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on The Reform of the Electoral Law of the European Union

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The Case for Electoral Law Reform

Even though already the Treaty of Rome in 1957 envisaged the possibility for the elaboration of a *uniform* electoral procedure based on direct universal suffrage, elections to the European Parliament are still highly dominated by national electoral rules. The political distribution of seats in the European Parliament is not determined by one European election, but 28 national elections of national seat contingents. This constitutes a sharp contrast to the nature of the European Parliament as a truly European body and an equal co-legislator in the European Union's institutional set-up. The political groups in the European Parliament show a remarkable level of coherence in voting comparable with most national parliaments. Fully in line with their role according to the European Treaties, Members of the European Parliament do not act as representatives of their Member State, but as "representatives of the European citizens"¹.

The different political visions and interests represented in the European Parliament are not presented to the electorate in the run-up to the European elections. Election campaigns are conducted first and foremost in the national political arenas, leaving European citizens in the dark about the actual policy that might result from their vote. In this regard the nomination of top candidates by the European Political Parties for the post of Commission President in the 2014 European elections can be seen as a breakthrough. However, despite all efforts, the leading top candidates were unknown to the majority of European citizens² and for many voters even the affiliation of the national parties to their European political families remained unclear. Elections are the main instrument of democratic participation, but due to the outdated system governing the European elections, citizens are unable to fully take part in European political debates.

Apart from the need to strengthen the European dimension of European elections, the current degree of heterogeneity in national electoral rules conflicts with the notion of European citizenship and the principle of equality. While harmonization is not an end in itself, European citizens must be able to exercise their voting rights under comparable conditions respecting democratic principles, irrespective of their national citizenship.

In order to bridge the gap between the European institutions and the electorates that are kept in their national cocoons, as well as to provide equal treatment of all Union citizens, the European Parliament is determined to make use of its rights enshrined in Article 223 (1) TFEU to initiate a reform of the European Electoral Act³.

¹ Article 14 (2) TEU: "The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats."

² According to an IPSOS poll conducted in April 2014 only 40% of voters throughout Europe knew Martin Schulz, 39% Jean-Claude Juncker and José Bové, 37% Guy Verhofstadt and 31% Ska Keller or Alexis Tsipras. See www.ipsos-na.com/news-polls/pressrelease.aspx?id=6491.

³ Act concerning the election of the members of the European Parliament by direct universal suffrage, OJ L 278, 8.10.1976, p.5, amended by Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283, 21.10.2002, p. 1–4, in the following called "European Electoral Act".

Status Quo

Since 1976, when the European Electoral Act paved the way for the first direct election of the European Parliament in 1979, the provisions governing the European elections have undergone some development, albeit not as substantial as the European Parliament would have wanted. In 1992 the Treaty of Maastricht gave the European Parliament the right to assent to the Council's decision on a uniform procedure and made significant advances in the area of citizenship by providing European citizens with the right to vote and stand as a candidate in any Member State of residence. The Maastricht Treaty introduced the possibility for establishing Political Parties at the European level, thereby making a step towards transnational politics. In the Amsterdam Treaty of 1997 the European Parliament's mandate for a reform of the European electoral law was widened. Since then, proposals of the European Parliament do not necessarily have to aim at a uniform procedure, but can also define common principles that have to be followed by all Member States. The Treaty of Lisbon granted Members of the European Parliament the status of representatives of the European Union's citizens instead of the "peoples of the States". It furthermore gave the European Parliament the right to *elect* the Commission President, instead of merely giving its consent to the European Council's choice. The obligation of the European Council to take the results of the European elections into account when nominating the candidate links the vote of the citizens to the election of the Commission President.

In parallel to the Treaty changes, progress was made in establishing basic conditions for the election of the European Parliament through secondary legislation. Council Directive 93/109/EC¹ laid down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens residing in a Member State of which they are not nationals. However, problems persist in its implementation (the Commission launched infringement procedure against 14 Member States who failed to transpose this Directive). Council Regulation 2004/2003² set the rules for the establishment of European Political Parties and gives them access to funding from European Union's general budget. The rules were further developed through Regulation 1141/2014³, which will enter into force in 2017 and grant European Political Parties a European legal personality. The only reform of the European Electoral Act itself took place in 2002 through Council Decision 2002/772 EC, which requires the Member States to conduct the elections on the basis of proportional representation using a list system or a single transferable vote system and abolished the dual mandate for Members of the European Parliament. Member States were furthermore granted the explicit right to establish constituencies on national level and introduce a national threshold of up to 5%.

¹ Council Directive 93/109/EC of 6 December 1993, OJ L 329, 30.12.1993, p. 34–38, amended by Council Directive 2013/1/EU of 20 December 2012, OJ L 26, 26.1.2013, p. 27–29.

² Regulation 2004/2003/EC of the European Parliament and the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, OJ L 297, 15.11.2003, p. 1, amended by Regulation 1524/2007/EC of the European Parliament and of the Council of 18 December 2007, OJ L 343, 27.12.2007, p. 5.

³ Regulation 1141/2014/EU, Euratom of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations, OJ L 317 04.11.2014, p. 1.

Despite these reforms European elections are still mostly governed by national laws, electoral campaigning remains national and European Political Parties can not sufficiently fulfil their constitutional mandate and “contribute to forming European political awareness and to expressing the will of citizens of the Union” as demanded by Article 10 (4) TEU.

The Way Forward

Article 223 (1) TFEU gives the European Parliament the right to initiate a reform of European electoral law by formulating proposals, which the Council decides upon by unanimity. Amendments to the European Electoral Act are then submitted for ratification by the Member States according to their constitutional requirements. In addition to this, Article 14 of the European Electoral Act provides for a lighter procedure to be used for more technical measures. They are adopted by a unanimous Council-vote after consulting the European Commission, without requiring national ratification. However, any implementing measure must be based on specific provisions in the European Electoral Act itself. Given the limited scope of the European Electoral Act in its current form, no substantial reforms can be undertaken by implementing measures.

The Rapporteurs examined a broad number of potential reform measures that could reach the goal of enhancing the democratic dimension of the European elections, reinforcing the European citizenship, improving the functioning of the European Parliament and the governance of the European Union, making the work of the European Parliament more legitimate and efficient, enhancing the effectiveness of the European elections' conduct, and providing for more electoral equality of the European citizens.

I. Based on their analysis, the Rapporteurs suggest the following **measures for a reform of the European Electoral Act** in time for the 2019 elections:

- Obligatory national/regional thresholds
- Harmonized voting system
- Harmonized age of voters/candidates
- Codification of top candidates in Electoral Act and common deadline for their nomination
- Visibility of European Political Parties on ballot paper
- Common deadline for establishing lists at national level
- Electronic/online voting possibilities
- Procedure to avoid voting in more than one MS
- European voting cards
- European Electoral Authority
- Uniform voting day and /or end of voting
- Harmonized requirements to vote abroad
- Harmonized method for the allocation of seats based on electoral results in the Member States
- Common rules for the creation of constituencies
- Gender balance

- Minimum standards for transparency and democracy concerning the nomination of candidates
- II. Furthermore, the Rapporteurs believe that the following ideas go beyond the current scope of the Treaties and should be reflected and tackled in the framework of a discussion on an eventual future Treaty revision:
- A threshold at the European level
 - Transnational lists
 - Allocation of seats to European Political Parties (double proportionality)
 - European rules governing the legal privileges and immunities of Members of the European Parliament

Annex: Measures for a reform of the European Electoral Act

1. Obligatory national/regional thresholds

A harmonised national threshold would provide more equality of European citizens. The existing European electoral provisions allow for a non-obligatory threshold of up to 5% to be set for European elections. Currently, 15 Member States have used this opportunity and have introduced a threshold of between 3% and 5%. Furthermore, in smaller Member States and Member States who sub-divided their electoral area into constituencies (e.g. France and the United Kingdom) the factual threshold lies above 5% even though no legal thresholds exist. Thus, only very few Member States, especially Spain and Germany, would be affected by such a measure. An obligatory threshold or a range applicable to all Member States would avoid further fragmentation of the European Parliament. As the Lisbon Treaty strengthened the competences of the European Parliament, a threshold is justifiable both from the democratic and legitimacy perspective. To safeguard the rights of minorities in certain Member States, regional thresholds could be allowed in addition or as an alternative measure.

2. Harmonized voting system

The European Electoral Act spells out two options for conducting the European elections on the basis of proportional representation: the list system and the single transferable vote system. Furthermore, the act explicitly allows the introduction of preferential voting, which is already used by a majority of 16 Member States. Research suggests that turnout is higher in Member States that use (semi-)open lists (62,59% on average)¹. Therefore, using the list system with a preferential voting possibility could be envisaged as a further measure to make elections more unified and to provide more equality between European citizens and make European elections more attractive.

3. Harmonized age of voters/candidates

Currently, all Member States have fixed the voting age (active suffrage) at 18, with the exception of Austria, where the voting age has been lowered to 16 in 2007. The age above which one can stand as candidate in European elections (passive suffrage) currently varies between 18 and 25 years.

It is highly questionable, why European citizens should have different access to the European elections as a voter or candidate depending on their nationality or Member State of residence. The difference in electoral rules regarding the minimum age to vote and stand as a candidate leads to a direct discrimination in the most fundamental area of citizenship – the right to participate in the democratic process. The harmonisation of the voting age as well as the minimum age for candidates would be highly desirable to provide real equality for European citizens.

¹ Instituto Europeo de Derecho (2010) Study on possible developments of EU legislation in the field of electoral matters including possible modification of Directive 93/109/EC, prepared for the European Commission DG Justice, Liberty and Security – Unit D.2 Citizenship, JLS/2008/FRAC/PR/1033.

4. Codification of top candidates in Electoral Act and common deadline for their nomination

The nomination of top candidates by the European Political Parties is not explicitly foreseen in the Treaties or the European Electoral Act, but is an indirect consequence of the Lisbon Treaty, which links the European elections to the election of the Commission President. Since the Lisbon Treaty gives a role of Parliament in the election of Commission President, the procedure for the nomination and selection of top candidates for this position should be an integral part of the election campaigns. Therefore, a provision on the nomination of the top candidates could be introduced in the European Electoral Act, laying down basic conditions for the nomination process, as for example a common deadline and the obligation to observe democratic standards. A more formalised role of the top candidates would possibly give them greater visibility and outreach and would as well consolidate the practice of their nomination as such.

5. Visibility of European Political Parties on ballot paper

Placing the names (and logos) of European Political Parties as well as their top candidates on the ballot papers would improve their visibility and show the link between the vote for a particular national party and the impact it has on the size of a European political group in the European Parliament. Furthermore, if European Political Parties are more present in the national campaigns, the focus of the campaigns would shift from the domestic agenda to European issues.

Such enhanced visibility measures would also render European elections more transparent and improve their democratic conduct as citizens will be aware for which European political family their vote goes. The measure could take two forms: a rule that the name (and logo) have to be placed on the ballot paper, or, as a softer version, the obligation for Member States to give the possibility to national parties to place their affiliated European Political Party on the ballot paper, if they wish to do so. Currently national legislation in 16 Member States prohibits such a reference (Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Germany, Greece, Finland, Hungary, Latvia, Luxembourg, Malta, Romania, Slovakia and Sweden)¹.

6. Common deadline for establishing lists at national level

Currently the deadlines for finalising electoral lists ahead of European elections vary greatly among Member States (ranging from 17 days in Greece to 83 days in Germany). A common deadline for establishing lists (at least six weeks before the election day) is absolutely necessary to give candidates sufficient time to present their ideas during the campaign and thus render the conduct of the European elections more democratic. A synchronisation of the campaign periods would also prepare the ground for linking the campaigns themselves. Furthermore, the measure would enhance electoral equality, as it would provide all European citizens with the same time to make their choice.

¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards more democratic European Parliament elections - Report on the implementation of the Commission's recommendations of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament, COM(2014) 196 final, p. 4.

7. Electronic/online voting possibilities

Electronic/online voting could make the conduct of the European elections more efficient and more appealing, especially for younger voters and for voters experiencing mobility issues or living abroad. However, there are serious safety questions that need to be considered and due to a lack of transparency electronic/online voting could give rise to unjustified fraud claims. The case of Estonia, the only European country that has introduced electronic/online voting, shows a sharp increase in electronic/online voting for the European Parliament (14,7% in 2009 and 31,3% in 2014)¹. Moreover, electronic/online voting could avoid multiple voting. Member States could be encouraged to consider electronic/online voting by explicitly allowing its use in the European Electoral Act.

8. Procedures to avoid voting in more than one Member State

Council Directive 93/109/EC provides a mechanism for the prevention of multiple voting which consists in the exchange of data between the Member States. On the basis of the data sent by the Member State of residence, the Member State of origin must remove citizens concerned from its electoral roll. However, this instrument has proven insufficient² to reach its purpose. Even though the European Commission has tried to remedy the situation, the Council has not taken up the proposals and the situation remains unsatisfying.

The prohibition to vote more than once in European elections is laid down in the European Electoral Act³, while the right of European citizens to “vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State” is directly enshrined in Article 22 (2) TFEU. The provision also provides a special legislative procedure for the adoption of implementation measures⁴, upon which Council Directive 93/109/EC is based. Provisions to avoid multiple voting could be introduced as implementing measures under Article 14 of the European Electoral Act. Furthermore, Council Directive 93/109/EC could be amended to facilitate the participation of European citizens residing in a Member State of which they are not nationals and at the same time avoid that these citizens vote more than once in the European elections.

9. European voting cards

A European voting card or a personal identification document for voters at the European elections would possibly make the conduct of European elections more efficient and could be especially useful for the electronic/ online voting. Due to its strong implications on the competences of the Member States in the field of electoral procedures, such a measure could

¹ www.vvk.ee/voting-methods-in-estonia/engindex/statistics

² Commission Recommendation of 12.03.2013, OJ C (2013) 1303.

³ Article 9 of the European Electoral Act: “No one may vote more than once in any election of members of the European Parliament”.

⁴ Article 22 (2) TFEU: “Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.”

be introduced only through an amendment of the Electoral Act itself.

10. European Electoral Authority

A European Electoral Authority could centralize the information on the European elections and oversee their conduct. It could observe and collect the development of national electoral rules and facilitate the exchange of information between Member States to prohibit multiple voting. Its further competences would depend on the measures undertaken, e.g. the introduction of transnational lists, the allocation of seats to European Parties on Union-wide level, or a European level threshold.

11. Uniform voting day and/or end of voting

A uniform electoral day would contribute strongly to the common European character of the European elections. Furthermore, it would avoid that election results in some Member States are publicized before the polling in all Member States has ended, thus possibly influencing the outcome of the elections. Although Article 10 (2) of the European Electoral Act explicitly prohibits the early publication of the results¹, they have been regularly leaked in the past.

A harmonization of the voting period by choosing a single election day (or by shortening the election period to two days) and a common ending time of the elections on Sunday evening could be envisaged.

12. Harmonized requirements to vote from abroad

Not all Member States² provide the possibility for their citizens to vote from abroad, and among those that do, the conditions for the deprivation of voting rights vary greatly. The harmonization of the requirements to vote from abroad would give the same possibility to participate in elections for all European citizens residing outside the Union and thus contribute to electoral equality.

13. Harmonized method for the allocation of seats based on electoral results in the Member States

Currently Member States use eight different formulas for the calculation of the seat distribution. Fifteen Member States use the d'Hondt-method, which makes it the most commonly used. Using the same formula would make the calculation of results more equal across the European Union and thus improve the conduct of elections.

¹ Article 10 Article 9 of the Act concerning the election of the members of the European Parliament by direct universal suffrage, OJ L 278, 8.10.1976, p.5:

„1. Elections to the European Parliament shall be held on the date and at the times fixed by each Member State; for all Member States this date shall fall within the same period starting on a Thursday morning and ending on the following Sunday.

2. Member States may not officially make public the results of their count until after the close of polling in the Member State whose electors are the last to vote within the period referred to in paragraph.“

² Czech Republic, Malta, Ireland and Slovakia don't allow for voting abroad.

14. Common rules for the creation of constituencies

Common rules for the creation of constituencies, for example a harmonized minimum or maximum number of voters or seats per constituency, would provide for more electoral equality. On the one hand, an obligatory subdivision into constituencies for Member States with a certain population (e.g. 20 million inhabitants) or for Member States with a certain minimum number of seats (e.g. 12) could increase the proximity between citizens and Members of European Parliament, spur interest for the European elections, and consequently increase the turnout. On the other hand, smaller constituencies translate the votes cast into a less proportional seat distribution. The smaller the constituencies are, the more votes lose their value. Furthermore, in many Member States constituencies grew historically (e.g. in the United Kingdom) or are designed to safeguard minority rights (e.g. the German-speaking population in Belgium).

15. Gender balance

While the number of female Members of the European Parliament has more than doubled since the first direct European elections, it still amounts to only 36.88%. A reformed European Electoral Act could entail a legal base for implementing acts under the ordinary legislative procedure, which are directed at establishing more gender equality (e.g. requirements for the electoral lists of national parties). In case of the creation of transnational electoral lists at the European level, the European Political Parties could be required to establish gender balanced lists or to nominate a certain minimum share of female candidates.

16. Minimum standards for transparency and democracy concerning the nomination of candidates

To render the European elections more democratic it is not only necessary to reform the rules governing them, but also to guarantee that national parties nominate their candidates in a transparent and democratic manner. Apart from a common deadline for the nomination of candidates, minimum requirements regarding transparency and democracy for the process of nomination itself could be included in the European Electoral Act, e.g. the obligation for national parties to put the nominations to a vote. Alternatively, a more general provision stating that national parties have to observe democratic standards could be created, which would serve as a legal basis for the European institutions to act under the ordinary legislative procedure if necessary.

17. A threshold at the European level

In order to maintain the good functioning of the European Parliament and to strengthen role of European Political Parties, a threshold laid down in the European Electoral Act could be introduced at the European level. The threshold would be calculated in relation to the votes cast for each European Political Party through their member parties in the 28 Member States. The voters would still cast their votes for the national member parties according to the respective national rules, but only national parties affiliated with a European Political Party surpassing the threshold could win seats in the European Parliament. A European threshold would thus incentivise national parties to determine and make public their affiliation with a European Political Party and thus give citizens a clearer idea about the consequence of their

vote. National parties would be encouraged to link and coordinate their campaigns with the European Political Party family. Also, a stronger connection between the European Political Parties and the political groups in the European Parliament would emerge. A European level threshold can be very low and it does not exclude the possibility to additionally introduce national or regional thresholds. In Member States with a single transferable vote system, the first preference vote would be considered for the calculation of the threshold.

18. Transnational lists

The introduction of transnational lists would be the most logic measure to represent the European dimension in the European electoral system. Part of the Members of the European Parliament would be elected in a constituency that comprises the whole territory of the European Union. The European Political Parties would be responsible to draft the candidate lists for the European constituency. Voters would have two votes: one - as before - for the national lists and one for the European lists.

Transnational lists would not fully replace national seats of Members of the European Parliament, nor would they distort the principle of degressive proportionality for the allocation of seats between the Member States. They would rather strengthen the role of European Political Parties and establish real competition between different political ideas at the European level, thus giving more prominence to European-wide issues and fostering transnational debates. The introduction of transnational lists would as well guarantee that all citizens are able to vote for the top candidates, which would be at the lead of their European Political Party's list.

19. Allocation of seats to European Political Parties (double proportionality)

In order to create genuine competition between the European Political Parties and to give them a central role in the campaigns, a system of double proportionality for the distribution of seats as a result of the European elections could be introduced. The apportionment of the seats would be calculated on the basis of the sum of votes cast for each European Political Party and additionally on the votes cast for the respective party in the Member State, thus having both a European political and a national territorial criterion for the allocation of seats in the European Parliament. Double proportionality would establish electoral equality among all Union citizens, without altering the number of seats allocated to each Member State.

20. European rules governing the legal privileges and immunities of Members of the European Parliament

The European Parliament still lacks an autonomous system for regulating the legal privileges and immunities of its Members. Article 6 (2) of the European Electoral Act refers to the protocol on the privileges and immunities of the European Union, which dates back to 8 April 1965 and essentially stipulates that Members of the European Parliament enjoy the same privileges as members of the national parliament in their respective Member State. The privileges and immunities are thus governed by 28 different sets of rules and lead to a discriminatory treatment of Members of the European Parliament. The protocol is annexed to the Treaties and has the same legal value as the Treaties themselves, which means that a reform of the rules governing the legal privileges and immunities of the Members of the European Parliament requires Treaty change and cannot be achieved by altering the European

Electoral Act.