SUPREME COURT
Criminal Chamber

Ruling Number:

Date of ruling: 09/01/2020

Type of proceedings: SPECIAL PROCEEDINGS

Proceedings number: 20907/2017

Verdict/Agreement: Free Text Ruling

Rapporteur: The Honourable Manuel Marchena Gómez

Origin: State General Prosecutor's Office

Judicial Administration Clerk: The Honourable Ms María Antonia Cao Barredo

Transcribed by: ICR

Note:

Summary

Ruling response request for preliminary ruling.

SPECIAL PROCEEDINGS no.: 20907/2017

Rapporteur: The Honourable Mr Manuel Marchena Gómez

Judicial Administration Clerk: The Honourable Ms María Antonia Cao Barredo

SUPREME COURT
Criminal Chamber

Ruling Number:

Their Honours

Mr Manuel Marchena Gómez, president

Mr Andrés Martínez Arrieta

Mr Juan Ramón Berdugo Gómez de la Torre

Mr Luciano Varela Castro

Mr Antonio del Moral García

Mr Andrés Palomo Del Arco

Ms Ana María Ferrer García

In Madrid, 09 January 2020.

The rapporteur was His Honour Mr Manuel Marchena Gómez.

BACKGROUND TO THE FACTS

1. On 19 December 2019 the Grand Chamber of the Court of Justice of the European Union issued a judgment in Case C-502/19, initiated as a result of the reference for a preliminary ruling made in our ruling of 1 July 2019 in the context of special proceedings no. 20907/2017.

2. On the same day the *Ministerio Fiscal*, the *Abogacía del Estado*, the *acción popular* and the legal representatives of Mr Oriol Junqueras were notified in order for them to present allegations within a period of five days.

3. The *Ministerio Fiscal* submitted a document to this Court dated 19 December 2019. The *Abogacía del Estado* submitted allegations via a document dated 30 December 2019. The *acción popular* and the defence counsel of Mr Junqueras asserted their interests via documents received by this Court on 26 December 2019.

LEGAL GROUNDS

1. The judgment of the Court of Justice of the European Union (hereinafter, CJEU), dated 19 December 2019, responded to the reference for a preliminary ruling made by this Chamber via a ruling of 1 July 2019. The CJEU finds the following in the operative part: "*Article 9 of the Protocol (No. 7) on the privileges and immunities of the European Union must be interpreted in the sense that: a) a person who has been officially declared elected to the European Parliament when they were in provisional custody in criminal proceedings for serious offences, but who has not been authorised*

to complete certain requirements established by national legislation after the declaration or to travel to the European Parliament to take part in the first session thereof, enjoys immunity under paragraph two of said article; b) this immunity implies the lifting of the measure of provisional custody that was imposed to allow the individual in question to travel to the European Parliament and complete the necessary formalities there. If the competent national court considers, however, that the measure of provisional custody should be maintained after the individual in question acquired the status of Member of the European Parliament, it should make a request as soon as possible to the European Parliament to waive said immunity, in accordance with Article 9(3) of the same Protocol".

A careful reading of this response allows the following conclusions to be established:

a) The question raised by this Chamber as to whether Article 9 of Protocol No. 7 on the privileges and immunities of the European Union is in effect before the "*session*", must be resolved in the affirmative.

This implies that a candidate declared elected by a national authority enjoys immunity, solely by virtue thereof, even when they are in provisional custody in criminal proceedings for serious offences and the competent court has refused leave to complete the formalities imposed by national law after being declared elected.

b) The immunity established in Article 9(2) of the Protocol, which is limited to authorising the elected individual to travel to the European Parliament so that they can complete the required formalities there, requires the court to do so by ordering "*...the lifting of the measure of provisional custody that was imposed".*

c) On an exceptional basis, this specific immunity, obtained from the moment they were declared elected, is compatible with the maintenance of the precautionary measure of provisional custody, provided that an urgent request is made to the European Parliament to waive said immunity.

No other interpretation can be given to the adversative sentence that clarifies that "*If the competent national court considers, however, that the measure of provisional custody should be maintained after the individual in question acquired the status of Member of the European Parliament, it should make a request as soon as possible to the European Parliament to waive said immunity*".

2. These three statements provide a full response to the question submitted by this Chamber. In our ruling, we raised, alternatively and interconnectedly, the following preliminary questions:

"*a) Is Article 9 of Protocol No. 7 on the privileges and immunities of the European Union in effect before the initiation of the "session" for an individual accused of serious offences who is in provisional custody, ordered by the Court for acts occurring prior to the initiation of an electoral process, in which said accused was declared elected to the European Parliament, but was denied, via a judicial decision, an extraordinary release on temporary licence which would allow him to complete the formalities established by the national electoral provisions referred to in Article 8 of the Act concerning the election of the members of the European Parliament by direct universal suffrage?*

b) If the answer is affirmative, if the body designated in national electoral rules had communicated to the European Parliament, because the elected individual had not met the requirements established for the election (which had been impossible due to the limitation on his freedom of

movement resulting from the fact that he is in provisional custody in proceedings for serious offences), that he will not acquire said status of Member of Parliament until he meets those requirements; would the broad interpretation of the term "session" persist, despite the temporary interruption as regards his prospects of taking his seat?

c) If the answer is that the broad interpretation persists, if the elected individual were in provisional custody in proceedings for serious offences, occurring a significant amount of time before the initiation of the electoral process, would the judicial authority that ordered the custody be required, in view of the expression "while they are travelling to and from the place of meeting of the European Parliament" in Article 9 of Protocol 7, to lift the measure of custody absolutely, almost automatically, to facilitate completion of the formalities and travel to the European Parliament?; or should a relative criterion of assessment and weighting be applied, in the specific case, of the rights and interests arising from the interests of justice and due process, on the one hand, and those pertaining to the institution of immunity, on the other, both as regards respect for the functioning and independence of Parliament and the right of the elected individual to exercise public functions?"

The situation affecting the formally accused Mr Oriol Junqueras must be resolved in accordance with the interpretation provided by the CJEU in these responses. All the above, as an eloquent expression of what has been described as the *dialogue between courts,* in keeping at all times with the principle of sincere cooperation enshrined in Article 4(3)(1) of the Treaty on European Union.

3. Via this ruling, the Chamber fully complies, in the strictest terms, with the decision of the CJEU. The information that should be taken into consideration to define its effects is as follows:

a) Mr Junqueras was sentenced in a judgment issued by this Chamber, dated 14 October 2019, to a prison term of 13 years and absolute disqualification from holding public office for 13 years, with the subsequent definitive forfeiture of all of his honours, positions and public posts, even where these are elective, and disqualification from holding these or any other honours, posts or public positions, or being elected to hold public office for the duration of the sentence. He was declared to be the perpetrator of an offence of sedition in joint consideration with an interrelated offence of misappropriation of public funds.

b) This judgment was the judicial outcome of criminal proceedings initiated on 12 February 2019 that entered the "*deliberation stage*" on 12 June of the same year.

c) Mr Junqueras was declared elected by the *Junta Electoral Central* via a decision dated 13 June 2019, published in the Official State Gazette on 14 June 2019, i.e. one day after all the hearings concluded and the process of judgment deliberations began.

d) On 14 June 2019 this Chamber denied Mr Junqueras a temporary licence, requested on 4 June 2019, for the oath or affirmation ceremony outlined in Articles 108.9 and 224.2 of the Organic Law on the General Electoral System, which was to be held at the seat of the Spanish Parliament on 17 June at 12:00.

The legal representatives of Mr Oriol Junqueras appealed against this decision, invoking the prerogatives and privileges established in Article 9 of the Protocol (number 7) on the privileges and immunities of the European Union.

This was the procedural framework in which the Chamber made a reference for a preliminary ruling in the terms described above. The need to highlight this context is unavoidable. Otherwise, there is a risk of incorrectly focusing the analysis of the consequences that the CJEU judgment entails for the special proceedings that were conducted. Indeed, the significance of this methodological premise was indicated previously in our ruling of 1 July 2019, by means of which we expressed our doubts to the CJEU regarding a balanced interpretation of the purposes of the proceedings, the fundamental rights at stake and the functional privileges arising from the declaration that Mr Junqueras had been elected.

As such, we indicated in section 2.3.3 of Legal Ground 1 that: "...*the initial stage of deliberation is underway. This point in the proceedings places this Court in a privileged position, for the first time, to assess the strength of the "prima facie" case that has underpinned the precautionary measures ordered by the Investigating Judge and confirmed by the Appeal Chamber. The criminal proceedings, therefore, have now reached the final stage, that of deliberation regarding the factual and legal elements that will define the outcome*". We added that "...*the interpretation to which this Court subscribes is the result of our determination not to sacrifice any of the interests and rights that converge in the question that was raised. As such, the temporary limitation of the right of participation of Mr Junqueras, which is of course dependent on the prompt conclusion of special proceedings no. 20907/2017, should be understood as a limitation that is necessary to preserve another constitutionally legitimate purpose which is inherent to a democratic society. The safeguarding of the purposes of the criminal proceedings, which would be irreversibly undermined if the Chamber authorised a temporary licence for Mr Junqueras to travel beyond our borders, determined the denial of the request. (...) In other words, we have not found a viable alternative to provisional custody as a means of safeguarding the purposes of the proceedings. The flight risk (...) led us to conclude that the situation affecting*

the defendant is incompatible with the granting of a temporary licence that would establish an exception to the limitation on freedom of movement that was ordered. We also consider that this sacrifice is proportionate, since the restriction that impacts the exercise of the right of participation in public office is transitory. It is, ultimately, a restriction on freedom of movement that is inherent to the situation of being in custody…"

4. The response of the CJEU selects a broad interpretation of immunity when travelling that protects MEPs from the moment they are elected. It clarifies that, even on those occasions when the elected candidate is subjected to a precautionary measure of preventive custody, the measure must be lifted. However, an exception is made to this general rule on those occasions when the competent national court considers "...*that the measure of provisional custody should be maintained after the individual in question acquired the status of Member of the European Parliament*". In such cases, the urgent duty to process the request for the lifting of immunity "...*as soon as possible*" is imposed on any court that may consider it is appropriate to maintain the precautionary measure.

The novel and complex nature of this ruling was acknowledged by the *Abogacía del Estado* which indicates in its written submissions of 30 December that "...*this procedural immunity had not previously been defined by the Court of Justice. In addition, it hinges on an interpretation that departs from the previous case law of the Court of Justice (e.g.: Judgment of 7 July 2019, Le Pen, EU:C:2005:249, or the Judgment of 30 April 2009, Donnici, EU:C:2009:275) which is difficult to reconcile with the wording of the Electoral Act of 20 September 1976 or with the references to national law in Protocol No.7*".

The Chamber subscribes to this case law laid down by the CJEU. Any situations that may arise in the future, in the same or similar terms, shall

be resolved in accordance with it. Consequently, the principles governing the resolution of any doubt regarding the manner in which to reconcile the convergence between the purposes of the proceedings and the functional rights and privileges of Members of the European Parliament shall be as follows:

a) In general, any individual in preventive custody who acquires the status of MEP - and they acquire it from the moment they are declared elected - must be released to complete the formalities following said designation.

b) In exceptional circumstances, the precautionary measure of provisional custody may be maintained provided the court considers it necessary. The request must be processed urgently - *as soon as possible* - to give the European Parliament an opportunity to adopt a decision on the waiver of the immunity that protects every elected MEP.

The Chamber considers that, in line with the terms previously suggested in section c) of our request for a preliminary ruling and in view of the response of the CJEU, the decision to keep an elected MEP in custody can only be the exceptional outcome of assessment and weighting in which the court balances the purposes of the proceedings, the rights of freedom and political participation of the individual affected by a precautionary measure and, in particular, the functional privileges that are necessary for the proper conduct of the activity of the European Parliament. The maintenance of preventive custody can only be justified in exceptional circumstances by the seriousness of the attributed acts and the continuing existence of an obvious risk of flight and reoffending. It will require from the court, in addition to an assessment that is consistent with the principle of proportionality, maximum urgency in processing the request.

5. This case law of the CJEU - accepted now in its wording, in its spirit and in its entirety - should be applied to resolve the procedural consequences that it may entail for the situation of Mr Junqueras.

The combined set of paragraphs 93 and 30 of the CJEU judgment endorses the conclusion that it corresponds to this Chamber to clarify the effects - whether direct or indirect - that the response to the request for a preliminary ruling must entail. This does not lessen the importance of the decision of the CJEU. Indeed, this was expressed by the Chamber in document of 14 October 2019, in which we informed the Court that the request for a preliminary ruling, despite the fact the judgment was final, was still valid and of interest, given that the response to the questions raised in the ruling making the reference would be effective, regardless of the situation of provisional custody or of a convicted individual that may affect Mr Junqueras (paragraphs 41 and 42). The above, logically, in accordance with the scope of the immunity arrangement arising from the response of the Court.

Our decision, as is to be expected, must be worded *"... in compliance with EU law and, in particular, the principle of sincere cooperation enshrined in Article 4(3)(1) TEU (...)"*. It must also take into account *"... in this context (...) the statements in paragraphs 64, 65, 76 and 82 to 86 of this judgment"*.

5.1. From this perspective, it is clear that replacing the precautionary measure of preventive custody affecting Mr Junqueras with a prison sentence imposed in a final judgment entails highly significant effects that cannot be overlooked when examining the consequences of the CJEU ruling.

In view of the response provided by the CJEU, his acquisition of the status of Member of the European Parliament was not conditional on the completion of formalities with the *Junta Electoral Central*, but rather on the

actual act of being declared elected. Mr Junqueras would have acquired the status of MEP, without the need to travel to complete bureaucratic formalities, from 13 June 2019, the date on which his status of elected candidate was recognised. However, the current situation of the appellant is not that of an individual in preventive custody, but that of a convicted prisoner who, solely by virtue thereof, is covered by a supervening ground for non-eligibility. Indeed, Article 6 of the Organic Law on the General Electoral System declares "*individuals sentenced in a final judgment to imprisonment, for the duration of the sentence*" ineligible. And Article 211 of the same law establishes that "*the grounds for non-eligibility for Members of the European Parliament are also grounds for incompatibility*".

The moment Mr Junqueras was sentenced to a prison term of 13 years, he became ineligible, by operation of law. And that legal obstacle to exercising the right of representation entails being covered by a ground for incompatibility that excludes him from the European Parliament. This is expressed in Article 7(3) of the Act concerning the election of the members of the European Parliament by direct universal suffrage, which states that "*...each Member State may, in the circumstances provided for in Article 8, extend rules at national level relating to incompatibility*".

No information of interest is added, despite being emphatically highlighted by the representatives of the convicted individual and the *Abogacía del Estado*, by the fact that this Chamber ordered the suspension of the enforcement of the sentence of absolute disqualification imposed in our sentence. The status of non-eligibility of Mr Junqueras is not linked to the sentence of disqualification, but rather to the prison term of 13 years that was imposed on him. In addition, the suspension of the sentence of disqualification, until the request for a preliminary ruling is resolved, is another example of sincere cooperation with the Court of Justice which was to respond to our request for a preliminary ruling. We stated in our ruling of

14 October 2019 that, "...*as regards the sentence of disqualification, it may be conditioned by the reflex effect, if applicable, of the resolution of the pending appeal in the personal situation dossier against the ruling of 14 May 2019. Since this sentence is formed of a part involving the loss of rights that is not capable of suspension and a limitation on the temporal scope of the exercise thereof, the Chamber orders that enforcement be postponed until the appeal is resolved".* Nothing that is said here provides arguments to contend that enforcement of the custodial sentence, the determining cause of the supervening incompatibility, would fail to produce the legally prescribed effect. It is obvious that the enforcement of the sentence of disqualification and, above all, the calculation of the sentence could be conditioned by the response provided by the CJEU. It is barely tenable to argue - as the *Abogacía del Estado* does - that this statement contains an acknowledgment by the Chamber that Mr Junqueras enjoyed immunity of some kind: *"...as such, that Chamber has already accepted that, without regard to the finality and full validity of the sentence, Mr Junqueras may continue to have immunity of some kind in the terms that the Court of Justice of the European Union may accord to him".* The Chamber cannot accept that which the law does not allow to be accepted.

In our document of 14 October 2019, sent by this Chamber to the President of the Court of Justice of the European Union, we indicated that "...*the preliminary ruling was still valid and of interest, given that it would be effective, regardless of the situation of provisional custody or of a convicted individual that may affect Mr Junqueras Vies*". The content of this official communication leads the *Abogacía del Estado* to contend that the Chamber "...*accepted that the questions that were raised about the immunity of Mr Junqueras were effective even after he had acquired the status of convicted individual*". Indeed, but on the basis of the responses of the CJEU, defining the scope and content of immunity when travelling, no obstacle prevented issuing a judgment - final in this instance - or enforcing the decisions, despite

the fact that we have waited prudently before giving effect to the sentence of disqualification.

The manifestation of our interest in resolving the question referred for a preliminary ruling and our assertion that it continued to be valid cannot be explained - as the *Abogacía del Estado* appears to suggest - by an implicit prior acceptance that the effectiveness of the immunity would be extended, even in a scenario in which Mr Junqueras was by that point serving a sentence imposed in a final judgment. What we wished to underline at that time was the importance of a response from the CJEU to a question that has not been raised thus far, whose usefulness was abundantly clear, regardless of the provisional nature of the custody to which the concerned party was subjected. The issue, in short, was to establish the scope of the immunity - if it was accorded to him - and whether said accordance limited, to any degree, our ruling, which entailed the loss of Mr Junqueras' status of MEP. And until the CJEU ruled, we could not determine the final outline thereof, which had to be defined in the preliminary ruling.

In short, said supervening incompatibility will trigger the replacement of the MEP covered by the ground for incompatibility. The replacement mechanism is outlined in Article 13, according to which, "*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*" (paragraph 1). And subject to the other provisions of the Act, "*each Member State shall lay down appropriate procedures for filling any seat which falls vacant during the five-year term of office referred to in Article 5 for the remainder of that period*" (paragraph 2).

Paragraph 3 of the Act, which is of particular interpretative value, states "*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". In addition, Article 4(4)(2) of the Regulations of the European Parliament sets out that "*where the competent authorities of the Member States notify the President of the end of the term of office of a Member of the European Parliament as a result either of an additional incompatibility established by the law of that Member State in accordance with Article 7(3) of the Act of 20 September 1976 or of the withdrawal of the Member's mandate pursuant to Article 13(3) of that Act, the President shall inform Parliament that the term of office of that Member ended on the date communicated by competent authorities of the Member State. Where no such date is communicated, the date of the end of the term of office shall be the date of the notification by that Member State*".

5.2. The case law of the Constitutional Court (Constitutional Court Judgment 144/1999, 22 July), in the context of the appeal for constitutional protection lodged by an individual who was declared ineligible in consequence of a judgment issued by a High Court of Justice, which imposed a custodial sentence on the appellant, which was suspended, states that "*...the grounds that can trigger the non-eligibility of an electoral candidate are not solely those outlined in Article 6 of the Organic Law on the General Electoral System, but also those derived from legislation, such as the Penal Code, the Civil Code or, in the case of regional elections, Statutes of Autonomy and other Regional Laws, which govern certain aspects of the legal capacity to be an elector, such as age, administrative area or region or the legal capacity to act or the grounds for the loss, suspension or denial concerned (in particular, sentences ordering disqualification from the right to take part in elections or disqualification from public office, Constitutional Court Judgments 80/1987, 158/1991, 7/1992, 166/1993), which restrict the possibility of holding the right to be a candidate, which falls under Article 23.2 of the Spanish Constitution, and which, insofar as they are not grounds for*

non-eligibility in a technical and strict sense, are not affected by the reserva material de Ley [assignation of the regulation of certain matters exclusively to Acts of Parliament] established by Article 70.1 of the Spanish Constitution.

Strictly speaking, if any of these grounds limiting the quality of being an elector are present, what is being addressed is not a ground for non-eligibility of the type that can be asserted as an incompatibility after the elected candidates have been declared (Articles 155, 178, 203 and 211 of the Organic Law on the General Electoral System), but rather a pure and simple lack of legal capacity to be a candidate and, as such, the recipient of the will of the body of voters in the exercise of their franchise. It is for this reason that, in these cases, the fundamental right of the subject covered by one of these grounds to access an elected public office would only be infringed if they are applied in violation of the principle of equality or contrary to the provisions of the relevant legal rule.

The Constitutional Court adds, in Legal Ground 6: "*...for this reason, the claim that Juntas Electorales [electoral commissions] have no authority to declare non-eligibility is completely unfounded, since, strictly speaking, it was not declared by them, but by the final legal ruling. The Judgment of the High Court of Justice is the legal act that establishes said electoral disqualification*".

In compliance with this legal obligation, this Chamber is required - and this is ordered in the operative provisions of this ruling - to notify the *Junta Electoral Central* and the European Parliament of the existence of a supervening ground for incompatibility for them to carry forward, within the impregnable sphere of their respective powers, the legal consequences arising from it. The Chamber is aware that, at the time this ruling was issued, the *Junta Electoral* declared the annulment due to supervening

circumstances of Mr Junqueras' parliamentary seat, in a ruling dated 3 January 2020, in the context of case number 561/79.

5.3 The arguments of the *Abogacía del Estado* and the defence counsel of Mr Junqueras defend the need, in view of the ruling of the CJEU, for the Chamber to submit a request for waiver of immunity to the European Parliament.

They are mistaken.

The *Inter-Parliamentary Union* - an institution whose aims include the strengthening of parliamentary institutions - in a publication dedicated to a comparative analysis of the parliamentary mandate, distinguishes between the inviolability of members of Parliament in respect of the opinions expressed or votes cast by them in the performance of their duties and what is referred to as immunity. But, in addition, it differentiates between several trends in immunity which it classifies as follows: 1. Countries in which ordinary law is deemed sufficient to protect all members of society, including parliamentarians, or which take the view that inviolability cannot be allowed to obstruct the course of criminal justice; 2. Countries that provide special protection, where, in turn, two systems can be distinguished: a) a formal prohibition against arresting them on the way to or from parliament or within its precinct - this is the category of immunity that we are considering here; b) a prohibition against all cases of arrest or prosecution without the express authorisation of the assembly to which a parliamentarian belongs.

Such an interpretation of Article 9(2) of the Protocol on Immunities provides parliamentarians with an effective tool for the performance of their tasks, while facilitating respect, in compliance with paragraph one, for the diversity of national regulations.

5.3.1. As such, a request in the form of a petition for him to be tried is not appropriate, once a judgment is issued which, as we have just indicated, pursuant to the case law of the Constitutional Court, is constitutive as regards the effect of annulment of the mandate that Mr Junqueras had received from the electorate. Likewise, it was not appropriate at the point at which, when the proceedings were in the final stage and pending judgment, he was elected as a Member of the national Parliament. The reasons that we advanced in our ruling of 14 May 2019, in response to the same request in the form of a petition, addressed in that case to the Spanish Parliament, now assume their full significance. We refer the reader to the reasons set out there.

Likewise it is not now appropriate, after the issuing of CJEU judgment, to submit a request in the form of a petition to the European Parliament, improperly attributing to the waiver of immunity the effects of a condition of admissibility in order to continue the trial. When Mr Junqueras was declared elected in a decision adopted on 13 June 2019, the criminal proceedings affecting him had concluded and this Chamber had begun the deliberation process.

In Spanish law, the limits of the scope of immunity are defined by regulatory and case law. It does not enter into consideration in the enforcement stage or in the appeal stage or, in general, after the opening of the oral trial. A ruling was issued in these proceedings indicating the legislation and purposes that underpin this dimension of immunity, which, moreover, is not an exotic rarity in the landscape of comparative law. As such, we must continue to assert, as we have thus far, that the defendant Mr Junqueras, insofar as he acquired the status of MEP - which we accept in line with the CJEU judgment - when the proceedings were already at the oral trial stage - indeed, during the final part of the trial - has never been able to rely on that aspect of immunity to impede the conduct of his trial. Not when

he acquired the status of Member of Spanish Parliament or when he was elected MEP; or when the CJEU recognised his status as such, even though he had not met some of the requirements.

If the oral trial has already been opened when the elected candidate acquires said status, it is obvious that the rationale for immunity as a condition affecting legal proceedings is degraded. This rationale is none other than protecting the institution of parliament from initiatives intended to prevent it from operating freely. Which logically cannot happen if the decision to proceed with the conduct of legal proceedings is adopted before the Members of Parliament are elected.

In short, individuals who take part in an electoral process when they are in the process of being tried, even if they are ultimately elected, do not enjoy immunity under national law. It cannot condition the outcome of the proceedings, let alone the issuing of the judgment. In view of the above, in accordance with Article 9(a) of the Protocol on Immunities, the authorisation of the Parliament was not and is not necessary.

The defence counsel of Mr Junqueras requests annulment of the proceedings from 12 June 2019 onwards; specifically, of the judgment issued by this Chamber on 14 October of the same year. This request - the legitimacy of which is not questioned - aspires to produce an effect that is supported solely by the intensity of the optimistic will with which it was submitted. And it is the case that the written submissions reveal a striking confusion between parliamentary immunity and what might enter into consideration as a judicial exemption. This misconception undermines all the arguments and conclusions that the defence obtains from the judgment issued by the CJEU. Mr Junqueras does not enjoy any kind of jurisdictional exemption that may be raised as an obstacle to prevent his trial.

In opposition to the nature of immunity, that of a mere condition of admissibility, an exemption - inherent to the privilege of inviolability - can only be declared by the court, in accordance with the principle of exclusive jurisdiction (Article 117 of the Constitution) after, it must be said, the condition of admissibility has been met.

It should be noted, in view of the reiterated claim of violation of the right of freedom and political representation of Mr Junqueras, that there are no grounds for annulment that have the capacity to invalidate the procedural acts that were held from the initiation of the oral trial, which took place on 12 February 2019, until its conclusion, which occurred on 12 June of the same year. Mr Junqueras, in accordance with the case law of the CJEU, acquired the status of MEP on the same day that he was declared elected, which occurred on 13 June 2019, a decision that was published in the Official State Gazette the day after it was adopted. If on that day the procedural activity conducted during the four months of the oral trial had already finished, it is difficult to see what invalidating effect the supervening acquisition of the status of MEP would have had. As such, the CJEU ruling did not affect his status of formally accused or defendant or, subsequently, that of convicted individual, because these situations occurred in succession within the framework of the main dossier on which the CJEU does not rule, but rather it defers to the Second Chamber to decide whether its own interpretation of Article 9 of the Protocol (No. 7) has any impact on the main proceedings.

Even though he was a Member of the European Parliament, Mr Junqueras did not enjoy immunity from jurisdiction. Solely immunity when travelling in the terms that were established by the Court of Justice. But that arrangement - it is important to emphasise - in no way discharged this Chamber from its duty to issue a judgment, whether the defendant was free or, as was the case, he was in a situation of provisional custody.

The defence focuses its request for annulment on the judgment of 14 October 2019, which was issued when Mr Junqueras had already acquired the status of elected MEP. But this argument, which reiterates the need to activate a request, proposes a new interpretation of the principle of *res judicata*, to the point that the inalterability of the decision would now not only be rescindable via an appeal for review [recurso de revisión], but also by means of a public vote which would be conferred with the power to invalidate, out of hand, the ruling of a court. If examined closely, the line of argument of the defence, when it asserts that the European Parliament has the "*...exclusive power (...) to authorise the conduct of any criminal proceeding",* intends to resuscitate an updated version of the historical *"provocatio ad populum",* with the capacity to condition the enforcement of a final ruling of a court of law. This nostalgic view is contrary to the principles that define any democratic society and therefore must be rejected outright.

The inalterability of the *res judicata* is not, of course, a mere formal statement by means of which this Chamber rejects the request that is put forward here. Its value as a precondition of legal certainty was also highlighted by the CJEU, which declared that EU law does not require a national court to stop applying domestic procedural rules that confer authority of *res judicata* on a ruling, even though this would allow a violation of EU law to be remedied by the decision in question (see, in this regard, the judgment of 1 June 1999, Eco Swiss, C-126/97, Remedy p. I-3055, paragraphs 46 and 47 and the more recent judgment 16 March 2006, C-234/04, paragraph 21).

5.3.2. The ruling of the CJEU, after it indicates the difference between the content of paragraphs one and two of Article 9 of the Protocol, in terms of temporal scope, establishes - section 85 - that the privilege outlined in the second paragraph covers MEPs while they are travelling to and from the place of meeting of the European Parliament from the moment they are elected. And that individuals who have been elected Members of the

European Parliament must be allowed to complete the necessary formalities to take office (paragraph 86).

Undoubtedly, this does not preclude the elected MEP from being in a situation of provisional custody, as the CJEU ruling admits, notwithstanding that, in such a case, if the individual concerned continued in said situation it would be necessary to request the waiver of the immunity by the Parliament, which should be sought as soon as possible.

The petition to request the waiver of immunity when travelling would have been possible previously, if futile, because prior to the CJEU ruling, the European Parliament itself, through its President - both the current incumbent and his predecessor - did not accept individuals were not included in the list published by the national authority as members of the Chamber. All the above in accordance with the then prevailing interpretation of Article 12 of the Act. Until that addition, therefore, the power corresponded to the national bodies. The lack of precedents associated with the interpretation that has now been laid down, due to the fact that it is new and has not been widely accepted - either by the European Parliament or by the CJEU itself when ruling on interim measures in actions for annulment of decisions adopted by Parliament - counselled making the reference for a preliminary ruling from the time it was so requested by the defence of Mr Junqueras.

Now we know the responses of the CJEU. But at this time it is not appropriate to activate the request to maintain the *obstacle to travelling* that the custody of Mr Junqueras represents. There is now a final judgment, for the issuing of which no impediment existed. For the delivery thereof, there was no obstacle to the determination of the scope of the immunity accorded when travelling. All the above leads to the mandatory enforcement, without any impediments, of the final ruling that entails the loss of the status of Member of the European Parliament. It serves no purpose, therefore, to

submit the request to allow him to go to obtain accreditation as an MEP and attend the sessions of the Chamber. There is now a final ruling denying him the elected position of MEP. His mandate is null and has been declared so by the *Junta Electoral Central*.

5.4. Pending the preliminary ruling requested in our ruling of 1 July 2019, included, as required, in Mr Junqueras' personal situation dossier, this Chamber issued a judgment dated 14 October 2019. In it we imposed on the accused, inter alia, a sentence of absolute disqualification for a period of 13 years. After enforcement proceedings were initiated, we suspended enforcement of said sentence - but not the custodial sentence - to safeguard, if appropriate, the potential effects of a response from the CJEU that might counsel delaying or suspending the calculation of the sentence with regard to said disqualification.

We did not know what answer would be provided regarding the content or scope of the immunity referred to in Article 9(2) of the Protocol on Immunities. Likewise, we did not know whether, in response to the third question we had raised for a preliminary ruling, we would have to lift the imposition of provisional custody on Mr Junqueras in absolute terms or whether, on the contrary, the material content of the immunity was compatible with an assessment and weighting on the part of this Chamber that might justify the maintenance of custody. In short, we did not know how the consequences that might be established by the rulings were to be materialised.

The response of the CJEU to our request declared that Mr Junqueras enjoyed immunity, the immunity outlined in Article 9(2) of the Protocol on Immunities which is limited, in accordance with the exact wording thereof, to the capacity of Members to *travel to and from* the place of meeting of the European Parliament. It is an immunity that is shaped autonomously, as its

own conceptual kind of immunity that is not derived from or related to other specific immunity arrangements relating to national law. The above, despite the inferred connection discerned by the Advocate General in his conclusions (paragraph 87). In short, as the comparative study by the Inter-Parliamentary Union - whose aims include the strengthening of parliamentary institutions - indicates, it represents a "*very rigorous*" interpretation "*of the concept of immunity, restricting its impact to the minimum*".

As such, the institution of immunity has been endowed with an effectiveness that promotes performance of the tasks of MEPs, without imposing a broad interpretation of a rule (Article 9(1)) of a Protocol (number 7) of the Treaty on the Functioning of the Union, which would therefore be contrary to the criteria of the Venice Commission which, in its significant Report on the scope and lifting of parliamentary immunities - adopted by the Commission at its 98th Plenary session (Venice, 21-22 March 2014, sections 185 and 187 of report 714/2013, CDL-AD (2014) 011) - was in favour of establishing limits and conditions to facilitate lifting immunity. The alternative would have meant proposing an interpretation that would hardly be compatible with the content of the rule itself, which, as part of a Protocol, has the same value as the Treaty itself.

5.5. As such, we considered that there was no impediment to issuing a judgment on the main dossier, which was delivered on 14 October 2019.

On 12 June 2019 - one day before Mr Junqueras was declared elected as a Member of Parliament and two days before the decision was published in the Official State Gazette, after four months of intense presentation of evidence and the arguments of the prosecutions and the defences in support of their respective thesis, the trial entered the "*deliberation stage*". There is no possible manner to conclude the proceedings other than by issuing the corresponding judgment (cf. Articles

741 and .742 of the Law of Criminal Procedure). The fact that there were other co-defendants in provisional custody and it was impossible to divide the subject matter of the proceedings, the inseparability of which had been highlighted in several rulings, counselled that the issuing of the judgment should not be postponed.

The text of Article 9(1) of the Protocol on Immunities of the Treaty on the Functioning of the European Union refers to national law and we indicated above that all the immunities accorded to Members of the Spanish Parliament refer exclusively to stages in the proceedings before the opening of the oral trial. After the intermediate stage of the proceedings had concluded and once the trial stage had been initiated, he would not be entitled to any immunity as a Member of the national Parliament. This is stipulated in Article 71 of the Spanish Constitution and rules of a lower rank, Articles 750 to 756 of the Law of Criminal Procedure (Title I, Book IV), Articles 5 to 9 of the Law of 9 February 1912, Article 11 of the Regulations of Congress and Article 22.1.2 of the Regulations of the Senate.

And we ruled thus in the ruling of 14 May 2019, in tune with settled case law that asserts the non-existence of immunity and the consequent absence of any need to request that it be lifted when the formal accusation stage has concluded, as occurs when a cassation appeal is pending in respect of the proceedings (cf. Judgment of the Second Chamber of the Supreme Court, 1952/2000 of 19 December, remedy 2103/2000) or the proceedings are at the enforcement stage (cf. Judgment of the Second Chamber of the Supreme Court, 54/2008 of 8 April, remedy 408/2007).

The nature of the offence that had been under investigation and prosecution provided further reasons for the need to issue the ruling that would bring the proceedings to a close. In the judgment that answered the question referred for a preliminary ruling by this Chamber - section 84 - the

CJEU includes a citation of the jurisprudence of the ECHR referring to the guarantees offered by parliamentary immunity in its two aspects, inviolability and immunity. They are intended to ensure the independence of Parliament in the performance of its tasks (Judgment of 17 May 2016, *Karácsony and others v. Hungary*, § 138). Likewise, in the judgment of 20 December 2016 - *Uspaskich v. Lithuania* - the ECHR reiterates the previous citation from the *Karácsony* case (§ 98) and warns - given that the claimant had stood in elections that accorded him consecutive immunities - that when corruption offences are prosecuted, States are encouraged to limit immunity to the degree necessary in a democratic society, in a direct and explicit reference to the sixth principle of Resolution (97) 24 of the Council of Ministers of the Council of Europe of 6 November 1997 on guiding principles for the fight against corruption: limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society.

It should be borne in mind that a corruption offence was tried in the special proceedings that are the focus of our attention - misappropriation of public funds [malversación de caudales públicos] with concealment of expenditure, perpetrated under the cover of the Government of the Generalitat of Catalonia, in various continuous concealment manoeuvres. The intention thereby was to facilitate the preparation and holding of a referendum, which was envisaged as part of a set of legal measures adopted by a parliamentary body without constitutional authority and in outright hostility to the rulings of the Constitutional Court and the orders to enforce them, issued by a body that was democratically entitled to do so (cf. opinion of the Venice Commission, report no. 827/2015, CDL-REF (2016) 034). Decisions that were adopted with disdain for the right of parliamentary representation of a significant number of Members of the Catalan Parliament, who comprised almost half of those in the chamber (cf. ECHR decision *María Carmen Forcadell I Lluis and others v. Spain*, of 28 May 2019, application no.

75147/17). The intention was, in short, to facilitate the holding of a referendum that entailed an effective displacement of laws - including the Constitution and the Statute of Autonomy of Catalonia - and was presented to the public as the requirement to automatically trigger the proclamation of an Independent Republic of Catalonia. All the above in the context of the mass mobilisation of a sector of the population over which Mr Junqueras and other co-defendants had substantiated influence, thereby preventing the prohibition against the referendum ordered by the High Court of Justice and the Constitutional Court from taking effect.

5.6. The same lack of viability can be attributed to the request for release that is submitted by the defence counsel of Mr Junqueras and, implicitly, by the *Abogacía del Estado*, which suggests consulting the European Parliament to ensure a balance between "*...the freedom of movement that the exercise of the accorded immunities may require*" and neutralisation of the flight risk, and to attain compliance with the judgment that has already been issued. Several reasons dispute this assertion.

Firstly, Mr Junqueras is not subjected to a precautionary measure of custody, but is rather serving a sentence imposed in a final judgment, the validity and effectiveness of which have not been neutralised. The argument of the *Abogacía del Estado* collapses when, after acknowledging the inviolability of the judgment issued by this Chamber, it suggests that the Chamber should waive enforcement of the prison sentence and *negotiate* with the European Parliament the terms of the freedom of movement to which Mr Junqueras could be entitled.

Secondly, because even if the reasoning of the defence is carried to its logical conclusion and if we dispense with Mr Junqueras' status of convicted individual, the CJEU judgment itself does not establish an automatic mechanism to release an elected candidate who is in preventive

custody, but rather it leaves in the hands of the national court the possibility of maintaining the measure, provided that the waiver of immunity is activated as quickly as possible. Even if we continue the hypothetical reasoning, disregarding the sentence that has already been imposed in a final judgment, it is important not to forget the exemptions established by the judgment issued by the CJEU, which states that maintenance of preventive custody and the request in the form of a petition are perfectly compatible, provided that no time is lost and it is submitted urgently. This idea of compatibility is not support by the defence, which contends that the word "*after*", which is used by the CJEU in conclusion two, requires that any detainee must be released immediately and authorised to travel to Brussels. This Chamber could only re-activate the rescinded precautionary measure if the waiver of immunity was not authorised. But that would entail accepting as unexceptional that any individual convicted of particularly serious offences would obtain an unwonted opportunity to evade their prison sentence at the precise moment at which their status of elected candidate was declared.

5.7. In addition, the request from the *Abogacía del Estado* is in any event conditional on the *Junta Electoral Central* not annulling Mr Junqueras' mandate ("*provided the mandate is not annulled in accordance with Article 13 of the Electoral Act*"). The case is that this annulment has already occurred, as a result of the order of 3 January 2020. This decision is merely a consequence of the mandatory effect associated with the conviction of Mr Junqueras, who, by operation of law, was covered by the ground for non-eligibility under national law - Articles 210 bis, in relation to 6.2 a) and b) of Organic Law 5/1985 of 19 June on the General Electoral System - which determines a supervening ground for incompatibility - Article 211.1 of the aforementioned Organic Law 5/1985. This circumstance would entail the annulment of the mandate within the meaning of Article 13 of the 1976 Act.

All the arguments advanced by the *Abogacía del Estado* to justify the *monitored* or *supervised* release of Mr Junqueras - in an unwonted and atypical coordination of functions between this Chamber and the European Parliament - are subordinate to the *Junta Electoral Central* not annulling his designation as a result of the sentence of 13 years of imprisonment and disqualification imposed in these proceedings. However, that resolution has already been adopted and notified to this Chamber and to the European Parliament, producing the effects thereof. It is also a decision whose effects derive directly, not from its debatable constitutive nature, but from what is laid down by law in the aforementioned provisions. The annulment of the mandate is not a consequence of the decision of the *Junta Electoral Central*. Its role is to declare that effect via the corresponding resolution. But it is the effect of a custodial sentence that makes the prisoner, by operation of law, incompatible for the performance of parliamentary duties. The resolution of 3 January does not pre-empt what this Chamber should have found. On the contrary, the requisite that determines the incompatibility is to be found in our judgment issued on 14 October 2017. The sentence to a term of 13 years in prison provided all the elements that are required for the annulment of Mr Junqueras' mandate, although the resolution ordering annulment was meaningless at that time, insofar as the *Junta Electoral Central* had declared the defendant's seat vacant. Only subsequently, after the new criterion of the CJEU that attributes the status of MEP to Mr Junqueras was announced, has a specific resolution of annulment made full sense, when the supervening custodial sentence entered into consideration as grounds for termination.

OPERATIVE PROVISIONS

THE CHAMBER ORDERS:

1. There are no grounds to authorise Mr Junqueras to travel to the seat of the European Parliament.

2. There are no grounds to order his release.

3. There are no grounds to set aside the judgment issued by this Chamber on 14 October 2019;

4. There are no grounds to process the request to the European Parliament.

5. Make a record in the enforcement dossier in order to rule there on the lifting of the suspension of the sentence of 13 years of disqualification imposed on the convicted individual. Perform the calculation of the sentence.

Notify this ruling to the *Junta Electoral Central* and the European Parliament for all pertinent legal purposes.

Thus is it ordered, issued and signed by the Honourable Judges indicated herein.

Manuel Marchena Gómez Andrés Martínez Arrieta Juan Ramón Berdugo Gómez de la Torre

Luciano Varela Castro Antonio del Moral García Andrés Palomo del Arco

Ana María Ferrer García