

Allocation of a possible additional seat in the European Parliament during the 2009 – 2014 parliamentary term

1. General

In your letter of 17 March 2009, you requested that the Electoral Council make a recommendation on the allocation of an additional seat in the European Parliament which, on the basis of agreements on a European level, would be granted to the Netherlands during the next term of the European Parliament, when the Treaty of Lisbon will come into effect.

The Electoral Council agrees with the need to reach consensus as quickly as possible on the manner in which this possible additional seat will be allocated. If the relevant decision-making process has not yet been initiated on the day following the elections to the European Parliament, the outcome is bound to be ruled by the specific interests which the political parties involved could have in it. The European Council appreciates the fact that you have chosen to ask for advice at this stage, even though as yet there is no definite intention, let alone a definitive legislative proposal.

2. The need to amend the law

The need for a formal legal basis – which is itself based on European decisions - for the actual allocation of this seat is evident. On 11 June 2009, the Electoral Council will determine the results of the election of members to the European Parliament based on the number of seats in the European Parliament which have been made available to the Netherlands on the basis of European regulations.¹ An increase in this number as a result of European decision-making some time after 11 June 2009 cannot alter and/or supplement the election results or the decisions taken on the basis of these results without any further formal legal provisions.

The Electoral Council would like to point out that initiating the possibility of changing an election result that was already determined during the term of a representative body can, in general, only be acceptable under specific conditions, whereby there can be no doubt that the wish to change is not prompted by favouring certain political parties over others. In the case in question, it is beyond dispute that such a motive plays a role.

3. Options for the allocation of an additional seat

With regard to the manner in which an additional seat is allocated, it is important to keep the special character of allocating an additional seat during a parliamentary term in mind. The Electoral Council assumes that the Netherlands can itself determine the manner in which the additional seat is allocated. The Electoral Council believes that a method should be followed which, on the one hand, does as much justice as possible to the verdict of the voter and, on the other, keeps in existence the rights of lists and candidates, arising during the determination of the results of the elections on 11 June 2009 and any decisions based on these.

These assumptions rule out three options. To call a new election for the additional seat would mean that the biggest party would by definition secure this seat in this interim election. This would mean that the principle of proportional representation of the voter in the Dutch constituency of the European Parliament would be completely breached. This option is unattractive for this reason, not to mention the problem of having to explain the reason for a European interim election to voters in a country which, because of its electoral system, is not used to by-elections. Another option is to determine the

¹ Section 190, subsection two of the Treaty establishing the European Community, as amended by Section 9, subsection two, of the Act of 25 April 2005 concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded. Please refer to the appendix to the request for advice for the distribution of the seats in the European Parliament among the various EU member states.

election results again for 26 as opposed to 25 seats on the basis of the voting proportions on 4 June 2009. This is not an attractive option, since it is not inconceivable that certain representatives who were initially appointed on 11 June 2009 would in this case have to give up their seat during the parliamentary term. This could particularly be the case when candidates have either only just fallen short of the preferential electoral threshold for 25 seats or have only just obtained the preferential electoral threshold for 26 seats. In fact, it cannot be ruled out that – in part due to the effects of entering into list combinations on the one hand and the lowering of the electoral threshold as a result of the lowering of the electoral quotient on the other – the distribution of seats among the different lists would change in such a way that a political grouping would have to “give up” a seat when the results are determined a second time. Mutatis mutandis, the determination of two election results on 11 June 2009 (one for 25 seats and one for 26 seats) has the same disadvantages. This would be different if, in both cases, one could assume on 11 June 2009 that an electoral quotient can be calculated for 26 seats, whereby the last seat is not yet actually allocated to a person. This would be the ideal solution. However, this is not an option, since a legal basis for this will not have been put into place before 11 June 2009 at either European or Dutch level.

The method which you have proposed, whereby the 26th seat is allocated during the parliamentary term on the basis of an electoral quotient based on 25 seats as if it were an additional residual seat, comes closest to this ideal solution. The existing rights of candidates and lists are respected. However, a disadvantage is that the method results in a deterioration of the proportional composition of the Dutch constituency of the European Parliament, albeit incidentally quite slight. Namely a limited distortion of the proportionality could happen if a party only narrowly misses its target when the seats are first allocated on 11 June 2009 since it did not secure a full seat and therefore does not qualify for a residual seat, while it would have secured one had there been 26 seats allocated to the Netherlands from the start. This objection can be overcome by declaring the normal rule for allocating residual seats in the European Parliament elections not applicable, whereby only lists qualify which initially also secured a full seat. A system could also be chosen which would entitle one to qualify for this additional seat if one obtained at least 75% of the electoral quotient², using the electoral quotient of course that was applied to the original allocation of 25 seats on 11 June 2009. Incidentally, the Electoral Council points out that such a rule could also mean that the additional seat ends up with parties which would not qualify normally for a seat. The Electoral Council suggests that you tolerate this disadvantage, since the system of distributing residual seats generally works to the advantage of larger political parties and, due to the small number of seats to be distributed, the electoral threshold in European elections lies at a higher level than in most other elections.

In conclusion, the Electoral Council believes that, in view of the circumstances, the solution which you recommended is the best one. However, the Electoral Council would like to suggest that you refine it further, to the extent that parties which at first did not qualify for a residual seat when the 25 seats were allocated on 11 June 2009, since the total vote did not exceed the level of the electoral quotient, actually qualify for this additional seat, provided that they obtained at least 75% of the electoral quotient. The Electoral Council believes that this could compensate for the slight limitation of the proportionality that would result from your proposal (as you have identified).

4. Organisation of the decision-making process on the allocation of the additional seat

With regard to the actual decision-making process on the allocation of the additional seat, the Electoral Council would like to point out the following.

The Electoral Council proposes that, as the central electoral committee for the election of members to the European Parliament, it takes a decision which has a specific legal basis and to which, as in the case for reports for determining election results, a model applies which, due to its non-recurrent character, could become law.

The decision of the central electoral committee should roughly consist of the following elements:

² The percentage of 75% is in line with the arrangement in Section P 8, subsection two, of the Elections Act, for the distribution of residual seats in municipal elections in municipalities where the municipal council consists of fewer than 19 seats.

- a. The determination of the rationale and legal basis;
- b. An overview of the full and residual seats allocated to the lists and/or list combinations on 11 June 2009;
- c. [If the proposal with regard to the 75 per cent rule (described under 3) were to be adopted] An overview of the parties which did not obtain a full seat on 11 June 2009, but which did obtain 75% of the electoral quotient;
- d. An overview of the highest average per list and/or list combinations after the allocation of the final allocated residual seat during the determination of the election results on 11 June 2009, including the averages of lists which were initially not included since they did not qualify for a residual seat on the basis of the regular rules;
- e. The allocation of the additional seat in the European Parliament to a list and/or list combination by means of continual application of Article P 7 et seq. of the Elections Act (on the basis of the rule of the highest average);
- f. If relevant: The allocation of the seat within a list combination on the basis of Article P 11 of the Elections Act (based on the rule of the largest remainder) continually being applied;
- g. The appointment of a person on this list as if it were an interim vacancy.

The Electoral Council would like to point out that, as far as the designation of the appointee is concerned, it is advisable to follow the rules of Chapter W of the Elections Act, which regulates the succession in the case of interim vacancies. One of the advantages of this is that it will not be possible to extend the examination of the credentials of the representative to the electoral process or to the determination of the results (cf. Section V 4, subsection three, of the Elections Act). However, a separate arrangement will have to be made, to the extent that the decision with regard to the specific allocation of the additional seat can be included in the examination of the credentials of the [TRANSLATOR'S NOTE: THE WORD "REPRESENTATIVE" SHOULD PROBABLY BE INSERTED HERE] after this "partial determination of the results".

Practically speaking, this means that Chapter W of the Elections Act is declared applicable whereby what is referred to as the ranking on the basis of Article P 19 of the Elections Act serves as the starting point for the question who is appointed. Article P 19 prescribes that, as part of the determination of the results, the elected candidates are ranked in the order in which they were declared elected for every list or identical set of lists. Another advantage of declaring Chapter W of the Elections Act applicable is that it clearly specifies which actions should be taken if a representative who cannot, or does not, wish to qualify for appointment. Article W 2 of the Elections Act specifies which persons should be excluded. This is also important since the persons who do not wish to qualify for vacancies will probably already have submitted what are referred to as W 2 declarations during the parliamentary term. These declarations will then also automatically apply to the appointment to this seat.

Incidentally, a decision still needs to be made as to which system applies in case of an insufficient number of candidates:

- The system of Chapter P of the Elections Act, which applies to the allocation of seats following an election (all seats should be held, even if this means that they pass to another party if the party involved has no available candidates) or,
- that of Chapter W of the Elections Act (they will only pass to another party in case of a list combination).

In view of the nature of the allocation of seats, the Electoral Council would in this case like to recommend that the system of Chapter P of the Elections Act is declared applicable, since the seat concerned will be occupied for the first time since the election.

In conclusion, it is necessary to arrange exactly which terms and rules of procedure (e.g. the exclusion of making an appeal to the courts, in accordance with the arrangement for the determination of the results) apply to the allocation of the additional seat.

5. Possible intent of the supplementary and varying provisions

The allocation of an additional seat to a candidate is a one-off event, and will only take place during the next term. From that perspective, it is advisable to include the necessary provisions in either a separate law or as part of Chapter Z of the Elections Act since, from a strictly legislative perspective, the relevant regulations are of a transitional character.

The need to amend the Elections Act is connected specifically with the need to make supplementary and varying provisions to Chapter P (Determination of the results), Chapter V (The start of the membership), Chapter W (The succession) and Chapter Y (The election of the members to the European Parliament, including the term and responsibilities of the central electoral committee) of the Elections Act. Below you will find a brief outline of the derogations and supplements that are necessary. The list only concerns the main points; it is not meant to be exhaustive.

General assumptions

It is advisable to regulate in a general provision that the central electoral committee for the European Parliament elections is responsible for deciding on the list or set of identical lists to which the additional seat will be granted, and that it is charged with the allocation of this additional seat to a candidate.

Chapter P of the Elections Act should be made applicable as far as the matter of deciding to which list or set of lists the seat should be allocated is concerned. The ranking determined by the central electoral committee on the basis of Article P 19 of the Elections Act is used to allocate seats [TRANSLATOR'S NOTE: I ASSUME THIS REFERS TO SEATS] to candidates. Chapter V (start and end of the membership) and Chapter W (the succession) are applicable *mutatis mutandis*.

Chapter P Determination of the results

Chapter P will have to be wholly applicable, with the exception of Articles P 5 and P 9.

Article P 5 prescribes the manner in which the electoral quotient is to be determined. In this case, the electoral quotient which was determined on 11 June 2009 would apply. For this reason, it is preferable to state explicitly that this applies in contravention to Article P 5. The rule that parties which obtained the absolute majority of the number of votes should also have the absolute majority of the number of seats (Article P 9 of the Elections Act), if need be by taking that seat away from another list, cannot be applied since the allocation of seats to those other lists cannot be revoked.³

Chapter V The start of the membership and Chapter W The succession

The terms which apply to the acceptance of the appointment should be clarified, since Article V 2 of the Elections Act currently distinguishes between an appointment following an election and an appointment to a seat which has become vacant in the interim period. The long term given to a representative in the latter case could have an unfortunate effect.

In case of the invalidity of the vote and/or respectively the incorrectness of the determination of the results, the procedure laid down in Article V 5 et seq. of the Elections Act should be focused on the exceptional situation of determining the results for this particular seat. There is no possibility of the vote being declared invalid during the examination of the credentials of the appointee to this seat, just as this cannot be the case for an interim vacancy.

It has already been pointed out above that it is desirable to use the system of Chapter W of the Elections Act, which deals with the succession in the event of an interim vacancy in a representative body, as a criterion for the arrangement. It concerns the arrangement in Article W 2 in particular, which could be applicable *mutatis mutandis*.

³ Incidentally, the reallocation of seats in the event that a list has the absolute majority of the number of votes but not the absolute majority of the number of seats should not be applied to the election of members to the European Parliament. There is no rationale for this rule, since it is out of the question that a Dutch list holds an absolute majority in the representative body, and only the "Dutch" seats are at issue in this election.

Chapter Y The Election of the members of the European Parliament

Members of the European Parliament sit for a fixed term of 5 years. It has also been pointed out that this term starts from the opening of the first session after each election (cf. Article Y 5 of the Elections Act). The parliamentary term of the person appointed to the 26th seat should of course be organised in such a way that he/she will step down at the same time as the other members of the European Parliament.

6. Conclusion and summary

The Electoral Council believes that your choice to allocate an additional seat (if any) in the European Parliament as if it were a residual seat is a sound one. However, to prevent a breach of the proportionality, albeit limited, that would result from your proposal, the Electoral Council suggests that you further refine it by also enabling the parties which obtained at least 75% of the electoral quotient in the election to qualify for this additional seat.

The Electoral Council has also made suggestions in its recommendations for the organisation of the decision-making process and the necessary derogations from, and supplements to, the Elections Act.

As an implementing and advisory body, the Electoral Council would like to be involved in further shaping the necessary regulations.