

UNNUMBERED DOCUMENTS

EXPLANATORY MEMORANDUM ON EUROPEAN UNION DOCUMENTS

European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union

Proposal for a Council Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage

Submitted by the Foreign and Commonwealth Office on 4 January 2016.

SUBJECT MATTER

1. The attached Resolution and associated proposal from the European Parliament set out a number of measures to reform the European Electoral Law of 1976, concerning the conduct of elections to the European Parliament (EP elections). Under Article 223(1) of the Treaty on the Functioning of the European Union, the European Parliament has the right to draw up a proposal to reform electoral law concerning election of its members. To take effect, the proposal would need to be endorsed unanimously by the Council, with the consent of the European Parliament, and then approved by all Member States in accordance with their constitutional requirements. There is therefore a power of national veto in respect of this measure.
2. The European Parliament states that the objectives of the proposed reforms are: to enhance the democratic and transnational dimension of the European elections and the democratic legitimacy of EU decision-making; to reinforce the concept of citizenship of the EU; to promote the principle of representative democracy and the direct representation of Union citizens in the EP; to improve the functioning of the EP and the governance of the Union; to make the work of the EP more legitimate and efficient; to enhance the effectiveness of the system for conducting European elections; and to provide for the greatest possible degree of electoral equality and participation for EU citizens.
3. The proposed reforms are wide-ranging. Most are directly concerned with the conduct of EP elections. These include the introduction of mandatory thresholds to win seats in the EP in those EU countries that have only one constituency or constituencies that have more than 26 seats; issues relating to affiliation between national political parties and the European political parties; gender balance in electoral lists; the simultaneous communication of election results in all Member States; as well as a number of measures aimed at standardising practices relating to establishing candidate lists, electoral periods and voting methods.

4. In addition to those proposals relating to the conduct of elections, there are four further proposals. Two of these are concerned with the method used for proposing the candidate for the President of the European Commission. The EP is proposing that EP elections should be contested with formal EU-wide lead candidates for the Commission Presidency; and that a transnational constituency be established for the selection of these candidates.
5. There is also a proposal to replace unanimity with qualified majority voting for some Council decisions relating to the Electoral Act. Finally, the proposal seeks to establish that the office of Member of the European Parliament be incompatible with other roles, including that of a member of a regional parliament or assembly vested with legislative powers.
6. It should be noted that a number of measures in the attached Resolution, such as the recommendation that Member States should consider ways to harmonise the minimum voting age at 16, and move towards a common voting day, are not the subject of legislative proposals in the draft Council Decision.

SCRUTINY HISTORY

7. These are new documents and have therefore not been subject to Parliamentary Scrutiny before.
8. An Explanatory Memorandum on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Preparing for the 2014 European elections: Further enhancing their democratic and efficient conduct - and the Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament was submitted for Parliamentary Scrutiny on 17 April 2013. The House of Commons European Scrutiny Committee cleared the documents as “legally and politically important” after a debate on the Floor of the House on 18 June 2013 (ESC 34797 & 34798, Session 2013/14). The House of Lords Select Committee on the European Union cleared the documents on 22 May 2013 after referral to Sub-Committee E.

MINISTERIAL RESPONSIBILITY

9. The Secretary of State for Foreign and Commonwealth Affairs is the Minister with overall responsibility for UK policy on the EU. The Cabinet Office has responsibility for electoral policy and legislation relating to elections in the UK.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

10. The UK’s Foreign Affairs policy is a reserved matter under the UK’s devolution settlements.

The devolved administrations have been consulted in the preparation of this EM, and will continue to be consulted on the proposals as the Government position on this develops.

LEGAL AND PROCEDURAL ISSUES

11. Legal Basis: Article 223(1) of the Treaty on the Functioning of the European Union. However, the EP's proposals concerning election of the President of the Commission and on implementing measures do not appear to be in accordance with this competence.
12. Voting Procedures: The Council acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members.
13. Impact on UK Law: The proposals if adopted would be likely to require amendment to UK domestic legislation, the extent of which would depend on the precise nature of any agreed proposed changes.
14. Application to Gibraltar: Yes.
15. Fundamental rights analysis: No fundamental rights issues apply.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

16. None.

SUBSIDIARITY

17. The Government considers that this proposal raises subsidiarity concerns. Member States have competence in how they administer their elections, including deciding procedures to administer European parliamentary elections at national level, provided they comply with the 1976 Act and do not affect the essentially proportional nature of the voting system. Such an approach permits, where appropriate, consistency with other elections, such as those to national or regional parliaments or assemblies. Some of the proposals seek to achieve uniformity of practice across Member States on matters that the Government considers should be decided at a national level.

POLICY IMPLICATIONS

18. It is important to note that the proposals will require unanimity from Member States (in the Council) in order to progress. The Government will look at the proposals carefully. Consideration of them is at an early stage, though the Government's initial view is that it is not persuaded of the merits of many of the proposals and does not consider that they would achieve the European Parliament's stated objectives.

A number of the proposals lack clarity and the Government, will therefore, be seeking further clarification as to what is intended.

Current arrangements for the election of UK Members of the European Parliament

19. Elections to the European Parliament are currently held every 5 years. For European Parliamentary elections, the UK is divided into 12 electoral regions: 9 in England (one of which includes Gibraltar) and the 3 regions of Wales, Scotland and Northern Ireland. The UK's MEP seats (there are currently 73 seats) are allocated across the regions in accordance with criteria set out in the European Parliament (Representation) Act 2003 which provides that each region has at least 3 MEP seats and, subject to this, MEP seats are allocated in proportion to the number of electors in each region. Since 1999, elections to the European Parliament in Great Britain have been held using the Closed List proportional representation system, and in Northern Ireland using the Single Transferable Vote (STV) system.

The introduction of an obligatory threshold ranging between 3% and 5% for candidates to be elected

20. Article 2 of the current Act permits Member States to establish constituencies for elections to the European Parliament. As described above, the UK has 12 such constituencies (or "electoral regions"). The European Parliament has proposed that for constituencies (and also for single-constituency Member States), in which use the list system is used and which comprise more than 26 seats, Member States must set a threshold for the allocation of seats which may not be lower than 3 per cent nor exceed 5 per cent of the votes cast in the constituency (or the single-constituency Member State) concerned. This proposal may stem from concerns that it is currently possible for extreme parties to win EP seats on a small share of the vote.
21. The UK does not have provision for thresholds at any of its statutory elections, and in principle does not support them as they can be seen as undemocratic, though it is recognised that in reality a party or candidate will need to secure a certain level of support in order to be elected.
22. However, the UK would not fall within the scope of the proposal as drafted. This is because each of the UK's 12 electoral regions has fewer than 26 seats. Currently, the UK electoral region that returns the most MEPs is the South East region, which has 10 MEPs. It is unlikely that under the existing provisions for allocating UK MEPs seats any region will ever have more than 26 seats. This means that ultimately this proposal would not be relevant in the UK.
23. However, there is currently no provision for thresholds at statutory elections in the UK, and adopting the principle of a mandatory threshold for a statutory election would be a significant change for the UK. The Government will therefore wish to consider the proposal very carefully.

Common deadline for establishment of lists of candidates

24. The European Parliament has proposed that a common deadline is set across Member States for the establishment of the lists of candidates standing for election. It is proposed that this is at least 12 weeks prior to the beginning of the period (from Thursday to Sunday) that polling occurs in Member States. At present, the deadline for parties and candidates to submit their nomination papers (in order to stand at the election) may vary across Member States.
25. In the UK, parties and candidates wishing to stand at a European election may submit their nomination papers within a window starting from the publication of the notice of election (which must be done no later than 25 working days before polling day) and ending at 4pm on the 19th working day before polling day.
26. Clearly, the proposal would be a significant change to the nomination process. The UK Government would be concerned that having an earlier deadline for nominations could present potential difficulties for parties and individuals wishing to stand for election if they did not have the necessary nomination papers ready by the earlier date. Political parties in the UK may not favour having to submit their papers so far before polling day and it is not clear whether the proposal would have support among UK political parties.
27. The proposal if implemented for European elections would mean that the nomination process for these elections would differ from that at other polls (where we would not wish to make such a change). This could create issues; in particular, it could make it more complex to combine European elections with other polls, such as local elections, which has generally been considered to have had a positive impact on voter turnout at these polls. The Government has been seeking to align timings at elections generally and this proposal would be a departure from that policy.

Common deadline for establishment of electoral register

28. The European Parliament has proposed that a common deadline of 8 weeks before polling can first begin at the elections is set across Member States for the establishment of the lists of electors who will be eligible to vote at the elections.
29. The current deadline for registering to vote at UK elections, including European elections, is 12 working days before polling day. We would not favour moving the current registration deadline, as is proposed, as this would restrict participation at polls and may prevent eligible persons who, for example, may have recently moved, from registering to vote in the run up to the poll. There is also provision for late alterations to be made to the register in certain circumstances. It would appear that under the proposal such alterations would also be prevented given that it requires the finalisation of the register 8 weeks before polling can first begin.

30. A concern seems to be that political parties should be aware of the persons who will be able to vote at the upcoming poll. It is relevant that in the UK, political parties may be supplied with the electoral register, including monthly updates, at any time for electoral purposes and therefore in practice parties, if they wish, may have access to the register 12 weeks before polling day.
31. Again, the proposal if adopted for European elections could create complexities with the combination of European elections with other polls as well as disadvantage persons who wish to register to vote in the run up to the poll. Such a change for European elections could prove to be unhelpful to electors and levels of participation in elections to the European Parliament.

Selection of candidates by political parties

32. The European Parliament has proposed that political parties participating in European elections should ensure that their procedures for selecting their candidates for those elections are democratic and transparent. Also, that the list of candidates for European elections should ensure gender equality. The Government notes that these proposals are aimed at enhancing trust in European elections and improving democratic representation in the European Parliament. The Government believes that democratic institutions make the best decisions when they have a mix of people with different skills, backgrounds and experiences, from across the country and we must ensure that women are better represented across all walks of life.
33. The Government does not consider that legal quotas are the best way to affect change. The European Parliament's proposals may therefore not be the appropriate way to proceed on these matters though we will wish to consider them carefully.

The affiliation between national parties and European political parties

34. The European Parliament has proposed that the ballot papers used in European elections should give equal visibility to the names and logos of national parties and to those of European political parties. Also, national parties should refer in their campaign material to the manifesto of the European political party, if any, to which the national party is affiliated.
35. Political parties can already indicate their affiliation with European parties, should they wish to. At European elections, there is nothing within UK domestic law which would prevent a national political party from making known its affiliation with a European political party, during the course of its election campaign.

36. Political parties standing at UK elections may register with the Electoral Commission up to 12 descriptions and up to 3 emblems, which may be used on ballot papers at elections - a description and an emblem may appear alongside the name of the party on the ballot paper at a European election. A party could therefore register with the Electoral Commission a description and an emblem that show its affiliation with a European party (providing they met the requirements in electoral law) and these details could appear on the ballot paper at a European election.

Posting of electoral materials to voters

37. The European Parliament has proposed that the rules concerning the posting of electoral materials to voters in European elections should be the same as those applied for national, regional and local elections in the Member State concerned.
38. This would appear to concern the provision of information to voters about parties and candidates standing at European elections. The Government recognises the point being made, though there may be differences between the position at national, regional and local elections within Member States, and it would not be straightforward to mandate the position in the terms of the proposal.

Use of electronic voting and postal voting

39. The European Parliament has proposed that Member States adopt electronic and internet voting at European elections in order to make the conduct of the elections more efficient and more appealing to voters. Postal voting should also be available.
40. We recognise that the European Parliament is seeking to encourage participation at European elections. At UK elections, electors (including eligible UK citizens living abroad) are already able to vote by post. To make online voting available for elections sounds attractive in light of current advances in IT. However, there are concerns that electronic voting is not sufficiently transparent or secure. The selection of elected representatives is regarded as requiring the highest possible level of test and, at present, there are concerns that electronic voting, by any means, is not seen by many to be sufficiently rigorous and could potentially be vulnerable to attack or fraud.
41. In addition, the cost of introducing such a system would be substantial. Public support for such measures is still far from universal and traditional means of voting (such as polling stations and postal voting) remain popular with the electorate. Therefore, any means of electronic voting would have to be introduced as an additional voting channel. Even if proven to be sufficiently robust, such a move would require careful consideration given the current economic climate.

The experience of the referendum on Scottish independence shows that if people are engaged in the democratic process they will turn out to vote using the existing mechanisms. Because of continuing concerns about the integrity of electronic voting systems, the UK Government has no plans to introduce such a system for UK elections.

Eligibility to be an MEP

42. The European Parliament has proposed that the office of MEP should be incompatible with that of member of a regional parliament or assembly vested with legislative powers. EU law currently prevents members of national parliaments from holding the office of MEP. The UK Government would wish to consider the proposal further in light of the potential impact it may have on membership of the devolved bodies in the UK.
43. Given the different types of elected bodies that exist at a sub-national level across Member States and the range of powers that they have, it would be important to ensure that any change resulting from this proposal is clearly drafted to ensure there is certainty and clarity on the issue. This may be a matter that would be more appropriate for individual Member States to decide.

EU citizens overseas

44. The European Parliament proposes that all EU citizens, including those living or working in a third country should be able to vote in European Parliamentary elections. Member States would be required to take the necessary measures to ensure the exercise of this right.
45. This seems to concern the position of citizens of a Member State who do not reside in their 'home' State. Currently, UK law provides that British citizens living overseas (whether in another Member State or otherwise) may register to vote in European elections in the UK for a maximum of 15 years after they were last registered to vote in the UK. The same time limit also applies to voting in UK Parliamentary elections. British citizens living overseas who are entitled to vote in European elections in the UK may vote by post or appoint a proxy to vote on their behalf at these elections.
46. As set out in its manifesto, the Government is committed to scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting and will introduce standalone legislation to deliver this as a permanent change in due course. Citizens of other EU Member States who are resident in the UK can register to vote in European elections in the UK in the same way as British citizens.

Exchange of data on voters

47. The European Parliament has made proposals relating to the exchange of data on voters under Directive 93/109/EC on the right to vote and stand as a candidate in elections to the EP for EU citizens residing in a Member State of which they are not nationals. In particular, it is proposed to set a common deadline for the exchange of data between Member States. The Government has concerns about the practicalities of the existing process which has not proved workable in practice. The Government will consider whether the European Parliament's proposals would improve the current system.

Voting and declaration of results

48. The European Parliament proposes that voting at European elections will continue to take place across Member States within a period of four days (from Thursday to Sunday), with each Member State fixing the date (or dates) and times for voting in their poll within that period, though voting should end by 2100 hours CET on the Sunday.
49. It is also proposed that, as now, Member States shall not officially make public their results until polling has closed in all Member States. Also, first official projections of the results should be communicated simultaneously in all Member States following the close of voting. Prior to this, exit poll-based forecasts should not be published.
50. UK electoral law governing the conduct of European Parliamentary elections in effect provides, in accordance with existing EU law, that UK results cannot be published until polls have closed in all Member States. UK law also prohibits the publication of exit polls until voting has ended across the EU.
51. It is proposed that the counting of postal votes may only begin in all Member States once the polls have closed in all Member States. In the UK, the verification and counting of postal votes is organised so that these stages will commence before the close of polling in all Member States and are completed after that time. Should these processes finish at an earlier point, UK law prevents results from being published until polls have closed in all Member States.
52. We agree that no indication of the result, final or projected, should go out before voting has ended in all Member States.

Voting Day

53. It is envisaged that European elections continue to be held across Member States every 5 years though it is proposed that in future the European Parliament, after consulting the Council will determine the electoral period for voting and will do so at least one year before the end of the existing 5 year term.

The UK has a long tradition of Thursday elections, and the UK Government welcomes that the European Parliament respects electoral diversity across Member States on this issue.

54. The period in which the elections are held is determined by EU law which provides that Council can move the date up to two months before or one month after the period fixed for voting, if all Member States agree, and after consulting the European Parliament. On the basis of this provision, the date of European elections has previously been changed; most recently the 2014 European election was moved to earlier in 2014 to avoid a clash with the Pentecost public holiday which could have affected electors' availability to vote. The UK Government would have concerns about changing the current arrangements were this to lead to elections being held in a period that might cause difficulty for some (or all) Member States.

The Post of President of the European Commission

55. There are two proposals that seek to reinforce the legitimacy of the "Spitzenkandidaten" process for the Commission Presidency. Firstly, that the EP elections should be contested with formal EU-wide lead candidates, and secondly, that a joint constituency is established in which lists are headed by each political family's candidate for the post of President of the European Commission. It is unclear what is intended by the second of these proposals.
56. The UK Government's view remains that, in accordance with the Treaties, it is for the European Council composed to propose the President of the European Commission. European political parties are free to nominate candidates for Commission President, and national political parties are free to declare support for those candidates, if they so choose.
57. However, the Prime Minister made clear in his statement to Parliament after the June 2014 European Council that the UK Government believed that it should not be for the European Parliament to dictate the choice of candidate for the role of the President of the European Commission. The Treaties clearly set out the role the European Parliament and the European Council respectively play in the process of selecting the next Commission President.

Replacing unanimity by qualified majority voting for implementing measures

58. Replacing unanimity with qualified majority voting for measures to implement this Act would remove an important tool that the UK and other member States have to block unwanted measures. In any event it does not appear to be in accordance with the Treaties for the European Parliament to propose a voting procedure that differs from that in Article 223(1) TFEU.

REGULATORY IMPACT ASSESSMENT

59. Not applicable.

FINANCIAL IMPLICATIONS

60. We have not carried out any detailed work on the financial implications of the proposals given that they are wide ranging and consideration of them is at an early stage. Should more refined proposals emerge following consideration of the EP's proposals by the Council and Member States we will consider in more detail their financial implications.

TIMETABLE

61. The European Parliament adopted these proposals on 11 November 2015 and they were formally transmitted to the Council by EP President Schulz on 27 November.
62. The Dutch Presidency will start discussions at working group level in January 2016.

The Rt Hon David Lidington MP
Minister for Europe
Foreign and Commonwealth Office