

ORDER OF THE PRESIDENT OF THE COURT

13 January 2009*

In Joined Cases C-512/07 P(R) and C-15/08 P(R),

APPEALS under the second paragraph of Article 57 of the Statute of the Court of Justice, lodged at the Court Registry on 22 November 2007 and 16 January 2008, respectively

Achille Occhetto, residing in Rome (Italy), represented by P. De Caterini and F. Paola, avvocati, with an address for service in Luxembourg,

and

European Parliament, represented by H. Krück, N. Lorenz and L. Visaggio, acting as Agents,

applicants,

the other parties to the proceedings being:

Beniamino Donnici, residing in Castrolibero (Italy), represented by M. Sanino, G.M. Roberti, I. Perego and P. Salvatore, avvocati,

* Language of the case: Italian.

applicant at first instance,

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by P. Gentili,
avvocato dello Stato,

intervener at first instance,

THE PRESIDENT OF THE COURT,

after hearing the Advocate General, M. Poiares Maduro,

makes the following

Order

- 1 By their appeals, Mr Occhetto and the European Parliament seek the annulment of the order of the Judge of the Court of First Instance of the European Communities hearing the application for interim measures of 15 November 2007 in Case T-215/07 R *Donnici v Parliament* [2007] ECR II-4673 ('the order under appeal'), whereby the Judge ordered the suspension of the operation of the decision of the European Parliament of 24 May 2007 on the verification of the credentials of Mr Donnici (2007/2121(REG)) ('the decision at issue').

- 2 As the abovementioned appeals are connected on account of their subject-matter, they are to be joined for the purposes of the present order.

Legal context

The 1976 Act

- 3 Articles 6 to 8, 12 and 13(3) of the Act concerning the election of representatives to the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ 1976 L 278, p. 1), as amended and renumbered by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ 2002 L 283, p. 1) ('the 1976 Act'), provide as follows:

'Article 6

1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.

2. Members of the European Parliament shall enjoy the privileges and immunities applicable to them by virtue of the Protocol of 8 April 1965 on the privileges and immunities of the European Communities.

Article 7

1. The office of member of the European Parliament shall be incompatible with that of:

- member of the Government of a Member State,

- member of the Commission of the European Communities,

- Judge, Advocate General or Registrar of the Court of Justice of the European Communities or of the Court of First Instance,

- member of the Board of Directors of the European Central Bank,

- member of the Court of Auditors of the European Communities,

- Ombudsman of the European Communities,

- member of the Economic and Social Committee of the European Economic Community and of the European Atomic Energy Community,

- member of committees or other bodies set up pursuant to the Treaties establishing the European Economic Community and the European Atomic Energy Community for the purpose of managing the Communities' funds or carrying out a permanent direct administrative task,

- member of the Board of Directors, Management Committee or staff of the European Investment Bank,

- active official or servant of the institutions of the European Communities or of the specialised bodies attached to them or of the European Central Bank.

2. From the European Parliament elections in 2004, the office of member of the European Parliament shall be incompatible with that of member of a National Parliament.

By way of derogation from that rule and without prejudice to paragraph 3:

- members of the Irish National Parliament who are elected to the European Parliament at a subsequent poll may have a dual mandate until the next election to the Irish National Parliament, at which juncture the first subparagraph of this paragraph shall apply.

- members of the United Kingdom Parliament who are also members of the European Parliament during the five-year term preceding election to the European

Parliament in 2004 may have a dual mandate until the 2009 European Parliament elections, when the first subparagraph of this paragraph shall apply.

...

Article 8

Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.

These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system.

...

Article 12

The European Parliament shall verify the credentials of members of the European Parliament. For this purpose it shall take note of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which this Act refers.

Article 13

...

3. Where the law of a Member State makes explicit provision for the withdrawal of the mandate of a member of the European Parliament, that mandate shall end pursuant to those legal provisions. The competent national authorities shall inform the European Parliament thereof.'

The Rules of Procedure of the European Parliament

⁴ Rules 3 and 4(3) and (9) of the Rules of Procedure of the European Parliament are worded as follows:

'Rule 3

Verification of credentials

1. Following elections to the European Parliament, the President shall invite the competent authorities of the Member States to notify Parliament without delay of the

names of the elected Members so that all Members may take their seats in Parliament with effect from the opening of the first sitting following the elections.

At the same time, the President shall draw the attention of those authorities to the relevant provisions of the [1976 Act] and invite them to take the necessary measures to avoid any incompatibility with the office of Member of the European Parliament.

2. Members whose election has been notified to Parliament shall make a written declaration, before taking his seat in Parliament, that they do not hold any office incompatible with that of Member of the European Parliament within the meaning of Article 7(1) or (2) of the [1976 Act]. Following general elections, this declaration shall be made, where possible, no later than six days prior to Parliament's constitutive sitting. Until such time as a Member's credentials have been verified or a ruling has been given on any dispute, and provided that he has previously signed the abovementioned written declaration, the Member shall take his seat in Parliament and on its bodies and shall enjoy all the rights attaching thereto.

Where it is established from facts verifiable from sources available to the public that a Member holds an office incompatible with that of Member of the European Parliament, within the meaning of Article 7(1) and (2) of the [1976 Act], Parliament, upon information provided by its President, shall establish that there is a vacancy.

3. On the basis of a report by the committee responsible, Parliament shall verify the credentials without delay and rule on the validity of the mandate of each of its newly elected Members and also on any dispute referred to it pursuant to the provisions of the [1976 Act], except those based on national electoral laws.

4. The committee's report shall be based on the official notification by each Member State of the full results of the election specifying the names of the candidates elected and those of any substitutes together with their ranking in accordance with the results of the vote.

It shall not be possible to confirm the validity of the mandate of a Member unless the written declarations required under this Rule and Annex I to these Rules have been made.

On the basis of a report by the committee, Parliament may at any time rule on any dispute as to the validity of the mandate of any of its Members.

5. Where the appointment of a Member is due to the withdrawal of candidates from the same list, the committee responsible for the verification of credentials shall ensure that such withdrawals have taken place in accordance with the spirit and the letter of the [1976 Act] and Rule 4(3).

6. The committee shall ensure that any information which may affect the performance of the duties of a Member of the European Parliament or the ranking of the substitutes is forwarded without delay to Parliament by the authorities of the Member States or of the Union, with an indication of the date of effect where an appointment is concerned.

Should the competent authorities of the Member States initiate a procedure which might lead to the disqualification of a Member from holding office, the President shall ask them to keep him regularly informed of the stage reached in the procedure and shall refer the matter to the committee responsible. On a proposal from that committee, Parliament may adopt a position on the matter.

Rule 4

Term of office of Members

...

3. Members who resign shall notify the President of their resignation and of the date on which that resignation shall take effect, which shall be not more than three months after notification. This notification shall take the form of an official record drawn up in the presence of the Secretary-General or his representative, signed by the latter and by the Member concerned and immediately submitted to the committee responsible, which shall enter it on the agenda of its first meeting following receipt of the document.

If the committee responsible considers that the resignation is not in accordance with the spirit or the letter of the [1976 Act] it shall inform Parliament to this effect so that Parliament can decide whether or not to establish the vacancy.

Otherwise, the vacancy shall be established with effect from the date indicated by the resigning Member in the official record. There shall be no vote in Parliament on the subject.

...

9. Parliament shall reserve the right, where acceptance or termination of office appears to be based on material inaccuracy or vitiated consent, to declare the appointment under consideration to be invalid or refuse to establish the vacancy.'

The Statute for Members of the European Parliament

5 Recital 4 to Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (OJ 2005 L 262, p. 1) ('the Statute for Members') provides that 'the freedom and independence of Members, which are enshrined in Article 2 and which are not mentioned in any provision of primary law, should receive statutory protection. Undertakings made by Members to relinquish their office at a given time, or declarations of their intent to relinquish office on an unspecified date, which political parties can make use of at their discretion, should be considered as incompatible with Members' freedom and independence and should therefore not be binding in law'.

6 Recital 5 to the Statute for Members states that Article 3(1) thereof reproduces in full the provisions of Article 6(1) of the 1976 Act.

7 Articles 2 and 30 of the Statute for Members provide:

'Article 2

1. Members shall be free and independent.

2. Agreements concerning the resignation from office of a Member before or at the end of a parliamentary term shall be null and void.

...

Article 30

This Statute shall enter into force on the first day of the European Parliament parliamentary term beginning in 2009.’

The facts giving rise to the dispute

8 The facts giving rise to the dispute were set out at paragraphs 6 to 17 of the order under appeal as follows:

‘6 At the elections to the European Parliament, held on 12 and 13 June 2004, Beniamino Donnici ... was a candidate on the “Società Civile — Di Pietro Occhetto” list, in the Italy South constituency. That list won two seats, the first in that constituency and the second in the Italy North-West constituency. Mr A. Di Pietro was elected in both constituencies and opted for the Italy South constituency.

- 7 Mr A. Occhetto was second on the electoral lists in the light of the number of votes obtained in the two constituencies, coming ahead of [Mr Donnici] in the Italy South constituency and of Mr G. Chiesa in the Italy North-West constituency. Since Mr Di Pietro opted to take his seat for the Italy South constituency, Mr Occhetto should have been declared elected in the Italy North-West constituency. However, by a written declaration, signed before a notary on 6 July 2004 and received by the Ufficio elettorale nazionale per il Parlamento europeo presso la Corte di cassazione (National Electoral Office for the European Parliament at the Court of [Cassation]; “the National Electoral Office”) on 7 July 2004, Mr Occhetto, who at the time was a member of the Italian Senate, “irrevocably” withdrew as a candidate for election to the European Parliament in both constituencies.

- 8 Following that withdrawal, on 12 November 2004 the National Electoral Office notified the Parliament of the official results of the European elections with the list of the candidates elected and their substitutes. The National Electoral Office declared Mr Chiesa elected in the Italy North-West constituency and Mr Di Pietro elected in the Italy South constituency, [Mr Donnici] becoming the first on the list of the candidates who had not been elected in the latter constituency.

- 9 In the parliamentary elections held in Italy on 9 and 10 April 2006, Mr Di Pietro was elected as a Member of the Italian Parliament and opted to take his seat in the National Parliament, with effect from 28 April 2006. Since, pursuant to Article 7(2) of the 1976 Act, that office was incompatible with the office of Member of the European Parliament, on 27 April 2006 the Parliament established that the seat in question was vacant, with effect from the following day, and informed the Italian Republic.

- 10 By declaration of 27 April 2006, addressed to the National Electoral Office, Mr Occhetto revoked his withdrawal of 7 July 2004, expressing “his intention, as the first of the candidates who had not been elected in the [Italy South] constituency, of succeeding Mr [Di] Pietro, so that any previous declaration of a different intent ... should be regarded as invalid and without effect and, in any event, revoked, and that

in any event it [was] necessary in that regard to take account of the intent expressed on the date of the proclamation of the names of the candidates elected”.

- 11 Following that declaration, on 8 May 2006 the National Electoral Office declared Mr Occhetto elected as Member of the European Parliament.

- 12 By judgment of 21 July 2006, the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court, Italy) dismissed as unfounded [Mr Donnici’s] action for annulment of that proclamation. In essence, the Tribunale amministrativo regionale del Lazio considered that Mr Occhetto’s withdrawal of 7 July 2004 in respect of the proclamation of elected representatives did not constitute a withdrawal from his position on the post-electoral list. The grounds for its decision were that respect for the will of the people requires that electoral results be regarded as inalienable and unalterable, that such a withdrawal has no effect when any acts of substitution are being adopted in the event of incompatibility, loss of civil rights, ineligibility or resignation from an appointment or position on the part of those officially entitled to them, and that a candidate who has withdrawn from an election is entitled, where the prerequisites for substitution are verified, to withdraw his act of withdrawal in order to take over a seat to be recovered by means of substitution.

- 13 [Mr Donnici] also appealed to the Parliament against the declaration of Mr Occhetto as Member of the European Parliament in place of Mr Di Pietro. His objection was examined by the Parliament’s Committee on Legal Affairs at its meeting held on 21 June 2006. After establishing that, under Article 12 of the 1976 Act, the objection was inadmissible because it was founded on Italian electoral law, the Committee on Legal Affairs passed a unanimous resolution proposing that the Parliament validate Mr Occhetto’s mandate with effect from 8 May 2006. On 3 July 2006, the Parliament confirmed Mr Occhetto’s mandate.

14 By final judgment of 6 December 2006, having the force of *res judicata*, the Consiglio di Stato (Council of State), allowed [Mr Donnici's] appeal against the aforementioned ruling of the Tribunale amministrativo regionale del Lazio, amended that ruling and annulled the proclamation of Mr Occhetto as a Member of the European Parliament made by the National Electoral Office on 8 May 2006. The Consiglio di Stato held, first, that the distinction between withdrawing from an election and withdrawing from a position on a list was illogical, since election is an effect of a position on a list, and withdrawal from an election entails the removal of the individual concerned from the list and whatever effects may follow. It held, secondly, that it was contradictory to assert that withdrawal from election as a Member of the European Parliament has no bearing on substitution and that the withdrawing candidate is entitled to withdraw the withdrawal in cases where substitution is called for. Thirdly and finally, the Consiglio di Stato considered that withdrawal from an election constituted an irrevocable declaration, once the competent body or office to which the announcement of withdrawal is sent has taken note thereof, which has the effect of amending the original list drawn up by the electoral office.

15 On 29 March 2007, the National Electoral Office took note of the aforementioned judgment of the Consiglio di Stato and declared [Mr Donnici] as Member of the European Parliament for the Italy South constituency, and accordingly revoked Mr Occhetto's mandate.

16 That declaration was notified to the European Parliament, which took note of it in the minutes of the plenary session of 23 April 2007 in the following terms:

“The Italian authorities had notified Parliament that the announcement of the election of [Mr Occhetto] had been annulled and that the resulting vacancy would be filled by [Mr Donnici]. Parliament noted these decisions with effect from 29 March 2007.

...

Under Rule 3(2) [of the Rules of Procedure of the European Parliament], until such time as [his] credentials had been verified or a ruling had been given on any dispute, and provided that [he] had previously made [a] written [declaration] stating that [he] did not hold any office incompatible with that of Member of the European Parliament, [Mr Donnici] would take [his] seat in Parliament and on its bodies and would enjoy all the rights attaching thereto.”

17 Meanwhile, by letter of 5 April 2007, which was supplemented by a note of 14 April 2007, Mr Occhetto raised an objection and requested the Parliament to ratify his mandate and not to validate that of [Mr Donnici]. By [the decision at issue], adopted on the basis of a report of the Committee on Legal Affairs of 22 May 2007 (A6-0198/2007), the Parliament declared that [Mr Donnici’s] mandate as Member of the European Parliament, whose election had been notified by the competent national authorities, was invalid, and ratified Mr Occhetto’s mandate. The Parliament also instructed its President to forward that decision to the competent national authorities, to [Mr Donnici] and to Mr Occhetto.’

The procedure before the Court of First Instance and the order under appeal

- 9 By application lodged at the Registry of the Court of First Instance on 22 June 2007, Mr Donnici brought an action, pursuant to the fourth paragraph of Article 230 EC, for the annulment of the decision at issue. By a separate document, he also lodged an application for interim measures, seeking the suspension of the operation of that decision.

10 Mr Occhetto and the Italian Republic were given leave to intervene in support of the forms of order sought by the Parliament and Mr Donnici respectively.

11 In support of his action for annulment, Mr Donnici raised two pleas. First, he claimed that, by adopting the decision at issue, the Parliament had infringed the rules and principles which govern its competence to verify the credentials of its members. Secondly, he called into question the adequacy of the statement of reasons for the decision at issue.

12 In the order under appeal, the Judge hearing the application for interim measures began by carrying out a prima facie examination of the substance of the pleas in law advanced by Mr Donnici in support of his action for annulment in order to ascertain whether the condition for establishing a prima facie case was fulfilled. On completion of that examination, he took the view that the argument that the Parliament did not have competence to adopt the decision at issue was weighty and could not be discounted without a more in-depth examination, which was a matter only for the Court giving judgment in the main action. He therefore found that the abovementioned condition was satisfied in the present case.

13 Next, the Judge hearing the application for interim measures considered that suspension of the operation of the decision at issue was necessary in order to avoid serious and irreparable harm to Mr Donnici's interests, particularly in view of the limited duration of the mandate of a member of the Parliament and the fact that the decision at issue prevented him from carrying out the tasks entrusted to him.

14 Finally, the Judge hearing the application for interim measures weighed up the interests involved, observing that, as the immediate and specific interests of Mr Donnici and Mr Occhetto were evenly matched, more general interests had to be taken into account. Stressing that the Italian Republic had an interest in having its electoral legislation respected by the Parliament and that Mr Donnici's arguments were sound and weighty,

the Judge found that the conditions for granting the suspension of operation of the decision at issue were satisfied and therefore granted Mr Donnici's application to that effect.

Arguments of the parties

- 15 By their respective appeals, Mr Occhetto and the Parliament seek the annulment of the order under appeal. The grounds on which they base their appeals are an incorrect assessment of the question of a prima facie case and an incorrect assessment of the urgency and the balancing of the interests involved.
- 16 Mr Donnici and the Italian Government contend that the appeals should be dismissed. With regard to Mr Occhetto's appeal, Mr Donnici claims as his principal argument that it should be dismissed as inadmissible.

The appeal

Admissibility of Mr Occhetto's appeal

- 17 Mr Donnici maintains that Mr Occhetto's appeal appears to be based essentially on the argument that, in the present case, withdrawal from a seat as a member of the Parliament is vitiated by a defect in consent, so that the withdrawal is not valid and the Parliament should have declared that to be the case at the stage of the verification of credentials. According to Mr Donnici, Mr Occhetto did not plead the existence of a defect in consent either before the national courts or the Community Judge hearing the

application for interim measures. It follows that Mr Occhetto's appeal is based essentially on facts raised for the first time in the present appeal proceedings. Furthermore, verification of the circumstances upon which the existence of a defect in consent could depend entails a finding on and assessment of factual matters, which is ruled out at the stage of an appeal. For those reasons Mr Donnici asks that Mr Occhetto's appeal be dismissed as inadmissible.

18 On that point, it must be observed that, while Mr Occhetto's appeal puts forward a number of considerations relating to the validity of his withdrawal as a candidate for election to the Parliament and the existence of a defect in consent, the appeal is nevertheless based on a number of grounds concerning, first, incorrect interpretation of the provisions of the 1976 Act and, second, incorrect assessment with regard to the urgency and balancing of the interests involved.

19 It must therefore be found that Mr Occhetto's appeal is admissible.

The grounds alleging incorrect assessment in relation to a prima facie case

20 With regard to the assessment by the Judge hearing the application for interim measures concerning a prima facie case, the appellants rely on three grounds alleging respectively:

- incorrect interpretation of Article 12 of the 1976 Act with regard to the extent of the Parliament's powers of verification;

- incorrect interpretation of Article 6 of the 1976 Act and its scope, as well as a breach of Article 3 of Additional Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), and

- an error in law and contradictory reasoning in relation to determining the effect of the alleged illegality of the Italian authorities' decision on the decision at issue.

Ground of appeal alleging erroneous interpretation of Article 12 of the 1976 Act

- Arguments of the appellants

²¹ According to Mr Occhetto and the Parliament, in finding that, under Article 12 of the 1976 Act, the Parliament is limited to taking note of the election results declared by the competent national authorities and has no fundamental power to ensure compliance with Community law by the Member States, the Judge hearing the application for interim measures misinterpreted that provision from the viewpoint of its wording and its general context.

²² While, under Article 12 of the 1976 Act, the Parliament must only 'take note' of the results of the verifications carried out by the national authorities on the basis of the law of the Member States, the Parliament nevertheless has an independent power of verification on the basis of the rules of Community law. As the procedure in question takes place in the context of the formation of a Community institution, there exists a Community legislative standard which aims, not to harmonise the national procedures, but to establish a minimum standard making it possible to avoid distortions due to

differences between the national procedures. For that purpose, Article 12 of the 1976 Act confers upon the Parliament power to rule on disputes arising out of the provisions of that Act. That power must of necessity be exercised, not only on the basis of the literal wording of the Act, but also on the basis of the general principles underlying the Act as a whole.

23 Therefore, contrary to the finding of the Judge hearing the application for interim measures, the second sentence of Article 12 of the 1976 Act does not aim to limit the Parliament's power, but indicates two ways in which that power may be exercised. Although, with regard to verification in the framework of national legislation, the Parliament must confine itself to taking note of that legislation, it has a full power of verification on the basis of Community law.

24 In support of that interpretation of Article 12 of the 1976 Act, the appellants cite, first, Article 8 of the Act which, according to them, confirms that the Parliament's power of verification operates on two levels. In stating that 'the electoral procedure shall be governed in each Member State by its national provisions', but 'subject to the provisions of this Act', the latter provision indicates the two parameters on the basis of which the power of verification may be exercised.

25 Secondly, there exists, within the Parliament, an institutional practice which unmistakably shows the Parliament's tendency to verify the credentials of its members by the yardstick of Community references.

- 26 That practice is demonstrated, first, by the report of the Committee on the Rules of Procedure, the Verification of Credentials and Immunities on amendment of Rules 7 and 8 of the Parliament's Rules of Procedure, concerning the verification of credentials and the term of the parliamentary mandate (A3-0166/94). Those rules correspond to Rules 3 and 4 respectively of the Parliament's Rules of Procedure currently in force.
- 27 Secondly, the appellants, observe that, in Article 2 of the Parliament's Resolution on disputes concerning the validity of appointments in connection with the 'tourniquet system' (OJ 1983 C 68, p. 31), the Parliament states that 'disputes concerning the validity of the appointments of newly-elected members or concerning the validity of the appointment of members whose credentials have already been verified based on legal objections to the "tourniquet system" are unfounded'. In any case, it is pointless to establish a complex verification system at two levels, national and Community, if the Community regulatory level is then to be non-existent and if the Parliament, in exercising its power of verification, is simply to take note of the results announced at the national level.
- 28 Thirdly, the judgments of the Court of Justice in Case C-208/03 P *Le Pen v Parliament* [2005] ECR I-6051 and of the Court of First Instance in Case T-353/00 *Le Pen v Parliament* [2003] ECR II-1729, to which the Judge hearing the application for interim measures referred, are not case-law precedents relevant to the substance of the present case. The facts which gave rise to those judgments concerned the validity of a decision whereby the Parliament took note of a decree of the national authorities ending the term of office of the person concerned as a representative in the Parliament and were therefore covered by Article 13(2) of the 1976 Act, not by Article 12. In any event, the background of that case showed that the delimitation of the Parliament's powers where the mandate of a member of the Parliament is withdrawn is a complex question which cannot be examined in the context of summary proceedings.

— Assessment

- 29 The first point to be noted is that this ground of appeal raises the question of the extent of the Parliament's powers of verification under Article 12 of the 1976 Act. In order to determine whether the Judge hearing the application for interim measures relied on an erroneous interpretation of that provision and, therefore, on an incorrect assessment of the extent of those powers, it is necessary to examine the wording of that provision and its general context.
- 30 In that connection, it must be borne in mind that Article 12 of the 1976 Act expressly provides that the Parliament must, first, 'take note' of the results declared officially by the Member States and, secondly, may rule on any disputes which may arise only 'on the basis of the provisions of this Act', and that is to be done 'to the exclusion of the national provisions to which the Act refers'.
- 31 It follows that the text of Article 12 of the 1976 Act appears at first sight to support a restrictive interpretation. In that regard, contrary to the appellants' arguments, the judgment of the Court of Justice in *Le Pen v Parliament*, on which the Judge hearing the application for interim measures based his reasoning, is of particular relevance, as it interpreted the use of the words 'take note' in the context of the 1976 Act as indicating the complete lack of discretion on the part of the Parliament in the matter (see to that effect, Case C-208/03 P *Le Pen v Parliament*, paragraph 50).
- 32 In addition, with regard to verification of the credentials of members of the Parliament, Article 12 of the 1976 Act and Rule 3(3) of the Rules of Procedure of the European Parliament confer upon the Parliament power to rule on the validity of the mandate of each of its newly elected Members together with any dispute which may arise on the basis of the provisions of the 1976 Act, but 'other than those arising out of the national provisions to which this Act refers' (in the former case) and 'except those [disputes] based on national electoral laws' (in the latter case). Those exceptions are also clear indications of the fact that the Parliament is not generally competent to rule on the

legality of national electoral procedures from the viewpoint of Community law (see, to that effect, Case C-208/03 P *Le Pen v Parliament*, paragraph 51).

33 Furthermore, the argument that that interpretation of Article 12 of the 1976 Act would result in the Parliament's powers of verification by virtue of that article being rendered meaningless cannot be accepted. As the Judge hearing the application for interim measures correctly observed, the Parliament has full power to rule, pursuant to that article, on the position of an elected candidate possessing one of the qualities incompatible with being a Member of the Parliament, as listed in Article 7 of the 1976 Act.

34 Finally, with regard to the institutional practice referred to by the Parliament, and irrespective of the question whether a unilateral practice of a Community institution is capable, on its own, of binding the Court in relation to the interpretation of the EC Treaty provisions or of the secondary Community law concerned, it is sufficient to observe that, in any case, the documents referred in that connection by the Parliament, namely a 1994 report of the Committee on the Rules of Procedure, Verification of the Credentials and Immunities of the Parliament and a 1983 resolution, are not sufficient to show the existence of a settled institutional practice.

35 On the basis of the above considerations, it must be found that there was no manifest error in law on the part of the Judge hearing the application for interim measures in relation to the interpretation of Article 12 of the 1976 Act.

36 Consequently the present ground of appeal must be rejected as unfounded.

Ground of appeal alleging incorrect interpretation of Article 6 of the 1976 Act

- 37 The appellants' second ground of appeal alleges that the Judge hearing the application for interim measures erred in holding that Article 6 of the 1976 Act confers upon the Parliament power to ensure that the parliamentary mandate is exercised freely only as regards members of the Parliament who are in office. Accordingly, free exercise of the mandate is ensured only in relation to agreements affecting the exercise of the Parliamentary mandate, but not to agreements which completely prevent the exercise of the mandate intended by the electors.
- 38 Taking the view that, if Article 6 of the 1976 Act has the object of protecting the freedom of action of members of the Parliament, it would be unreasonable to limit its application to members who are in office, the appellants favour a purposive interpretation of Article 6. According to them, interpretation of that provision in the light of its objective must lead to its application also to candidates officially named in the post-electoral list as those candidates potentially constitute the Parliament.
- 39 In that context, Article 6 of the 1976 Act, which requires the members of the Parliament to be independent and not to receive a binding mandate, is a general mandatory principle which aims to ensure the proper functioning of the Parliament. The reference to 'the provisions of this Act' in Article 12 of the 1976 Act must therefore necessarily relate to the general principles underlying the Act which are inherent in the proper carrying out of the verification of credentials by the Parliament. Those principles, which result in particular from Article 6 of the Act, are in fact the consequence of the fundamental principle laid down in Article 3 of Additional Protocol No 1 to the ECHR, which is mandatory in nature and which states that the Contracting States undertake to hold free elections 'under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

40 In support of that interpretation of Article 6 of the 1976 Act, the appellants rely on, first, Article 2 of the Statute for Members which, although not yet in force, is a codification of the legislative content of Article 6 of the 1976 Act and, consequently, of the current position in Community law in that respect. Secondly, they refer to the provisions of Rules 3(5) and 4(3) and (9) of the Rules of Procedure of the European Parliament and submit that the Judge hearing the application for interim measures ought to have taken those provisions into account when interpreting Article 6 of the 1976 Act, which would have led him to the conclusion that the principles set out in Article 6 also apply in situations which may affect the composition of the Parliament.

41 In that connection, it must be observed that, as the Judge hearing the application for interim measures rightly found, the wording of Article 6 of the 1976 Act expressly refers to 'members of the European Parliament'. What is more, Article 6 mentions their right to vote which cannot, by nature, be associated with the candidate status officially declared in the post-electoral list.

42 It is admittedly true that, as a general rule, the interpretation of a provision of Community law cannot consist in strict respect for its wording with no regard to its context and purpose. However, irrespective of whether that method of interpretation could lead to an interpretation *contra legem* in the present case, it must be said that the matters relied on for that purpose by the appellants cannot show that the interpretation of Article 6 of the 1976 Act by the Judge hearing the application for interim measures is manifestly incorrect.

43 In the first place, even assuming that Article 6 of the 1976 Act is based on certain general principles, in particular Article 3 of Additional Protocol No 1 to the ECHR, it is nevertheless a very specific formulation of the latter. It follows that Article 6 cannot on its own constitute a general power of the Parliament to assess the legality of the electoral procedures of the Member States in the light of all of those principles and of the ECHR.

44 With regard in the second place, to Article 2 of the Statute for Members, it must be observed that recital 4 in the preamble to the Statute states that ‘the freedom and independence of Members, which are enshrined in Article 2 [of the Statute] and which are not mentioned in any provision of primary law, should receive statutory protection’. When this is read in conjunction with recital 5 in the preamble, which states that Article 3(1) of the Statute reproduces in full the provisions of Article 6(1) of the 1976 Act, it is a clear *prima facie* indication that Article 2 of the Statute for Members is not a codification of Article 6 of the 1976 Act.

45 In the third place, the Judge hearing the application for interim measures correctly found that, pursuant to the principle of the hierarchy of norms, a provision of the Rules of Procedure of the European Parliament cannot permit the provisions of the 1976 Act to be derogated from. The Rules of Procedure are rules of internal organisation and cannot grant powers to the Parliament which are not expressly afforded by a legislative measure, in this case by the 1976 Act (see, to that effect, Joined Cases C-200/07 and C-201/07 *Marra* [2008] ECR I-7929, paragraph 38). It follows that, at least in the context of an examination relating to the establishment of a *prima facie* case, it is rather the provisions of the Rules of Procedure of the European Parliament that should be interpreted in the light of the letter and the spirit of the provisions of the 1976 Act, and not the converse.

46 In those circumstances, it must be found that in the order under appeal there is no manifest error of law in relation to the interpretation of Article 6 of the 1976 Act.

47 Consequently this ground of appeal must also be rejected as unfounded.

Ground of appeal alleging an error in reasoning in relation to the effect on the Parliament's decision relating to the verification of Mr Donnici's credentials of the alleged illegality of the Italian electoral office's decision declaring Mr Donnici a member of the Parliament

48 With regard to the assessment of the effect on the Parliament's decision relating to the verification of Mr Donnici's credentials of the alleged illegality of the Italian electoral office's decision declaring Mr Donnici a member of the Parliament, the reasoning of the order under appeal is said to be erroneous and contradictory. In particular, the Parliament considers that, in rejecting its argument that the decision on the verification of credentials would itself be illegal if it were based on an illegal national measure, the Judge hearing the application for interim measures relied on precedents in case-law which were not relevant, namely, Case C-97/91 *Oleificio Borelli v Commission* [1992] ECR I-6313, paragraphs 10 to 12, and the order of the President of the Court of First Instance in Case T-18/07 R *Kronberger v Parliament* [2007] ECR II-50, paragraphs 38 to 40, instead of taking into consideration Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389.

49 According to the Parliament, by the decision at issue, it refused to validate the mandate of a person designated by the national authorities on the ground that that decision was contrary to the principle that the mandate is to be exercised freely, being a rule which, textually, is addressed to the Parliament and confers upon it a power of supervision. It would be absurd to argue that, on the one hand, the national judicial and administrative authorities have an obligation to apply Community law, disregarding any national provisions to the contrary, and, on the other hand, to say that the Parliament has no such power.

50 In that regard, it must be observed that in *Oleificio Borelli v Commission*, which concerned in particular the interpretation of Article 13(3) of Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, p. 1), the Court

observed that a project may receive aid from the European Agricultural Guidance and Guarantee Fund only if it is approved by the Member State on whose territory it is to be carried out and that, consequently, where the opinion is unfavourable the Commission can neither follow the procedure for the examination of the project in accordance with the rules laid down in that regulation nor *a fortiori* review the lawfulness of the opinion thus issued. The Court concluded that any irregularity that might affect the opinion cannot affect the validity of the decision by which the Commission refused the aid applied for (*Oleificio Borelli v Commission*, paragraphs 11 and 12).

51 In relying on that case-law, the Judge hearing the application for interim measures took the view that, where a national measure forms part of a Community decision-making procedure and, by virtue of the division of powers in the field in question, is binding on the Community decision-making authority and therefore determines the terms of the Community decision to be adopted, any irregularity that might affect the national measure cannot affect the validity of the decision of the Community authority. Those observations clearly follow from paragraphs 10 to 12 of *Oleificio Borelli v Commission* and they are relevant to the present case, especially if account is taken of the distribution of powers resulting from Article 12 of the 1976 Act.

52 Conversely, at paragraph 93 of the judgment in *Sweden v Commission*, concerning the interpretation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), the Court made it clear that Article 4(5) of that regulation did not aim to establish a division between two powers, one national and the other of the Community, with different purposes, but created a decision-making procedure, the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed in Article 4(1) to (3) of the regulation, a decision-making procedure in which both the Community institution and the Member State concerned play a part.

53 It follows that, by invoking the latter judgment, the Parliament submits that Article 12 of the 1976 Act does not provide for a division of powers between the national authorities and the Parliament and for those powers to be exercised in the framework of different procedures, but for a single decision-making procedure in which both the Parliament and the national authorities play a part. However, in view of what has been said at paragraphs 29 to 34 of the present order, that is not, *prima facie*, the case.

54 Therefore it must be found that there is no error in the reasoning of the order under appeal in relation to the effect of the alleged illegality of the decision of the Italian Electoral Office declaring Mr Donnici a member of the Parliament on the latter's decision concerning the verification of Mr Donnici's credentials.

55 Consequently this ground of appeal must be rejected as unfounded.

Ground of appeal alleging incorrect assessment of urgency

56 The Parliament claims that the assessment of urgency by the Judge hearing the application for interim measures is mistaken in law on the ground that the Judge took into account only the possible damage to Mr Donnici and not the possible damage to political representation. According to the Parliament, if the implementation of the decision at issue had not been suspended, the member's seat concerned would have continued to be occupied by a person of the same political persuasion as Mr Donnici. It followed that the latter's interest was not such as to justify an order suspending the implementation of the decision at issue from the viewpoint of political representation.

57 In that regard, it is sufficient to observe that, according to settled case-law, the purpose of interim proceedings is to guarantee the full effectiveness of the judgment on the substance. In order that the latter objective may be attained, the measures sought must be urgent in the sense that, in order to avoid serious and irreparable damage to the applicant's interests, they must be ordered and become effective even before the decision in the main proceedings (order of the President of the Court in Case C-65/99 P(R) *Willeme v Commission* [1999] ECR I-1857, paragraph 62).

58 It follows that, in order to assess the urgency of the measures sought, the Judge hearing the application for interim measures is required to take into consideration the applicant's interests only, in particular the existence of a risk of serious and irreparable damage to those interests, without regard to other factors of a general nature such as, in the present case, the continuity of political representation, those being factors which could, if necessary, be taken into account only when striking a balance between the interests involved.

59 Consequently the Parliament's ground of appeal relating to the assessment of urgency must also be rejected as unfounded.

The ground of appeal alleging an error of law in the balancing of interests

60 The appellants' final ground of appeal claims that the Judge hearing the application for interim measures erred in law when balancing the interests involved. This ground of appeal is supported by three complaints.

61 First, the appellants consider that the Judge hearing the application for interim measures erred in finding that the interests of Mr Donnici and Mr Occhetto were equally matched. The Judge failed to draw the appropriate conclusions from the fact that Mr Occhetto received a majority of the preference votes and, therefore, that his interests should prevail over those of Mr Donnici as regards the exercise of the parliamentary mandate.

62 Secondly, the Judge hearing the application for interim measures did not take into account the public interest in ensuring the maximum level of political legitimacy of the Parliament, that legitimacy being based on universal suffrage. In the present case, taking the public interest into account ought to have led the Judge hearing the application for interim measures to refuse suspension of the implementation of the decision at issue because that measure would have caused the person with fewer votes to sit in the Parliament, thus reducing the Parliament's political legitimacy. In any case, even if the decision on the substance of the case were in favour of Mr Donnici, a refusal to order the suspension of the implementation of the decision at issue would not have caused irreparable damage to the Parliament's political legitimacy because, during the period between the decision on interim measures and the decision on the substance of the case, there was a member of the Parliament who had greater legitimacy by virtue of universal suffrage.

63 Thirdly, the appellants consider that the order under appeal is mistaken in law in so far as the Judge hearing the application for interim measures used the *prima facie* justification to assess the existence of urgency and the pre-eminence of Mr Donnici's interests. According to the appellants, even if the case-law appears to allow the possibility of a certain degree of mutual set-off between the *prima facie* factor and the urgency factor, nevertheless it cannot be possible for the presence of the one of those factors to be sufficient to offset the complete absence of the other.

64 According to the appellants, in striking a balance between the interests, the Judge hearing the application for interim measures ought to have found that there was no

urgency at all in the present case. In that regard, the appellants cite the order of the President of the Court in Case C-208/03 P-R *Le Pen v Parliament* [2003] ECR I-7939, paragraph 106, which states that the Judge hearing the application for interim measures must, when balancing the relevant interests, examine whether the possible annulment of the act in question by the Court giving judgment in the main action would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of the operation of that act would be such as to prevent its being fully effective in the event of the appeal being dismissed on the merits. If, in the present case, the Judge hearing the application for interim measures had carried out the second part of that assessment, he would necessarily have come to the conclusion that suspension of the implementation of the decision at issue would inevitably prevent that decision from having full effect if the application for annulment were dismissed. It follows that an element of urgency is wholly lacking in the present case.

65 In that connection, it must be observed that the Judge hearing the application for interim measures began by finding that, if the decision at issue were annulled by the Court dealing with the substance of the case, the damage to Mr Donnici would be irreparable if the implementation of the decision were not suspended, and the Judge then went on to strike a balance between the interests involved, pointing out first Mr Occhetto's interest in the implementation of the decision at issue, which meant the continuation of his mandate. According to the Judge hearing the application for interim measures, while implementation of the decision at issue risked causing irreversible harm to Mr Donnici, conversely, the same risk existed for Mr Occhetto if the application for the suspension of implementation were granted in view of the likelihood that any judgment dismissing the main application would be delivered only after most, if not all, of the remainder of his mandate had elapsed.

66 Having thus concluded that the immediate and specific interests of Mr Donnici and Mr Occhetto were evenly matched, the Judge hearing the application for interim measures continued his reasoning by considering the more general interests which, in such circumstances, take on a special significance. In this regard, the Judge took the view that, while the Italian Republic undeniably has an interest in having its electoral legislation respected by the Parliament, the latter has a general interest in the upholding of its decisions. However, the Judge found that neither of those interests could prevail in balancing the interests involved.

67 Consequently, only after finding that the specific and the general interests involved were evenly matched did the Judge hearing the application for interim measures take into consideration the strength of the pleas relied upon by Mr Donnici and find that there was a prima facie case on the basis of well-established case-law, namely the orders of the President of the Court in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 110; Case C-481/01 P(R) *NDC Health v IMS Health and Commission* [2002] ECR I-3401, paragraph 63; and *Le Pen v Parliament*, paragraph 110.

68 It must be held that the appellants' arguments cannot call into question that assessment by the Judge hearing the application for interim measures.

69 In that connection it must be observed that, first, on balancing the interests involved, the Judge hearing the application for interim measures found that the specific interests of Mr Donnici and Mr Occhetto were evenly matched. However, the fact that they were evenly matched does not mean that there was no urgency. On the contrary, the risk of irreversible harm, which is the sole criterion of urgency, was present in this case in relation to both Mr Donnici and, if the application for the suspension of implementation were granted, in relation to Mr Occhetto.

70 Secondly, contrary to the appellants' submissions, the Judge hearing the application for interim measures had regard to the more general interests of the Parliament, in particular its interest in having its decisions upheld. However, instead of considering those interests in isolation, the Judge rightly balanced them against the interest of the Italian Republic in having its electoral legislation respected by the Parliament. The same applies in relation to the political legitimacy of the Parliament and its interest in the candidate who obtained the most votes receiving a seat. While the existence of such interests cannot be denied, that of the Italian Republic in having the Italian members who are elected in accordance with national electoral procedures and are declared to be members by one of the highest courts in that Member State take their seats cannot be ignored either.

71 Therefore the appellants' plea that there is an error of law in the balancing of the interests involved must also be rejected as unfounded.

72 As all the grounds of the appeal have been rejected, it follows that the appeal should be dismissed.

Costs

73 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Mr Donnici has applied for costs and the appellants have been unsuccessful, they must be ordered to pay Mr Donnici's costs.

On those grounds, the President of the Court hereby:

- 1. Dismisses the appeals;**
- 2. Orders Mr Occhetto and the European Parliament to pay Mr Donnici's costs.**

[Signatures]