noted that candidates in prison have been awarded, in the past, penitentiary leave with the sole objective of fulfilling this procedure at the Central Electoral Committee. However, the Spanish courts have decided this on a case-by-case basis and depending on the concrete circumstances.¹
7. Once the list of elected MEPs are communicated to the EP the general procedure and conditions for all MEPs apply, that is, Rule 3(2) of the EPs Rules of Procedure:

“Members whose election has been notified to Parliament shall declare in writing, before taking their seat 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 Act of 20 September 1976. Following general elections, the declaration shall be made, where possible, no later than six days prior to Parliament's first sitting following the elections. Until such time as Members' credentials have been verified or a ruling has been given on any dispute, and provided that they have previously signed the above-mentioned written declaration, they shall take their seat in Parliament and on its bodies and shall enjoy all the rights attaching thereto.”
8. The requirement of the declaration that there is no incompatibility is normally signed in Brussels at the EP premises. However, there is no explicit rule that provides for such presence and there

¹ ATSJ NA 1/1987, Tribunal Superior de Justicia de Navarra, de 21 de febrero de 1987, regarding a member of the Basque Parliament. More recently, in the context of other Catalan leaders regarding the events of 2017, the Supreme Court adopted the position of facilitating the pledge by other means than the presence in the Electoral Committee, although the requirements for a regional mandate are different than the requirement for an MEP - see ATS 5/2018, de 12 de enero, Tribunal Supremo.

have been exceptions to this, for instance, an MEP signing his declaration in the EP office in Helsinki.

9. Finally, it is to be noted that the Spanish legislation determines the incompatibility of the office of Member of a regional assembly with the office of MEP (Article 221(2)(d) of the Organic Law on the Electoral Regime). An elected Member of a regional assembly who is later elected as an MEP may resign from his regional mandate to take up his regional mandate.

b) Parliamentary immunity under EU law, in particular its temporal scope

10. Pursuant to Article 9 of the Protocol on the Privileges and Immunities of the European Union

“During the sessions of the European Parliament, its Members shall enjoy:

(a) in the territory of their own State, the immunities accorded to members of their parliament;

(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.”

11. The sessions of the European Parliament start at the opening of the first session following each election, in accordance with Article 5 of the Act on the Elections to the European Parliament of 1976.

“1. 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.

(...)

2. The term of office of each member of the European Parliament shall begin and end at the same time as the period referred to in paragraph 1.”

12. In accordance with Rule 146 RoP, the protection under Article 9 PPI will deploy its effects for the newly elected MEPs as from 2 July 2019 at 10.00 a.m.
13. It is worth noting that although immunity protected under Article 9 PPI relies on national law as regards its material scope, the period covered by its protection is an element determined by EU law alone, as the Court of Justice stated in Wybot/Faure.²
14. This limitation in time of the parliamentary immunity to the sessions of the EP is a logical consequence of the functional character of immunity granted under Article 9 PPI. Indeed, as Rule 5(2) of Parliament’s Rules of Procedure underlines “Parliamentary immunity is not a

² C-149/85 - Wybot v Faure, ECLI:EU:C:1986:310, at paragraph 17.

Member's personal privilege but a guarantee of the independence of Parliament as a whole, and of its Members.”

15. In the event that the candidate became an MEP and the national authorities requested the waiver of his immunity, the file would have to be analysed by JURI based on Article 9 PPI. According to the practice of JURI, immunity should be waived unless it appears that the intention underlying the legal proceedings may be to damage a Member’s political activity and thus Parliament's independence (*fumus persecutionis*).³ This must relate to the MEP’s political activity as such, and not to his activity in the regional or national political sphere.

c) Parliamentary immunity in Spain

16. The immunity granted to Spanish Members of Parliament is very wide. As established in Article 71 of the Constitution:

“Members of Congress and Senators shall enjoy freedom of speech for opinions expressed in the exercise of their functions. During their term of office, Members of Congress and Senators shall likewise enjoy freedom from arrest and may be arrested only in the event of flagrante delicto. They may be neither indicted nor tried without prior authorization of their respective House.”

17. This means that MEPs elected in Spain enjoy a full Article 9 PPI immunity from any measures of arrest and from indictment and trial against them. These measures shall be suspended until the immunity is lifted or the mandate expires.
18. It is important to note that according to the Rules of Procedure of the *Congreso de los Diputados*, Article 20(2) provides that the beginning of the mandate be set at the constitutive session of the newly elected Parliament, but that the prerogatives of MPs (including immunities) shall already take effect on the date that the candidates are proclaimed elected. This rule setting retroactive effects for the sake of the immunity protection is not applicable to MEPs elected in Spain, as argued in the previous section.

III. Conclusions

19. In the case in question, a candidate under a national arrest warrant in Spain may run as candidate for the EP elections in Spain. His presence in Madrid is required in order to take the pledge of the Spanish constitution and thus be included in the list communicated by the Spanish authorities to the European Parliament. If he were arrested when doing so, the Spanish judicial authorities could still give him permission to do such taking of the pledge. Whether this permission is given depends on the Spanish judicial authorities.

³ Point 43 of Notice to Members 11/2016 of the JURI committee.