



RESEARCH NOTE

OF THE RESEARCH AND DOCUMENTATION DIRECTORATE

Preconditions for taking office as a Member of the European Parliament laid down in national electoral regulations

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Subject: Preconditions for taking office as a Member of the European Parliament
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OVERVIEW

INTRODUCTION

1. The Research and Documentation Directorate (RDD) has been asked to prepare a research note on preconditions for taking office as a Member of the European Parliament laid down in national electoral regulations.
2. It is important to note at the outset that it follows from Article 223 of the FEU Treaty and the provisions of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, as amended ¹, that European electoral law is based on a sharing of competences between the European Union, acting through the European Parliament, and the Member States. The 1976 Electoral Act sets out the principles common to all Member States ², while the electoral procedure remains governed in each Member State by its national provisions ³.
3. It is also important to distinguish between the status of Member of the European Parliament and the term of office of a Member of the European Parliament, which is the principal attribute of that status. In this connection, the Court has had occasion to hold that, while the acquisition of the status of Member of the European Parliament occurs because of and at the time of the official declaration of the election results carried out by the Member States ⁴, actually taking office as a Member of the European Parliament, which necessarily occurs after the status of MEP has been acquired, may be subject to the completion of 'certain requirements [or formalities] under national law', subsequently to the official declaration ⁵.
4. The aim of this research note is thus to determine the existence of such preconditions and, where appropriate, to describe them exhaustively. These conditions are ones which, in theory, must be satisfied after the status of Member of the European Parliament has been acquired.
5. In order to prepare this note, an initial review of 23 national legal systems ⁶ was carried out. This revealed that preconditions for taking office as a Member of the European Parliament exist in the electoral regulations of only five Member States, namely **Germany, Spain, Italy, Netherlands and Poland**.
6. On reviewing the electoral regulations of these five Member States, we came across a varied range of conditions and requirements that must be satisfied before an individual takes office as a Member of the European Parliament. These preconditions may be grouped into three categories,

¹ Act concerning the election of the Members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/EEC, Euratom of 20 September 1976 ([OJ 1976 L 278, p. 1](#)), as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 ([OJ 2002 L 283, p. 1](#)) ('the Electoral Act').

² European Union elections must be based on proportional representation, using the list system or the single transferable vote. Another common rule is that the Member States may set a minimum threshold for the allocation of seats, which may not exceed 5% of the votes cast, or the rule that they may specify electoral constituencies. Lastly, the rules list a number of incompatibilities with the mandate of Member of the European Parliament.

³ The first paragraph of Article 8 of the Electoral Act.

⁴ Judgment of 19 December 2019, *Junqueras Vies*, (C-502/19, [EU:C:2019:1115](#), paragraphs 71 and 74).

⁵ Judgment of 19 December 2019, *Junqueras Vies*, (C-502/19, [EU:C:2019:1115](#), paragraph 87).

⁶ The 23 legal systems reviewed were those of **Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovakia, Spain** and **Sweden**.

namely a requirement of a solemn nature, such as the swearing of an oath to the Constitution (**part I**), requirements requiring a declaration (**part II**) and review and verification procedures, carried out by a special body, covering conditions of eligibility and the rules on incompatibilities, subsequent to the official declaration of the results of elections to the European Parliament (**part III**). In addition, for comparison purposes, mention will be made of certain preconditions for taking office as a Member of a national Parliament.

7. Summary tables are annexed to this overview which set out in detail, for each of the five Member States, the preconditions for taking office as a Member of the European Parliament identified in their electoral regulations.

I. REQUIREMENT OF A SOLEMN NATURE: THE SWEARING OF AN OATH

8. In the majority of Member States considered, a requirement of a solemn nature, such as the swearing of an oath to the Constitution, must be satisfied before an individual may take office as a Member of the national Parliament (part A). However, only one Member State lays down this requirement both for Members of its national Parliament and for Members of the European Parliament (part B).

A. THE SWEARING OF AN OATH AS A PRECONDITION OF TAKING OFFICE AS A MEMBER OF THE NATIONAL PARLIAMENT

9. A **majority of the Member States** lay down an obligation, in order to be able to take office as a Member of the *national* Parliament, to swear an oath to uphold the Constitution or to swear an oath of loyalty to the State, the Republic or the monarch at the opening session of the newly elected national Parliament (**Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, Greece, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovakia, and Spain**).
10. A **minority of the Member States** do not provide for this type of solemn requirement. In these Member States, the term of office commences, in principle, after the official declaration of the election results, at the opening of the first session of the newly elected Parliament (**Finland, France, Germany, Ireland, Italy and Sweden**).

B. THE SWEARING OF AN OATH AS A PRECONDITION OF TAKING OFFICE AS A MEMBER OF THE NATIONAL PARLIAMENT OR AS A MEMBER OF THE EUROPEAN PARLIAMENT

11. Our research has shown that only **Spain** lays down in its electoral legislation an obligation to swear an oath or promise to uphold the Constitution both for Members of its national Parliament and for Members of the European Parliament. It is in fact the only condition precedent identified in the electoral regulations of this Member State that governs the taking of office as a Member of the European Parliament.
12. The particular nature of the mandate of a Member of the European Parliament and the constraints inherent in the performance of that mandate most likely explain why the other Member States considered have chosen not to lay down this type of requirement in their electoral regulations for MEPs elected in their territory.

1. HOW THE OATH IS SWORN BY MEMBERS OF THE EUROPEAN PARLIAMENT

13. In Spanish law, Article 224(2) of Basic Law No 5/1985 on the General Electoral System ⁷ (‘the Spanish Electoral Law’) provides: ‘Within *five days* of their being declared the elected candidates, the latter shall take an oath or promise to uphold the Constitution before the Central Electoral Commission. Once that period has elapsed, the Central Electoral Commission shall declare the seats attributed to Members of the European Parliament who have not taken an oath or promised to uphold the Spanish Constitution to be vacant and that all the privileges to which they may be entitled by reason of their office are suspended until such time as that oath or promise has been given.’
14. It appears from that provision that the oath or promise is an act that must be performed in person before the Central Electoral Commission. Failure to discharge that obligation by a Member of the European Parliament (or rather by an ‘elected candidate’, in the terms of Article 224 of the Spanish Electoral Law), even if for reasons beyond his or her control, immediately and automatically results in a declaration that the individual’s seat is vacant, such that his or her name will not appear on the list of elected individuals communicated to the European Parliament. The vacancy of the seat is accompanied by the suspension of all rights and privileges associated with the office of Member of the European Parliament (salary, staff, official car and other benefits) until such time as the oath is taken.
15. The seat is declared vacant for an unspecified period. The elected Member cannot be automatically replaced by another candidate unless he or she resigns and the candidate next on the list of results is able to take the vacant seat. The Member, who will retain the status of elected candidate and parliamentary immunity, may at any time remedy the situation by appearing in person and taking the requisite oath, which will then enable him or her to take office as a Member of the European Parliament.

2. DIFFERENCES WITH RESPECT TO HOW THE OATH IS SWORN BY MEMBERS OF THE NATIONAL PARLIAMENT

16. In Spanish law, the requirement to swear an oath or promise to uphold the Constitution is an obligation, laid down in Article 108(8) of the Spanish Electoral Law, for every elected individual. In so far as concerns individuals elected to the Spanish Parliament, the obligation is laid down in the Rules of Procedure of each chamber of the Parliament. The oath is sworn before the relevant chamber for each Member of the Parliament, in principle, at its first plenary session. It is therefore a procedure internal to the chamber concerned and does not involve any third-party institution.
17. However, by contrast with the period of five days provided for by Article 224(2) of the Spanish Electoral Law for Members of the European Parliament, individuals elected to the Spanish Parliament have *three plenary sessions* in which to discharge the obligation before the penalty of the seat being declared vacant is imposed.
18. It is worth noting that, while that requirement determines whether or not the mandate may actually be carried out, meaning whether or not parliamentary office may be taken, it does not in any way determine the acquisition of the mandate, which arises exclusively from the result of the elections. In its judgment of 21 June 1990, the Tribunal Constitucional (Constitutional Court,

⁷ Ley Orgánica 5/1985, del Régimen Electoral General of 19 June 1985 (BOE No 147 of 20 June 1985, p. 19110).

Spain) held, with regard to the obligation to swear an oath to uphold the Spanish Constitution, that ‘any failure to discharge that obligation does not deprive a person of the status of deputy or senator, because that status is based solely on election by the people, but merely of the exercise of the office inherent in that status’⁸.

II. REQUIREMENTS REQUIRING A DECLARATION

19. Some of the requirements identified, which condition the effective exercise of the mandate of Member of the European Parliament, require a declaration to be made. They concern three types of declaration: a declaration of resignation (part A), a declaration of the choice of a particular post (part B) or a declaration of acceptance of the mandate (part C).

A. DECLARATION OF RESIGNATION

20. In **Germany**, the Members of the European Parliament Act; ‘the EuAbgG’⁹ provides, in essence, that certain public offices, duties and mandates are incompatible with being a Member of the European Parliament¹⁰. Any individual holding such an office or having such duties or mandates, as specified in the Law on European Elections¹¹, becomes a Member of the European Parliament *only if, after having been elected*, he or she resigns from the incompatible office, duties or mandate¹².
21. It is also worth noting that the Members of the European Parliament Act refers, generally, to the concept of ‘Mitgliedschaft im Europäischen Parlament’ (status of Member of the European Parliament) encompassing the main attribute of that status, namely the mandate.
22. According to legal theorists, an elected individual may only obtain the mandate of Member of the European Parliament (MEP) when there is no incompatibility,¹³ and, in Germany, an elected individual may, in principle, choose between the position he or she holds and the office of MEP.

⁸ Judgment 119/1990 of 21 June 1990 (ES:TC:1990:119). See also, the commentary on that judgment: Santaolalla López, F., ‘El juramento y los reglamentos parlamentarios’, *Revista española de derecho constitucional*, No 30/1990, p. 149. According to this author, the fact that the obligation to swear to uphold the Constitution is not a condition of acquiring a parliamentary mandate is ‘something that is commonly accepted and does not warrant further comment’.

⁹ Gesetz über die Rechtsverhältnisse der Mitglieder des Europäischen Parlaments aus der Bundesrepublik Deutschland, Europaabgeordnetengesetz of 6 April 1979 (BGBl. I, p. 413), as amended by the Law of 11 July 2014 (BGBl. I, p. 906).

¹⁰ Paragraph 7 of the EuAbgG, read in conjunction with Paragraph 22(2)(7) to (15) of the Gesetz über die Wahl der Abgeordneten des Europäischen Parlaments aus der Bundesrepublik Deutschland (Europawahlgesetz – EuWG) of 8 March 1994 (BGBl. I, pp. 423, 555, 852), as amended by the Decree of 19 June 2020 (BGBl. I, p. 1328), specifies several cases where the mandate of a Member of the European Parliament is incompatible with other mandates, public offices and duties. For a complete list of these incompatibilities, see the summary table for Germany set out in the annex.

¹¹ Europawahlgesetz – EuWG: see footnote 10 for the full reference to the Law on European Elections.

¹² It seems permissible to interpret Paragraph 7 of the EuAbgG as meaning that the individual concerned is to tender his or her resignation to the body which, in principle, has competence to adopt a decision on the incompatibility in question (and for a complete list of these incompatibilities, see the summary table for Germany set out in the annex), which, in most cases, would appear to be the President of the Bundestag, the European Parliament or the Council of Elders of the Bundestag (Ältestenrat des Deutschen Bundestages). It should be added that the first paragraph of Paragraph 7 of the EuAbgG refers to Paragraph 22(2) points 7 to 15 of the EuWG and also provides for the making of a declaration to the Federal Returning Officer (Bundeswahlleiter) where the person concerned appears on the list of alternates.

¹³ See, in that regard, Bieber R., Haag M., *Europaabgeordnetengesetz*, 2nd edition, 2016, Nomos, Baden-Baden, annotation 4 under Paragraph 7; and Boettcher E., Högner R. (editors), *Europawahlgesetz, Europawahlordnung*, 4th edition, 1994, Verlag Jehle, Munich, annotation 20 under Paragraph 22.

23. For the sake of completeness, it should be observed that the system of incompatibilities applicable to MEPs generally reflects that applicable to Members of the Bundestag (German Federal Parliament).
24. In **Poland**, the rules which apply to Members of the national Parliament are set out in the Electoral Code and apply, *mutatis mutandis*, to Members of the European Parliament in the situations that are not covered by Title VI of the Electoral Code, which concern MEPs specifically.¹⁴
25. As regards the system of incompatibilities, if, on the day of the election (or in the period between the official declaration of the results and the opening of the first session of the newly elected European Parliament), an individual elected to the European Parliament held an office or performed duties or a mandate deemed incompatible under the Electoral Code,¹⁵ his or her mandate as an MEP may be withdrawn. It will be withdrawn if the individual concerned does not present to the Marshal of the Sejm (Lower Chamber of the Polish Parliament) a *declaration of resignation* from the position held or the duties or mandate performed within 14 days of the date of the official declaration of the election results by the National Electoral Commission. Such a declaration therefore constitutes a precondition of taking office as a Member of the European Parliament, because if the requirement is not satisfied, the withdrawal of the mandate of Member of the European Parliament will be declared.
26. For all intents and purposes, it is worth noting that similar grounds of incompatibility also apply to Members of the national Parliament. The same 14-day period applies to the declaration of resignation and the same consequences ensue from failure to satisfy this requirement, namely the mandate of Member of the national Parliament is withdrawn.¹⁶

B. DECLARATION OF THE CHOICE OF A PARTICULAR POST

27. In **Italy**, the Law on the election in Italy of Members of the European Parliament¹⁷ provides that the mandate of Member of the European Parliament may be withdrawn by declaration of the national electoral office, where it is found that that mandate is incompatible with other mandates, posts or institutional duties.¹⁸
28. In the event of an incompatibility provided for in that law, the candidate elected to the European Parliament must, within 30 days of the official proclamation of the results, *declare* to the national electoral office *which post he or she chooses*, failing which the national electoral office will declare the mandate withdrawn, declare the seat vacant and fill it with the candidate next on the same list of results and from the same constituency.¹⁹ If that happens, the elected candidate whose mandate has been declared withdrawn may bring an appeal against the national electoral office's decision before the Court of Appeal in Rome.²⁰

¹⁴ Article 338 of the ustawa Kodeks wyborczy (Law establishing the Electoral Code; 'the Electoral Code').

¹⁵ Article 333 and Article 334(2) of the Electoral Code.

¹⁶ Article 247 of the Electoral Code.

¹⁷ Legge No 18, Elezione dei membri del Parlamento europeo spettanti all'Italia of 24 January 1979, (GURI No 29 of 30 January 1979, p. 947).

¹⁸ Article 6 of the Law on the election in Italy of Members of the European Parliament.

¹⁹ The second and third paragraphs of Article 6 of the Law on the election in Italy of Members of the European Parliament.

²⁰ The fourth paragraph of Article 6 of the Law on the election in Italy of Members of the European Parliament.

29. In addition, in the Italian electoral system, every individual has the right to be a candidate in one or several constituencies. A candidate elected in several constituencies must declare to the national electoral office, within eight days of the official declaration of the results, the constituency for which he or she wishes to opt. For the constituency not chosen, the national electoral office declares elected the candidate whose name is next on the same list.
30. It should further be noted that similar grounds of incompatibility also apply to Members of the national Parliament. These are laid down in the Italian Constitution ²¹ and in various legislative acts. ²² The manner in which the choice of post must be made and the consequences ensuing from a failure to choose are laid down in the Rules of Procedure of the Chamber of Deputies. ²³ The procedure to be followed is, however, different from and more complex than that which applies to Members of the European Parliament. ²⁴

C. DECLARATION OF ACCEPTANCE OF THE MANDATE

31. In the **Netherlands**, the Netherlands Electoral Law, ²⁵ certain provisions of which, relating to the procedure to be followed by Members of the national Parliament, apply, *mutatis mutandis*, to Members of the European Parliament, ²⁶ provides that, by no later than the day after the official declaration of the election results by the Electoral Council, the chairperson of the Electoral Council is to notify elected candidates of their election, either by letter with acknowledgement of receipt or by registered letter. At the same time, the chairperson also gives written notification of the elections to the Tweede Kamer der Staten-Generaal (Lower House of the Netherlands Parliament; 'the Tweede Kamer'), which is the body having competence to determine whether, pursuant to national electoral provisions, the elected individuals may be admitted as Members of the European Parliament.
32. If an elected individual accepts the mandate, he or she must send a signed declaration to the House of Representatives by no later than the tenth day following the date of notification of his or her election. In the event of an appointment to a vacant seat after the first session of the newly elected European Parliament, the signed declaration must be sent to the House of Representatives by no later than 28 days after the date of notification of the appointment.
33. The signed declaration must include written confirmation of all public offices held by the elected individual. Unless he or she was already in office as a Member of the European Parliament, the elected individual must also submit a certified copy of the extract from the register of persons stating the individual's domicile and date and place of birth. Failure to satisfy these requirements within the 10-day period will result in the refusal of the House of Representatives to admit the elected individual as a Member of the European Parliament. In such case, in order to fill the resulting vacancy, the chairperson of the Electoral Council will declare the candidate next on the

²¹ Articles 65, 84, 104, 122 and 135 of the Italian Constitution.

²² Law No 60 of 13 February 1953 on Parliamentary Incompatibilities, or Law No 78 of 27 March 2004, which provides that the mandate of Member of the European Parliament is incompatible with that of Member of the Chamber of Deputies or senator of the Italian Republic.

²³ Regolamento della Giunta delle elezioni (Rules of Procedure of the Electoral Council) of 6 October 1998, published in GURI No 246 of 21 October 1998.

²⁴ For details of the procedure which applies to Members of the national Parliament in cases of incompatibility, see the summary table for Italy set out in the annex.

²⁵ Nederlandse Kieswet, as amended on 25 October 1989, Stb. 1989, No 480, ('the Netherlands Electoral Law').

²⁶ Article Y25(2) of the Netherlands Electoral Law.

list of election results to be elected, and that person will then have to make the same declarations.

34. If the House of Representatives does not receive the declaration of acceptance of the mandate within the 10-day period mentioned, the individual is deemed not to have accepted the mandate. Alternatively, if the elected individual does not accept the mandate, he or she must inform the chairperson of the Electoral Council in writing within 10 days. The Electoral Council will inform the House of Representatives, which will in turn notify the European Parliament of the non-acceptance.
35. In **Poland**, in the event that the mandate of a Member of the European Parliament is withdrawn, the individual's seat will be filled by the candidate next on the same list of election results who has obtained the largest number of votes, provided that he or she submits a *declaration of acceptance of the mandate* within seven days of the Marshal of the Sejm (Lower Chamber of the Polish Parliament) issuing an opinion. In such a situation, this declaration is necessary if the individual wishes to take office as a Member of the European Parliament.

III. REVIEW AND VERIFICATION PROCEDURES CARRIED OUT BY A SPECIAL BODY

36. Review and verification procedures carried out by a special body cover grounds of ineligibility (part A) and grounds of incompatibility (part B) arising or established subsequently to the official declaration of the results of elections to the European Parliament.
 - A. GROUND OF INELIGIBILITY ARISING OR ESTABLISHED AFTER THE OFFICIAL DECLARATION OF ELECTION RESULTS
37. **Four Member States** make provision in their electoral regulations for procedures for the review and verification of grounds of ineligibility arising or established after the official declaration of election results. The most common is a Member's loss of the right to be elected resulting from a final judicial decision.
38. Thus, in **Germany**, the Law on European Elections ²⁷ lists the circumstances which may affect the mandate of an MEP, ²⁸ in particular, during the period between the official declaration of the election results and the opening of the first session of the newly elected European Parliament. Some of these circumstances are also referred to in the Law on Members of the European Parliament, ²⁹ in particular, the incompatibilities which arise from the individual's already holding an office or performing duties or a mandate.
39. Some of these circumstances, including the invalidity of the acquisition of the mandate and the supervening ineligibility of an elected Member, are subject to electoral scrutiny by the Bundestag, after the election results have been declared, but solely if an objection is lodged, inter alia, by a voter. Under the Law on the Scrutiny of Elections, ³⁰ such an objection must, as a general rule, be lodged within two months of the day of the election.

²⁷ Paragraph 22(2) of the EuWG.

²⁸ For a complete list of these incompatibilities, see the summary table for Germany set out in the annex.

²⁹ Paragraph 7 of the EuAbgG.

³⁰ The Wahlprüfungsgesetz, as corrected and published in BGBl. III, item number 111-2, amended by the Decree of 19 June 2020 (BGBl. I, p. 1328). Paragraph 2 of the Law on the Scrutiny of Elections (Wahlprüfungsgesetz), read in conjunction with Paragraph 26(1) and (2) of the EuWG.

40. It is important to note that it is the Ältestenrat des Deutschen Bundestages (Council of Elders of the Bundestag)³¹ that has competence to give decisions regarding the circumstance of ineligibility arising as a result of an individual judicial decision³² and the circumstance of the supervening ineligibility of an elected Member resulting from a final judicial decision.
41. Under the Law on European Elections, the Member must resign from the European Parliament upon being notified of the decision of the Council of Elders of the Bundestag.³³ That law provides that, once the seat becomes vacant, the candidate next on the list of the results of the election may be declared elected.³⁴ It also provides that an application may be made to the Bundestag to challenge the decision of the Council of Elders of the Bundestag, within two weeks of notification of its decision.³⁵ The Bundestag in plenary will then adopt a decision, which will have been prepared by a committee in the context of the electoral scrutiny provided for by law.³⁶ That decision too may be challenged before the Bundesverfassungsgericht (Federal Constitutional Court), within a period of two months.³⁷
42. It is also worth noting that, in Germany, a mandate may also be withdrawn as a result of a decision of the Bundesverfassungsgericht (Federal Constitutional Court) finding the party or group within the party to which the Member belongs to be unconstitutional, or a decision proscribing the political association to which the Member belongs. The Council of Elders of the Bundestag will be bound by such a decision and will note the name of the person concerned. Where a decision finds that a political party is unconstitutional, it will not be possible to appoint the candidate next on the list of the results and the seat of the person to whom the decision of the Council of Elders of the Bundestag is addressed will remain vacant.³⁸
43. Where a decision has been adopted in the context of electoral scrutiny, or by the Council of Elders, the President of the Bundestag must inform the President of the European Parliament of the reason for and the date of the loss of membership of the European Parliament.³⁹
44. In addition, the Law on Federal Elections⁴⁰ provides for similar grounds of ineligibility and for similar review procedures for Members of the Bundestag as those which apply to Members of the European Parliament.⁴¹

³¹ The Council of Elders of the Bundestag (Ältestenrat des Deutschen Bundestages) is a body within the Bundestag provided for by Paragraph 6 of its Rules of Procedure (Geschäftsordnung des Bundestages). The Council of Elders comprises the President of the Bundestag, Vice-Presidents and 23 other Bundestag Members, who are appointed by parliamentary groups.

³² Article 6(1) of Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals ([JO 1993, L 329, p. 34](#)).

³³ The first and second subparagraphs of Paragraph 23(3) of the EuWG.

³⁴ Paragraph 24 of the EuWG.

³⁵ The third subparagraph of Paragraph 23(3) of the EuWG.

³⁶ Paragraphs 3 and 13 of the Law on the Scrutiny of Elections (Wahlprüfungsgesetz).

³⁷ Paragraph 26(3) of the EuWG, read in conjunction with Paragraph 13(3) and Paragraph 48 of the Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht, Bundesverfassungsgerichtsgesetz) of 11 August 1993 (BGBl. I, p. 1473), as amended by the Law of 20 November 2019 (BGBl. I, p. 1724).

³⁸ The second subparagraph of Paragraph 22(4) of the EuWG.

³⁹ Paragraph 23(5) of the EuWG.

⁴⁰ Bundeswahlgesetz of 23 July 1993 (BGBl. I, p. 1288, 1594), as amended by the Law of 3 June 2021 (BGBl. I, p. 1482).

⁴¹ Paragraphs 46 and 47 of the Law on Federal Elections (Bundeswahlgesetz).

45. In **Italy**, the Law on the election in Italy of Members of the European Parliament provides that, after an election, the electoral offices of the various constituencies or, in some cases, the national electoral office must check whether there are any grounds for disqualification from holding office as a Member of the European Parliament. The law provides, in particular, for the possibility of the mandate of the MEP to be declared withdrawn by the national electoral office, on grounds of ineligibility.
46. In 2012, the Italian legislature adopted a law ⁴² delegating power to the government to adopt a legislative decree bringing together in a single legislative act all the provisions relating to the prohibition on standing as a candidate in elections (grounds of ineligibility) to the offices of Member of the European Parliament, Member of the Chamber of Deputies or Senator of the Italian Republic, as well as the provisions relating to the prohibition on the holding of elected or governmental offices. The legislative decree that was adopted ⁴³ provides that any person who has been sentenced to a term of imprisonment of more than two years or who has negotiated a conviction in respect of an offence falling within certain categories of particularly serious crime may not hold office as a Member of Parliament, Senator of the Republic or Member of the European Parliament.
47. In accordance with that legislative decree, when lists of candidates are submitted to the European Parliament, and within the deadline for their admission, they are checked by the constituency electoral office by reference to the declarations of eligibility made by each candidate. ⁴⁴ When a ground of ineligibility arises or is established after the lists are checked, but within the deadline for their admission and before the official declaration of the results, the constituency office or national electoral office will declare that those candidates, the ineligibility of whom has been ascertained, are not to stand. ⁴⁵ If a ground of ineligibility arises or is established after the official declaration of the results, the national electoral office verifies the ground, declares the mandate of the MEP concerned to be withdrawn and immediately informs the Secretariat of the European Parliament. ⁴⁶
48. To that end, final convictions entailing ineligibility handed down against elected Members of the European Parliament are immediately notified by the competent court to the national electoral office. ⁴⁷ The national electoral office will then inform the Secretariat of the European Parliament of judicial decisions that have become final and will correct the results of the election as appropriate and replace those candidates that have unlawfully been allowed to stand with candidates who are entitled to stand, informing the persons concerned thereof and the Secretariat of the European Parliament. ⁴⁸
49. As regards the **Netherlands**, it is apparent from the legislative history of the Netherlands Electoral Law that the verification of the credentials of MEPs carried out by the European Parliament ⁴⁹ does not extend to the question of whether the elected individual was elected in

⁴² Law No 190/2012.

⁴³ Legislative Decree No 235/2012.

⁴⁴ Article 5(2) of Legislative Decree No 235/2012.

⁴⁵ Article 5(4) of Legislative Decree No 235/2012.

⁴⁶ See, in that regard, the judgment of 30 April 2009, *Italy and Donnici v Parliament* (C-393/07 and C-9/08, [EU:C:2009:275](#)).

⁴⁷ Article 5(5) and (6) of Legislative Decree No 235/2012.

⁴⁸ Article 46 of the Law on the election in Italy of Members of the European Parliament.

⁴⁹ Pursuant to Article 12 of the Electoral Act.

accordance with national electoral provisions or whether his or her admission as a Member of the European Parliament is consistent with the conditions of eligibility laid down by national law. Consequently, the Netherlands Electoral Law provides that it is incumbent on the House of Representatives to examine the credentials of elected candidates and to decide whether or not they should be admitted as Members of the European Parliament.

50. To that end, the House of Representatives checks, amongst other things, that elected candidates still fulfil the conditions of eligibility laid down in national law. The House of Representatives also decides any disputes that may arise regarding credentials or the election itself. The manner in which the credentials of Members of the House of Representatives are examined is governed by the House's Rules of Procedure.
51. It is apparent from those Rules of Procedure that the provisions governing admission as a Member of the House of Representatives and the loss of that status apply, *mutatis mutandis*, to decisions on admission as a Member of the European Parliament and on the loss of that status.⁵⁰
52. As regards, more specifically, the condition relating the existence of the right to be elected as a Member, it should be noted that that right can only be lost as a result of a judicial decision that has become final. Whether the right is lost is determined by reference to the situation as it stood on the day when the individual was declared elected. A person convicted of a criminal offence may be deprived, by judicial decision, in the cases established by law, of his or her right to vote and to stand for election. The loss of these rights may only be declared where the individual concerned has been sentenced to a term of imprisonment of at least one year and such a declaration will take effect on the day when the conviction becomes final.
53. Once these checks have been completed, the Speaker of the House of Representatives immediately informs the President of the European Parliament and the elected individual of the outcome. Where the House of Representatives decides that the elected individual can be admitted as a Member of the European Parliament, its Speaker will also inform the President of the European Parliament of the Member's credentials, so that the European Parliament can verify them.
54. If, on the other hand, the House of Representatives decides not to admit the elected individual as a Member of the European Parliament, on the ground that he or she does not meet the eligibility requirements, the Speaker of the House is immediately to inform the chairperson of the Electoral Council. The consequences of failure to meet the eligibility requirements are the same as those resulting from failure to comply with the other requirements described above, inasmuch as the elected individual will not be admitted as an MEP. In such case, in order to fill the resulting vacancy, the chairperson of the Electoral Council declares elected the candidate next on the list of election results.
55. In **Poland**, once the results of European elections have been officially published in the Dziennik Ustaw (Journal of Laws), the National Electoral Commission must provide the Minister of Justice with detailed information about the elected MEPs. Then, within 14 days, the Minister is to provide the Marshal of the Sejm (Lower Chamber of the Polish Parliament) with information taken from the National Criminal Register (criminal record) concerning any Members who have been finally convicted and sentenced to imprisonment for an offence committed intentionally and

⁵⁰ Article 13(1) of the Rules of Procedure of the House of Representatives.

prosecuted on the basis of a public indictment, or for a tax offence committed intentionally, and concerning any Members who have been deprived of their civic rights by a final judicial decision.

56. This then is a further check on whether the individual is entitled to be elected as an MEP. Indeed, the existence of this right is subject to an initial verification at the point where the individual puts himself or herself forward as a candidate, information about him or her is collected and a written declaration certifying that he or she has the right to be elected is submitted. Immediately upon being notified of the list of candidates, the Regional Electoral Commission will make a request to the Minister of Justice for information regarding the criminal records of the candidates on the list.⁵¹ If a candidate does not have the right to be elected, the regional electoral commission will issue a decision refusing to register that candidate.⁵²
57. Once the criminal records of candidates have been checked, the National Electoral Commission issues the elected individuals with certificates of election to the European Parliament, by no later than 14 days after the official declaration of the results. It should nevertheless be noted that, if an elected Member does not collect his or her certificate, that does not entail the withdrawal of his or her mandate.

B. GROUNDS OF INCOMPATIBILITY ARISING OR ESTABLISHED AFTER THE OFFICIAL DECLARATION OF ELECTION RESULTS

58. In the **Netherlands**, the posts, duties and mandates that are incompatible with the status of Member of the European Parliament are determined by the Law on Incompatibilities.⁵³ As mentioned earlier, it is the House of Representatives that, when checking the credentials of elected candidates, also checks that they do not hold a position, or carry out duties or a mandate incompatible with the status of MEP. An elected candidate that does perform incompatible duties has time to resign from his or her position and may communicate to the House of Representatives, within 10 days of notification of his or her election, a written confirmation of the public duties carried out, together with a declaration of acceptance of the mandate and a certified copy of the relevant data held on the register of persons. After this, the House of Representatives checks the credentials of the elected candidate, on the basis of the information thus received, and decides whether or not the elected candidate can be admitted as a Member of the European Parliament.
59. Alternatively, an elected candidate who carries out incompatible duties may give up his or her mandate as an MEP, by giving written notice to the chairperson of the Electoral Council, within the same 10-day period. The chairperson will then inform the House of Representatives. If the House has not received a declaration of acceptance of the mandate within that period, the elected individual is deemed not to accept the mandate. In addition, until such time as a decision is taken to admit an elected individual as an MEP, that individual may give the House of Representatives written notice of non-acceptance of his or her mandate, whereupon he or she will be deemed not to have accepted the mandate.

⁵¹ Article 214 of the Electoral Code.

⁵² Article 215(4) of the Electoral Code.

⁵³ Wet Incompatibiliteiten Staten-Generaal en Europees Parlement, as amended on 1 January 2020, Stb. 2019, No 173 and Stb. 2019, No 483, Article 2. For further details on cases of incompatibility, see the summary table for the Netherlands set out in the annex.

60. Again, once the checks have been completed, the Speaker of the House of Representatives will immediately inform the President of the European Parliament and the elected individuals of the outcome. If the House of Representatives decides that an elected individual can be admitted as a Member of the European Parliament, the Speaker of the House will also inform the President of the European Parliament of the person's credentials, so that the European Parliament can verify them.
61. If, on the other hand, the House of Representatives decides not to admit an elected individual as a Member of the European Parliament, on the ground that he or she holds a post incompatible with that status, the Speaker of the House of Representatives will immediately inform the chairperson of the Electoral Council of that. The consequence of failure to comply with the system of incompatibilities is the same as that of failure to meet the conditions of eligibility, which is that the elected individual will not be admitted as a Member of the European Parliament. In such case, in order to fill the resulting vacancy, the chairperson of the Electoral Council will declare elected the person next on the list of the results of the election.

CONCLUSION

62. Our review of the electoral regulations in 23 Member States revealed that preconditions for taking office as a Member of the European Parliament exist in only five Member States, namely **Germany, Spain, Italy, Netherlands and Poland**.
63. The electoral regulations of these **five Member States** provide for special bodies, one of the tasks of which is to check that elected MEPs fulfil the preconditions for taking office as a Member of the European Parliament laid down in national law.
64. These conditions may be grouped into three categories.
65. The first category of preconditions identified comprises a requirement of a solemn nature, such as the swearing of an oath to the Constitution. Although such a requirement appears in the majority of Member States considered as a precondition of taking office as a Member of the national Parliament, only one Member State, **Spain**, lays down this condition both for taking office as a Member of its national Parliament and for taking office as a Member of the European Parliament. It is the only precondition for taking office as an MEP laid down in Spanish electoral regulations.
66. The second category of preconditions was found to exist in **four Member States**. This category comprises requirements concerning the making of a declaration, such as a declaration of resignation (**Germany and Poland**), a declaration of the choice of a particular post (**Italy**) or a declaration of acceptance of the mandate (**Netherlands and Poland**).
67. The third and last category of preconditions includes review and verification procedures, carried out by a special body, covering grounds of ineligibility arising or established subsequently to the official declaration of the results of elections. Such procedures are provided for in electoral regulations of the **same four Member States**. The most common ground of ineligibility is a Member's loss of the right to be elected resulting from a final judicial decision. In the **Netherlands**, provision is also made for a specific procedure for checking grounds of incompatibility arising or established subsequently to the declaration of the results of elections.
68. In each case, failure to fulfil the preconditions identified entails the non-admission of the elected candidate as a Member of the European Parliament (the **Netherlands**), the invalidity of the

acquisition of the mandate or resignation from the European Parliament (**Germany**) or withdrawal of the mandate of the MEP (**Spain, Italy** and **Poland**).

69. These situations automatically result in a declaration that the seat of the elected Member is vacant and the filling of that seat by appointment of the candidate next on the list of election results.⁵⁴ It is nevertheless worth noting that, in **Spain**, the seat is declared vacant for an unspecified period. The elected Member cannot be automatically replaced by another candidate unless he or she resigns and the candidate next on the list of results takes the vacant seat. In all the situations mentioned, the European Parliament is informed of any final decision adopted by a national authority concerning an elected Member.

[...]

⁵⁴ Article 13(1) and (2) of the Electoral Act.

ANNEX

SUMMARY TABLES OF THE MEMBER STATES THAT INCLUDE PRECONDITIONS FOR TAKING OFFICE AS A MEMBER OF THE EUROPEAN PARLIAMENT LAID DOWN IN NATIONAL ELECTORAL REGULATIONS

| GERMANY |
|---|
| National regulations concerning the election of MEPs |
| <p>German electoral law concerning Members of the European Parliament comprises:</p> <ul style="list-style-type: none"> - the Law on European Elections ⁵⁵ ('the EuWG'); - the Regulations on European Elections ⁵⁶ ('the EuWO'). <p>The status of MEP is also governed ⁵⁷ by the Members of the European Parliament Act ⁵⁸ ('the EuAbgG'). This law also covers the performance of the mandate.</p> <p>The abovementioned regulations make particular reference to the provisions of the Law on Federal Elections, ⁵⁹ the Law on the Scrutiny of Elections, ⁶⁰ ('the Wahlprüfungsgesetz') and the Law on Members of the Bundestag. ^{61 62}</p> |
| Electoral procedure |
| <p>The EuWG provides that, once elections have been prepared, including the submission of candidacy proposals and the declarations made by the candidates, ⁶³ and after scrutiny, the competent bodies determine how many votes have been cast. ⁶⁴ The Federal Electoral Committee (<i>Bundeswahlausschuss</i>) also determines which candidates have been elected, pursuant to Paragraph 18(4) of the EuWG.</p> <p>The Federal Returning Officer (<i>Bundeswahlleiter</i>) publicly announces the results in the Federal Gazette (<i>Bundesanzeiger</i>), in accordance with Paragraph 72(1) and Paragraph 79(1) of the EuWO, and then informs the candidates, in accordance with Paragraph 19 of the EuWG, as well as the President of the Bundestag, who communicates the election results to the President of the European Parliament, in accordance with Paragraph 20 of the EuWG.</p> |

⁵⁵ See footnotes 10 and 11.

⁵⁶ Europawahlordnung of 2 May 1994 (BGBl. I, p. 957), as amended by the Law of 18 June 2019 (BGBl. I, p. 834).

⁵⁷ Von der Groeben, H., Schwarze, J., Hatje, A. (editors), Bieber, Haag, *Europäisches Unionsrecht*, 7th edition, 2015, Nomos, Baden-Baden, annotation 22 under Paragraph 223.

⁵⁸ See footnote 9.

⁵⁹ See footnote 40.

⁶⁰ See footnote 30.

⁶¹ Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages, Abgeordnetengesetz, of 21 February 1996 (BGBl. I, p. 326), as amended by the Law of 8 October 2021 (BGBl. I, p. 4650).

⁶² See Grabitz, E., Hilf, M., Nettesheim, M. (editors), Hölscheidt, *Das Recht der Europäischen Union*, I EUV/AEUV, C.H. Beck, Munich, annotations 10, 54 and 63 under Paragraph 223 AEUV (revised in May 2021).

⁶³ Paragraph 11 of the EuWG.

⁶⁴ Paragraph 18 of the EuWG.

Once the Federal Electoral Committee (*Bundeswahlausschuss*) has made its determinations, the results of the elections are formally established and review becomes possible only in the context of the electoral scrutiny provided for by the *Wahlprüfungsgesetz*.⁶⁵

Electoral scrutiny requires that any objection, inter alia, by a voter, is lodged, as a general rule, within two months of the day of the election.⁶⁶ The decision adopted by the Bundestag in the context of such review takes effect *ex nunc*.⁶⁷ That decision too may be challenged before the Bundesverfassungsgericht (Federal Constitutional Court) within a period of two months,⁶⁸ and any such challenge will have suspensive effect, which is to say that the individual concerned will retain his or her rights and obligations until such time as the decision of the Bundestag has the authority of *res judicata*.⁶⁹

Elected Members commence their mandate or term of office at the opening of the plenary session of the newly elected European Parliament.⁷⁰

Circumstances which may affect the mandate of an MEP

Paragraph 22(2) of the EuWG lists the situations in which a Member of the European Parliament loses his or her mandate.⁷¹ These situations may arise in the period between the official declaration of the election results and the opening of the first session of the newly elected European Parliament. Points 7 to 15 concerning incompatibilities are referred to in Paragraph 7 of the EuAbgG.

⁶⁵ Frommer, H., Engelbrecht, K., Bätge, F. (editors), *Europawahlrecht, Kommentar für die Praxis*, Carl Link Kommunalverlag, Neuwied, annotation 1 under Paragraph 72 EuWO (revised in February 2021).

⁶⁶ Paragraph 2 of the Law on the Scrutiny of Elections (*Wahlprüfungsgesetz*), read in conjunction with Paragraph 26(1) and (2) of the EuWG.

⁶⁷ Boettcher, Högner, *Europawahlgesetz, Europawahlordnung*, see note 13, annotation 5 under Paragraph 26 of the EuWG.

⁶⁸ See footnote 37.

⁶⁹ Paragraph 16(1) of the Law on the Scrutiny of Elections (*Wahlprüfungsgesetz*), read in conjunction with Paragraph 26(2) of the EuWG.

⁷⁰ The EuWG refers, generally, to the status of Member of the European Parliament (*Mitgliedschaft im Europäischen Parlament*), encompassing the main attribute of that status, namely the mandate or term of office. See, as regards the moment when the mandate is obtained, Boettcher, Högner, *Europawahlgesetz, Europawahlordnung*, note 13, annotation 2 under Paragraph 21 of the EuWG.

⁷¹ Boettcher, Högner, *Europawahlgesetz*, see note 13, annotation 1 under Paragraph 22 of the EuWG. The provision again refers, generally, to the status of Member (see footnote 70); Lenz, Ch., Gerhard, T.; *Europawahlgesetz*, 2nd edition, 2019, Nomos, Baden-Baden, annotation 77.

The situations listed are the following:

- (1) the invalidity of the acquisition of the mandate,
- (1a) lack of eligibility resulting from an individual judicial decision, within the meaning of Article 6(1) of Directive 93/109,⁷²
- (2) recalculation of the election result,
- (3) supervening ineligibility,
- (4) renouncement,
- (5) decision of the Bundesverfassungsgericht (Federal Constitutional Court) finding the party or group within the party to which the Member belongs to be unconstitutional,
- (6) proscription of the political association to which the Member belongs,
- (7) acceptance of election as President of the Federal Republic of Germany,
- (8) appointment as a judge of the Bundesverfassungsgericht (Federal Constitutional Court),
- (9) appointment as Parliamentary State Secretary,
- (10) appointment as Parliamentary Commissioner for the Armed Forces of the Bundestag,
- (11) appointment as Federal Commissioner for Data Protection,
- (12) acceptance of election or appointment as a member of a provincial government,
- (13) appointment to one of the offices referred to in Paragraph 7(1) or (2) of the Electoral Act,⁷³
- (14) appointment to a position that is incompatible with the status of MEP under other legal provisions,
- (15) taking office, in another Member State, as Head of State, judge of a Constitutional Court, member of a government comparable to that of a German provincial government or in a position comparable to that of Parliamentary State Secretary.

⁷² See footnote 32.

⁷³ See footnote 1.

Grounds of ineligibility arising or established after the declaration of the results

Some of the circumstances mentioned above, including **the invalidity of the acquisition of the mandate** and **the supervening ineligibility of an elected Member**, are subject to electoral scrutiny by the Bundestag, after the election results have been declared, but solely if an objection is lodged, inter alia, by a voter, as a general rule, within two months of the day of the election.⁷⁴

The Council of Elders of the Bundestag (Ältestenrat des Deutschen Bundestages)⁷⁵ has competence to give decisions regarding:

- **ineligibility arising as a result of an individual judicial decision,**⁷⁶
- **the supervening ineligibility of an elected Member resulting from a final judicial decision.**

In accordance with the first and second subparagraphs of Paragraph 23(3) of the EuWG, the Member must resign from the European Parliament upon being notified of the decision of the Council of Elders of the Bundestag. Paragraph 24 of the EuWG provides that, once the seat becomes vacant, the candidate next on the list of the results of the election may be declared elected.

The third subparagraph of Paragraph 23(3) of the EuWG provides that an application may be made to the Bundestag to challenge the decision of the Council of Elders of the Bundestag, within two weeks of the notification of the decision. The Bundestag in plenary session will then adopt a decision, which will have been prepared by a committee in the context of the electoral scrutiny provided for by law.⁷⁷ That decision too may be challenged before the Bundesverfassungsgericht (Federal Constitutional Court), within a period of two months.⁷⁸

- The Council of Elders of the Bundestag will also note the withdrawal of a mandate resulting from a decision of the Bundesverfassungsgericht (Federal Constitutional Court) finding the party or group within the party to which the Member belongs to be unconstitutional, and
- the withdrawal of a mandate resulting from a decision proscribing the political association to which the Member belongs.

The candidate next on the list of results cannot be appointed in the event of a decision finding a political party unconstitutional. The seat of the person to whom the decision of the Council of Elders of the Bundestag is addressed will remain vacant.⁷⁹

⁷⁴ See footnote 66.

⁷⁵ See footnote 31.

⁷⁶ See footnote 32.

⁷⁷ Paragraphs 3 and 13 of the Law on the Scrutiny of Elections (Wahlprüfungsgesetz).

⁷⁸ See footnote 37.

⁷⁹ The second subparagraph of Paragraph 22(4) of the EuWG.

Where a decision has been adopted in the context of electoral scrutiny, or by the Council of Elders, the President of the Bundestag must inform the President of the European Parliament of the reason for and the date of the loss of Membership of the European Parliament.⁸⁰

In addition, the Law on Federal Elections⁸¹ provides for similar grounds of ineligibility and for similar review procedures for Members of the Bundestag as those which apply to Members of the European Parliament.⁸²

System of incompatibilities: declaration of resignation

Paragraph 7 of the EuAbgG provides, in essence, that certain public offices, duties and mandates are incompatible with being a Member of the European Parliament. Thus, any individual holding such an office or having such duties or mandates, as specified in Paragraph 22(2), points 7 to 15 of the EuWG and set out above, becomes a Member of the European Parliament *only if, after having been elected*, he or she resigns from the incompatible office, duties or mandate.

The EuWG refers, generally, to the concept of 'Mitgliedschaft im Europäischen Parlament' (status of Member of the European Parliament) encompassing the main attribute of that status, namely the mandate or term of office.

According to legal theorists, an elected individual may only obtain the mandate of MEP when there is no incompatibility.⁸³

For the sake of completeness, the system of incompatibilities applicable to MEPs generally reflects that applicable to Members of the Bundestag.

⁸⁰ Paragraph 23(5) of the EuWG.

⁸¹ See footnote 40.

⁸² Paragraphs 46 and 47 of the Law on Federal Elections (Bundeswahlgesetz).

⁸³ Bieber, Haag, *Europaabgeordnetengesetz*, see footnote 13, annotation 4 under Paragraph 7; Boettcher, Högner, *Europawahlgesetz, Europawahlordnung*, see footnote 13, annotation 20 under Paragraph 22.

| SPAIN |
|---|
| Swearing of an oath by Members of the European Parliament |
| <p>Article 224(2) of Basic Law No 5/1985 on the General Electoral System ⁸⁴ ('the Spanish Electoral Law') provides: 'Within five days of their being declared the elected candidates, the latter shall take an oath or promise to uphold the Constitution <u>before the Central Electoral Commission</u>. Once that period has elapsed, the Central Electoral Commission shall declare the seats attributed to Members of the European Parliament who have not taken an oath or promised to uphold the Spanish Constitution to be vacant and that all the privileges to which they may be entitled by reason of their office are suspended until such time as that oath or promise has been given.'</p> <p>The oath or promise must be given <u>in person</u> before the Central Electoral Commission within five days of the declaration of election.</p> <p>Consequences of an MEP's failure to fulfil this obligation:</p> <ul style="list-style-type: none"> - immediate and automatic declaration that the MEP's <u>seat is vacant</u>; - <u>suspension of all rights and privileges associated with the office of MEP</u> (salary, staff, official car and other benefits) until such time as the oath is taken. <p>The seat is declared vacant for an unspecified period. The elected Member cannot be automatically replaced by another candidate unless he or she resigns and the candidate next on the list of results is able to take the vacant seat. The Member, who will retain the status of elected candidate and parliamentary immunity, may at any time remedy the situation by appearing in person and taking the requisite oath, which will then enable him or her to take office as a Member of the European Parliament.</p> |
| Swearing of an oath by Members of the national Parliament |
| <p>Obligation laid down in Article 108(8) of the Spanish Electoral Law, for every elected individual.</p> <p>In so far as concerns individuals elected to the Spanish Parliament, the obligation is laid down in the Rules of Procedure of each chamber of the Parliament. The oath is sworn before the relevant chamber for each Member of the Parliament, in principle, at its first plenary session.</p> <p><u>Period allowed for fulfilment of the obligation</u>: by contrast with the period of <u>five days</u> provided for by Article 224(2) of the Spanish Electoral Law for Members of the European Parliament, individuals elected to the Spanish Parliament have three plenary sessions in which to discharge the obligation before the penalty of the seat being declared vacant is imposed.</p> |
| National case-law concerning the requirement to swear an oath |
| <p>Requirement to swear an oath to the Constitution: the subject of controversy and debate.</p> <p>Some authors consider that the inclusion of an obligation to make a promise or swear to uphold the Constitution in order to carry out parliamentary duties amounts to introducing a religious or moral component into what can only be a political and legal act.</p> |

⁸⁴ See footnote 7.

In its **judgment of 21 June 1990, the Tribunal Constitucional** (Constitutional Court) held, with regard to the obligation to swear an oath to uphold the Spanish Constitution, that ‘any failure to discharge that obligation does not deprive a person of the status of deputy or senator, because that status is based solely on election by the people, but merely of the exercise of the office inherent in that status’. ⁸⁵ That judgment was handed down in a dispute between three deputies and the President of the Chamber concerning the swearing of an oath which differed from the usual form in that it included the words ‘by legal imperative’, which had resulted in their not acquiring the full status of Deputy.

According to the Constitutional Court, while this formality could affect the performance of the mandate, meaning the performance of parliamentary duties, it in no way affected the acquisition of the mandate, which resulted solely from the results of elections.

Three appeals are currently before the Constitutional Court concerning atypical promises. ⁸⁶ The Constitutional Court has admitted the three appeals, finding that they ‘could provide an opportunity to clarify or alter the Court’s case-law in response to the emergence of new social realities and because the question raised goes beyond the specific case, in that it could have general political consequences’. ⁸⁷

Legal theory

The judgment of 21 June 1990 of the Constitutional Court has been extensively commented upon by Spanish legal theorists.

See, inter alia: **Santaolalla López, F.**, ‘El juramento y los reglamentos parlamentarios’, *Revista española de derecho constitucional*, No 30/1990, p. 149. According to this author, it is the election which determines the status of Member of Parliament, not compliance with the obligation to swear an oath to uphold the Constitution. The fact that the obligation to swear to uphold the Constitution is not a condition of acquiring a parliamentary mandate is ‘something that is commonly accepted and does not warrant further comment’.

Professor **Javier Pérez Royo** considers that ‘it is urgent that the Congress of Deputies reform its Rules of Procedure and repeal the obligation to give a promise or swear an oath, at the first plenary session which the elected deputy attends, to uphold the Constitution’. He considers this to be necessary following the judgment of 19 December 2019, *Junqueras Vies* (C-502/19, [EU:C:2019:1115](#)), in which the Court held that the status of Member of Parliament is acquired by virtue of the votes cast by citizens. Once a candidate has been declared elected by the competent electoral authority and provided that that declaration is not the subject of an appeal or that any such appeal has been decided by the competent judicial body, the individual elected is a Member of Parliament, without having to comply with any further requirements. The acquisition of the status of representative cannot be made subject to an additional requirement that has nothing to do with the expression of the will of citizens by means of the exercise of their right to vote.

⁸⁵ See footnote 8.

⁸⁶ Appeals No 962-2020, No 1314-2020 and No 2001-2020.

⁸⁷ A note issued by the Constitutional Court concerning the admission of these three appeals may be found at: https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_037/NOTA%20INFORMATIVA%20N%C2%BA%2037-2021.pdf

| ITALY |
|--|
| National rules governing the election of Members of the European Parliament |
| <p>The rules governing the election in Italy of MEPs are laid down by Law No 18 of 24 January 1979 on the election in Italy of Members of the European Parliament, as amended and supplemented by subsequent legislative acts.⁸⁸</p> |
| Grounds of ineligibility arising or established after the declaration of election results |
| <p>The Law on the election in Italy of Members of the European Parliament provides that, after an election, the electoral offices of the various constituencies or, in some cases, the national electoral office must check whether there are any grounds for disqualification from holding office as a Member of the European Parliament. The law provides, in particular, for the possibility of the mandate of an MEP to be declared withdrawn by the national electoral office, on grounds of ineligibility.</p> <p style="text-align: center;"><u>Legal framework</u></p> <p>In 2012, the Italian legislature adopted a law⁸⁹ delegating power to the government to adopt a legislative decree bringing together <i>in a single legislative act</i> all the provisions relating to the prohibition on standing as a candidate in elections (grounds of ineligibility) to the offices of Member of the European Parliament, Member of the Chamber of Deputies or senator of the Italian Republic, as well as the provisions relating to the prohibition on the holding of elected or governmental offices.</p> <p>The legislative decree that was adopted⁹⁰ provides that any person who has been sentenced to a term of imprisonment of more than two years or who has negotiated a conviction in respect of an offence falling within certain categories of particularly serious crimes may not hold office as a Member of the Chamber of Deputies, senator of the Republic or Member of the European Parliament.</p> <p>In accordance with that legislative decree, when lists of candidates are submitted to the European Parliament, and within the deadline for their admission, they are checked by the constituency electoral office by reference to the declarations of eligibility made by each candidate.⁹¹</p> <p>When a ground of ineligibility arises or is established after the lists are checked, but within the deadline for their admission and before the official declaration of the results, the constituency office or national electoral office will declare that those candidates, the ineligibility of whom has been ascertained, are not to stand.⁹² If a ground of ineligibility arises or is established after the official declaration of the results, the national electoral office verifies the ground, declares the</p> |

⁸⁸ See footnote 17.

⁸⁹ See footnote 42.

⁹⁰ See footnote 43.

⁹¹ Article 5(2) of Legislative Decree No 235/2012.

⁹² Article 5(4) of Legislative Decree No 235/2012.

mandate of the MEP concerned to be withdrawn and immediately informs the Secretariat of the European Parliament.

To that end, final convictions entailing ineligibility handed down against elected Members of the European Parliament are immediately notified by the competent court to the national electoral office.⁹³ The national electoral office will then inform the Secretariat of the European Parliament of judicial decisions that have become final and will correct the results of the election as necessary and replace those candidates that have unlawfully been allowed to stand with candidates who are entitled to stand, informing the persons concerned thereof and the Secretariat of the European Parliament.⁹⁴

Case-law of the Constitutional Court and of the European Court of Human Rights

The grounds of ineligibility laid down in Legislative Decree No 235/2012 have been the subject of a review of legality carried out by the Italian Constitutional Court.⁹⁵

One question debated in legal theory⁹⁶ and in the case-law is the legal nature of the grounds of ineligibility and, in particular, whether they are sanctions of a criminal law nature.

The Constitutional Court has consistently held that the measures provided for by Legislative Decree No 235/2012 are not punitive in nature.⁹⁷ It has held, specifically, that '[...] those measures do not constitute penalties or the penal effects of a conviction. They are the consequences of the absence of a subjective requirement for access to the offices under consideration or for retaining such an office. The cases of disqualification and mandatory suspension from holding elective office laid down in the legislative provisions at issue do not involve the imposition of a penalty the severity of which depends on the gravity of the offence. Instead, they involve a finding that an essential requirement for continuing to perform public elective duties is absent (Judgment No 295/1994), that finding being made in accordance with the power to lay down conditions of eligibility reserved to the legislature by [the first paragraph of] Article 51 of the Constitution (Judgment No 25/2002). In essence, the legislature, in the exercise of its own discretionary power, has decided that, in certain cases, a criminal conviction precludes the holding of office, resulting in disqualification or suspension, depending on whether the conviction is final or not.'

In 2021, the European Court of Human Rights ('ECtHR') gave rulings on the compatibility of the provisions of Legislative Decree No 235/2012 in connection with the withdrawal, on grounds of ineligibility, of the mandate of a Member of the Italian Parliament (*Galan v. Italy*⁹⁸) and

⁹³ Article 5(5) and (6) of Legislative Decree No 235/2012.

⁹⁴ Article 46 of the Law on the election in Italy of Members of the European Parliament.

⁹⁵ Judgments No 236/2015, No 276/2016, 36/2019 and No 46/2020.

⁹⁶ Gorlani, M., *Incandidabilità sopravvenuta e ruolo del Parlamento*. Riflessioni a margine del 'caso Minzolini', in *Costituzionalismo.it* Fascicolo 1/2018; Lupo, N., Rivosecchi, G., *La disciplina delle incandidabilità, ineleggibilità e incompatibilità con il mandato parlamentare*, in D'Alimonte, R., Fusaro, C., (editors), *La legislazione elettorale italiana*, Bologna, 2008; Marini, F. S., *La 'legge Severino' tra le Corti: luci e ombre dell'incandidabilità dopo la sentenza n. 236 del 2015*, in *Osservatorio costituzionale AIC*, February 2016; Marolda, G., *La non irragionevolezza delle 'legge Severino': nota a margine della sent. n. 236/2015 della Corte costituzionale*, in *Forumcostituzionale.it*; Longhi, L., *Il caso de Magistris: il delicato bilanciamento tra diritti di elettorato passivo e tutela del buon andamento della pubblica amministrazione*, in *Federalismi.it*, No 3/2016; Pupo, V., *La 'legge Severino' al primo esame della Corte costituzionale: la natura non sanzionatoria della sospensione dalla carica elettiva e la ragionevolezza del bilanciamento*, in *Le Regioni*, 2016, p. 361 et seq.

⁹⁷ See Judgment No 236 of 20 October 2015.

⁹⁸ ECtHR, Section I, 17 June 2021, *Galan v. Italy* (Application No 63772/16).

disqualification from standing in regional elections (*Maniscalco v. Italy*⁹⁹) for the reason that the individuals in question were the subject of final criminal convictions. More specifically, the ECtHR was required to address the question of whether the provisions at issue should be regarded as being essentially of a criminal law nature, and whether the principle of non-retroactivity in criminal matters should be regarded as infringed where the provisions were applied to facts pre-dating the decree's entry into force.¹⁰⁰

The ECtHR adopted the same approach as the Italian Constitutional Court, finding that the prohibition on standing as a candidate in elections and the disqualification at issue could not be regarded as similar to criminal penalties for the purposes of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

The ECtHR also considered that, in this national context, the immediate application of the prohibition on standing as a candidate in elections was consistent with the objective pursued by the legislature, namely that of removing from Parliament elected individuals who have been convicted of serious offences, and thereby safeguarding the democratic process.

System of incompatibilities: declaration of the choice of a particular post

The Law on the election in Italy of Members of the European Parliament provides that the mandate of a Member of the European Parliament may be withdrawn by declaration of the national electoral office, where it is found that that mandate is incompatible with other mandates, posts or institutional duties.¹⁰¹

In the event of an incompatibility provided for in that law, the candidate elected to the European Parliament must, within 30 days of the official proclamation of the results, **declare to the national electoral office which post he or she chooses**, failing which the national electoral office will declare **the mandate withdrawn**, the seat vacant and fill it with the candidate next on the same list of results and from the same constituency.¹⁰² If that happens, the elected candidate whose mandate has been declared withdrawn may bring an appeal against the national electoral office's decision before the Court of Appeal in Rome.¹⁰³

In addition, in the Italian electoral system, every individual has the right to be a candidate in one or several constituencies. A candidate elected in several constituencies must declare to the national electoral office, within eight days of the official declaration of the results, the constituency for which he or she wishes to opt. For the constituency not chosen, the national

⁹⁹ ECtHR, Section I, 17 June 2021, *Miniscalco v. Italy* (Application No 55093/13).

¹⁰⁰ An *allegation* concerning the real and retroactive nature of the measures restricting the right to be elected contained in Legislative Decree No 235/2012 was put forward following the lodging by Silvio Berlusconi of an application to the ECtHR concerning the withdrawal of his status as senator following the final conviction handed down against him for tax fraud in connection with facts dating back to 2004, before the entry into force of Legislative Decree No 235/2012. However, on this occasion, the Grand Chamber of the ECtHR, to which the case had been transferred in accordance with Article 30 of the European Convention on Human Rights, did not have an opportunity to give a ruling: in July 2018, after being rehabilitated by the Tribunale di Milano, Silvio Berlusconi withdrew his action for the reason that he no longer had an interest in bringing proceedings (*Berlusconi v. Italy* (Application No 58428/13)).

¹⁰¹ Article 6 of the Law on the election in Italy of Members of the European Parliament.

¹⁰² The second and third paragraphs of Article 6 of the Law on the election in Italy of Members of the European Parliament.

¹⁰³ The fourth paragraph of Article 6 of the Law on the election in Italy of Members of the European Parliament. See, in this connection, the judgment of 30 April 2009, *Italy and Donnici v Parliament* (C-393/07 and C-9/08, [EU:C:2009:275](#)).

electoral office declares elected the candidate whose name is next on the same list.

Similar grounds of incompatibility apply to Members of the national Parliament. These are laid down in the Italian Constitution ¹⁰⁴ and in various legislative acts. ¹⁰⁵ The manner in which the choice of post must be made and the consequences of a failure to choose are laid down in the Rules of Procedure of the Chamber of Deputies. ¹⁰⁶ The procedure to be followed is different from and more complex than that which applies to Members of the European Parliament.

Once elections are completed, a review of existing grounds of incompatibility is carried out. For that purpose, a ***Giunta per le elezioni*** (Electoral Council) is appointed within the Chamber of Deputies. This is the body responsible for ensuring the lawfulness of the election of each Member, both as regards the votes obtained and the existence of grounds of ineligibility or incompatibility with the mandate of Member of Parliament.

In particular, Articles 15, 16 and 17 of the Rules of Procedure of the Electoral Council (within the Chamber of Deputies) provide as follows:

- within 30 days of the first sitting of the Chamber of Deputies, or of the date of proclamation, every Member is to declare to the President of the Chamber the offices and mandates of all kinds which he or she held on the date of presentation of his or her candidacy and has held since. In the event that a Member accepts a post or office subsequently to the proclamation, he or she must make a **declaration**, within 30 days of being formally appointed to the new post or taking that office;
- on the basis of the declarations made by the Members, the *Giunta per le elezioni* conducts, through the intermediary of a committee, an **investigation** to assess the compatibility, ineligibility or disqualification of the Members.

If the committee discovers a case of incompatibility or ineligibility, it will carry out an *inter partes* inquiry, informing the Member concerned of the reasons for its assessment. Once that stage is completed, the committee submits a proposal to the *Electoral Council*, which will adopt a resolution regarding the grounds of incompatibility.

Resolutions regarding incompatibility may not be the subject of a request for reconsideration and are immediately communicated to the President of the Chamber, which will invite the Member concerned to choose, within 30 days, between the parliamentary mandate and the post found to be incompatible.

If that period expires without a choice being made, the President of the Chamber will enter the proposal for a declaration of incompatibility and the resulting disqualification of the Member from his or her parliamentary mandate on the agenda for the assembly.

If a Member opts for the post or office deemed incompatible with a parliamentary mandate, he or she must resign from parliamentary office.

¹⁰⁴ Articles 65, 84, 104, 122 and 135 of the Italian Constitution.

¹⁰⁵ See footnote 22.

¹⁰⁶ See footnote 23.

| NETHERLANDS |
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| Applicable rules |
| <p>The Netherlands Electoral Law ¹⁰⁷ provides that certain provisions relating to the procedure to be followed by Members of the national Parliament, apply, <i>mutatis mutandis</i>, to Members of the European Parliament. ¹⁰⁸</p> |
| Electoral procedure – declaration of acceptance of the mandate |
| <p>The Netherlands Electoral Law provides that, by no later than the day after the official declaration of the election results by the Electoral Council, its chairperson is to notify elected candidates of their election, either by letter with acknowledgement of receipt or by registered letter. At the same time, the chairperson also gives written notification of the elections to the Tweede Kamer der Staten-Generaal (Lower House of the Netherlands Parliament; the House of Representatives), which is <u>the body having competence to determine whether, pursuant to national electoral provisions, the elected individuals may be admitted as Members of the European Parliament</u>.</p> <p>If an elected individual accepts the mandate, he or she must, within 10 days, send to the House of Representatives:</p> <ul style="list-style-type: none"> - a letter of acceptance of the appointment, by no later than the <u>tenth day</u> following the date of notification of his or her election or, in the event of appointment to a vacant seat after the first session of the newly elected European Parliament, by no later than 28 days after the date of notification of the appointment; - a signed declaration including written confirmation <u>of all public offices held</u> by the elected individual; - a certified copy of the extract from the register of persons stating the individual's domicile and date and place of birth (although this is not required if the individual has already been in office as a Member of the European Parliament). <p>Failure to satisfy these requirements within the relevant period will result in the refusal of the House of Representatives to admit the elected individual as a Member of the European Parliament. In such case, in order to fill the resulting vacancy, the chairperson of the Electoral Council will declare the candidate next on the list of election results to be elected.</p> <p>If the House of Representatives <u>does not receive</u> the declaration of acceptance of the mandate <u>within the 10-day period</u> mentioned, the individual is <u>deemed not to have accepted the mandate</u>.</p> <p>Alternatively, if the elected individual <u>does not accept the mandate</u>, he or she must inform the chairperson of the Electoral Council in writing within <u>10 days</u>. The Electoral Council will inform the House of Representatives, which will in turn notify the European Parliament.</p> |

¹⁰⁷ See footnote 25.

¹⁰⁸ Article Y25(2) of the Netherlands Electoral Law.

Grounds of ineligibility arising or established after the declaration of election results

It is apparent from the legislative history of the Netherlands Electoral Law that the verification of the credentials of MEPs carried out by the European Parliament ¹⁰⁹ does not extend to the question of whether the elected individual was elected in accordance with national electoral provisions or whether his or her admission as a Member of the European Parliament is consistent with the conditions of eligibility laid down by national law.

Consequently, the Netherlands Electoral Law provides that it is incumbent on the House of Representatives to examine the credentials of elected candidates and to decide whether or not they should be admitted as Members of the European Parliament.

To that end, the House of Representatives checks, amongst other things, that elected candidates still fulfil the conditions of eligibility laid down in national law. The House of Representatives also decides any disputes that may arise regarding credentials or the election itself. The manner in which the credentials of Members of the House of Representatives are examined is governed by the Rules of Procedure of the House of Representatives.

It is apparent from these Rules of Procedure that the provisions governing admission as a Member of the House of Representatives and the loss of that status apply, *mutatis mutandis*, to decisions on admission as a Member of the European Parliament and on the loss of that status. ¹¹⁰

As regards, more specifically, the condition relating to the existence of the right to be elected as a Member, that right can only be lost as a result of a **judicial decision that has become final**. Whether the right is lost is determined by reference to the situation as it stood on the day when the individual was declared elected. A person convicted of a criminal offence may be deprived, by judicial decision, in the cases established by law, of his or her right to vote and to stand for election. The loss of these rights may only be declared where the individual concerned has been sentenced to a term of imprisonment of at least one year and such a declaration will take effect on the day when the conviction becomes final.

As regards the age requirement, which is that candidates must have reached the **age of 18**, the Electoral Council will remove from the constituency list any candidate who, during the term of the European Parliament's mandate, has not reached the required age to sit in the European Parliament. It is interesting to note that this requirement is verified again after the election of Members (the first time being when the candidacy is submitted), as part of the House of Representative's verification of credentials. It is apparent from the Netherlands Electoral Law that, if an elected individual attains the requisite age to be a Member of the newly elected European Parliament before its plenary session, that fact will be taken into account when the House of Representatives takes its decision on the matter.

Once these checks have been completed, the Speaker of the House of Representatives immediately informs the President of the European Parliament and the elected individual of the outcome.

¹⁰⁹ Pursuant to Article 12 of the Electoral Act.

¹¹⁰ Article 13(1) of the Rules of Procedure of the House of Representatives.

Where the House of Representatives decides that the elected individual can be admitted as a Member of the European Parliament, its Speaker will also inform the President of the European Parliament of the Member's credentials, so that the European Parliament can verify them.

If, on the other hand, the House of Representatives decides not to admit the elected individual as a Member of the European Parliament, on the ground that he or she does not meet the eligibility requirements, the Speaker of the House is immediately to inform the chairperson of the Electoral Council.

The consequences of failure to meet the eligibility requirements are the same as those resulting from failure to comply with the formalities described above, inasmuch as **the elected individual will not be admitted as an MEP**. In such case, in order to fill the resulting vacancy, the chairperson of the Electoral Council declares elected the person next on the list of election results.

Grounds of incompatibility arising or established after the declaration of election results

The posts, duties and mandates that are incompatible with the status of Member of the European Parliament are determined by **the Law on Incompatibilities**.¹¹¹

More specifically, an MEP elected in the Netherlands cannot also hold one of the following positions: Minister, Secretary of State, Member of the Council of State, Member of the Court of Auditors, Member or Attorney-General, Deputy Attorney-General or Advocate-General of the Supreme Court, National Ombudsman or Deputy Ombudsman, Member of the Board of Directors of the Employee Insurance Administration Institute or of the Social Insurance Bank referred to in the Law on the structure of the organisation of work and income, Member of the Supervisory Committee, Member of the complaints handling department of the Supervisory Committee, Member of the review committee for the exercise of powers.

The following offices also may not be held simultaneously with that of MEP: Commissioner of the King, military officer in active service, official at the Council of State, the Court of Auditors or the Office of the National Ombudsman, civil servant in a Ministry or in one of the institutions, departments and undertakings falling under it, representative of the Kingdom of the Netherlands for the public entities of Bonaire, Sint-Eustatius and Saba.

As indicated above, it is the House of Representatives that, when checking the credentials of elected candidates, also checks that they do not hold a position or carry out duties or a mandate incompatible with the status of Member of the European Parliament. An elected candidate that does perform incompatible duties has time to resign from his or her position and may communicate to the House of Representatives, within 10 days of notification of his or her election, a **written confirmation of the public duties carried out**, together with a declaration of acceptance of the mandate and a certified copy of the relevant data held on the register of persons.

After this, the House of Representatives checks the credentials of the elected candidate, on the basis of the information thus received, and decides whether or not the elected candidate can be

¹¹¹ See footnote 53.

admitted as a Member of the European Parliament.

Alternatively, an elected candidate who carries out incompatible duties may give up his or her mandate as an MEP, by giving written notice to the chairperson of the Electoral Council, within the same 10-day period. The chairperson will then inform the House of Representatives. If the House has not received a declaration of acceptance of the mandate within that period, the elected individual is deemed not to have accepted the mandate. In addition, until such time as a decision is taken to admit an elected individual as an MEP, that individual may give the House of Representatives written notice of non-acceptance of his or her mandate, whereupon he or she will be deemed not to have accepted the mandate.

Again, once the checks have been completed, the Speaker of the House of Representatives will immediately inform the President of the European Parliament and the elected individuals of the outcome.

If the House of Representatives decides that an elected individual can be **admitted as a Member of the European Parliament**, the Speaker of the House will also inform the President of the European Parliament of the person's credentials, so that the European Parliament can verify them.

If, on the other hand, the House of Representatives decides **not to admit an elected individual** as a Member of the European Parliament, on the ground that he or she holds a post incompatible with that status, the Speaker of the House of Representatives will immediately inform the chairperson of the Electoral Council of that.

The consequence of failure to comply with the system of incompatibilities is the same as that of failure to meet the conditions of eligibility, which is that the elected individual **will not be admitted as a Member of the European Parliament**. In such case, in order to fill the resulting vacancy, the chairperson of the Electoral Council will declare elected the person next on the list of the results of the election.

Grounds of ineligibility or incompatibility established while an MEP is in office

The Netherlands Electoral Law provides ¹¹² that, in the event that it is finally established that a Member of the European Parliament already in office **does not fulfil a condition of eligibility** ¹¹³ **or occupies a post that is incompatible with admission as an MEP**, ¹¹⁴ he or she will cease to be an MEP (*'houdt hij op lid te zijn'*).

Where a Member of the European Parliament finds himself or herself in one of those situations, he or she must notify the Speaker of the House of Representatives. If the MEP fails to do so, and the Speaker of the House of Representatives is of the opinion that a condition has not been fulfilled, he will give the individual a written warning. If the MEP contests that warning, he or she

¹¹² Article Y28 of the Netherlands Electoral Law.

¹¹³ In accordance with Article Y4 of the Netherlands Electoral Law.

¹¹⁴ Under the Law on Incompatibilities (Wet Incompatibiliteiten).

may, within eight days of the warning, submit the case to the opinion of the House of Representatives.¹¹⁵

A similar procedure applies to Members of the national Parliament.¹¹⁶

It is apparent from the legislative history of the Netherlands Electoral Law that, since the warning can be submitted to the House of Representatives for its opinion thereon, the status of MEP is not lost immediately but may be lost after an inter partes procedure before the House, if the Member disputes the House's negative opinion.¹¹⁷

In the event that it is finally established by the House of Representatives that a Member of the European Parliament does not fulfil a requisite condition, the Speaker will immediately inform the President of the European Parliament and the chairperson of the Electoral Council.¹¹⁸

¹¹⁵ Article Y29 of the Netherlands Electoral Law; Article 3 of the Rules of Procedure of the House of Representatives.

¹¹⁶ Article X3 of the Netherlands Electoral Law.

¹¹⁷ *Kamerstukken II* 2006/07, 31115, 3, p. 6 (under 'PP').

¹¹⁸ Article Y28 of the Netherlands Electoral Law.

POLAND

Grounds of ineligibility arising or established after the declaration of the results

The rules which apply to Members of the national Parliament are set out in the **Electoral Code** and apply, *mutatis mutandis*, to Members of the European Parliament in the situations that are not covered by Title VI of the Electoral Code, which concern MEPs specifically.¹¹⁹

Once the results of European elections have been officially published in the Dziennik Ustaw (Journal of Laws), the National Electoral Commission must provide the Minister of Justice with detailed information about the elected MEPs.

Then, within 14 days, the Minister is to provide the Marshal of the Sejm (Lower Chamber of the Polish Parliament) with information taken from the National Criminal Register (criminal record) concerning:

- any Members who have been finally convicted and sentenced to imprisonment for an offence committed intentionally and prosecuted on the basis of a public indictment, or for a tax offence committed intentionally, and
- any Members who have been deprived of their civic rights by a final judicial decision.

This then is a **further check on whether the individual is entitled to be elected as an MEP**.¹²⁰ Indeed, the existence of this right is subject to an initial verification at the point where the individual puts himself or herself forward as a candidate, information about him or her is collected and a written declaration certifying that he or she has the right to be elected is submitted. Immediately upon being notified of the list of candidates, the regional electoral commission will make a request to the Minister of Justice for information regarding the criminal records of the candidates on the list. If a candidate does not have the right to be elected, the regional electoral commission will issue a decision refusing to register that candidate.¹²¹

Once the criminal records of candidates have been checked, the National Electoral Commission issues the elected individuals with certificates of election to the European Parliament, by no later than 14 days after the official declaration of the results. It should nevertheless be noted that, if an elected Member does not collect his or her certificate, that does not entail the withdrawal of his or her mandate.

¹¹⁹ Article 338 of the Electoral Code.

¹²⁰ Kisielewicz, A., Zbieranek, J. [w:] Czaplicki, K., Dauter, B., Jaworski, S., Kisielewicz, A., Rymarz, F., Zbieranek, J., *Kodeks wyborczy. Komentarz*, wyd. II, Warsaw, 2018, Art. 365.

¹²¹ The loss of the right to be elected also entails the loss of the right to take office if the conviction is handed down after the election and the individual convicted has already obtained a mandate but has not yet taken office. If, on the other hand, the individual has already taken office, the conviction becomes a precondition for withdrawal of the mandate.

System of incompatibilities: declaration of resignation and acceptance of the mandate

If, on the day of the election (or in the period between the official declaration of the results and the opening of the plenary session of the newly elected European Parliament), an individual elected to the European Parliament held an office or performed duties or a mandate deemed incompatible under the Electoral Code,¹²² his or her mandate as an MEP may be withdrawn.

The grounds of incompatibility are as follows:

- holding, on the day of the election (or being appointed, during a term of office, to) a particular office specified in EU law;
- being a Member of the Council of Ministers or Secretary of State of the Republic of Poland;
- holding an office which, pursuant to the provisions of the Constitution or laws of the Republic of Poland, may not be combined with the mandate of Member of the Sejm (Lower Chamber of the Polish Parliament) or of senator;
- holding office as a Member of the Sejm or as senator.

The individual's mandate as an MEP will be withdrawn if he or she does not present to the Marshal of the Sejm (the Lower Chamber of the Polish Parliament) a **declaration of resignation** from the position held or the duties or mandate performed within 14 days of the date of the official declaration of the election results by the National Electoral Commission. Such a declaration therefore constitutes a precondition of taking office as a Member of the European Parliament, because if the requirement is not satisfied, the **withdrawal of the mandate** of Member of the European Parliament will be declared.

In the event that the mandate of a Member of the European Parliament is withdrawn, the individual's seat will be filled by the candidate next on the list of election results who has obtained the largest number of votes, provided that he or she submits a **declaration of acceptance of the mandate** within seven days of the Marshal of the Sejm issuing an opinion.

In such a situation, this declaration is necessary if the individual wishes to take office as a Member of the European Parliament.

Similar grounds of incompatibility apply to Members of the national Parliament. The same 14-day period applies to the declaration of resignation and the same consequences ensue from failure to satisfy this requirement, namely the mandate of Member of the national Parliament is withdrawn.

The Electoral Code¹²³ includes the following grounds of incompatibility:

- holding, on the day of the election (or being appointed, during a term of office, to) an office which, pursuant to the provisions of the Constitution or laws of the Republic of Poland, may not be combined with the mandate of Member of the national Parliament;
- election, during a term of office, as a Member of the European Parliament.

¹²² Article 364 of the Electoral Code.

¹²³ Article 247 of the Electoral Code.