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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Working Party on General Affairs
Subject:	European Parliament´s 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 - legal assessment

I. INTRODUCTION

1. In November 2015, the European Parliament adopted a Resolution on the reform of the electoral law of the European Union which set out a 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 (electoral Act).[2]

[1] This document contains legal advice protected under Article 4(2) 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, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

[2] See 14743/15.

2. At its meeting on 13 January 2016 the General Affairs Group asked the Council Legal Service to give its opinion on the compatibility of the European Parliament´s proposal with the Treaties. The present opinion assesses the main legal issues raised by the EP´s proposal. The legal analysis will be limited to the content of the proposed Council Decision and not of the European Parliament´s resolution to which it is annexed, which has a somewhat different scope.

II. LEGAL BASIS AND GENERAL REMARKS ON SUBSIDIARITY

3. The EP proposal is based on Article 223 TFEU, according to which:

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

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, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

4. The provision was significantly modified by the Lisbon Treaty. Before Lisbon, former article 138 (and after Amsterdam art. 190) provided that the Council "*shall, acting unanimously (...), lay down the appropriate provisions which it shall recommend to Member Sates for adoption in accordance with their respective constitutional requirements*."

5. Under the previous regime it was therefore clear that the electoral Act was an act of the Member States, and that the Union's competence was limited to submitting, in accordance with a specific procedure, a *recommendation* for the adoption of that act. Consequently, in previous opinions, the LS qualified the electoral Act from a legal point of view as an international agreement between Member States, having the same force as the Treaties and therefore not subject to the legality review of the Court of Justice.[3]

6. On the contrary, the current version makes it clear that it is up to the Council to lay down the necessary provisions for the election of the European Parliament, in accordance with a *special legislative procedure* which provides for the consent of the European Parliament and, as an additional condition for entry into force, approval by the *Member States in accordance with their constitutional requirements.* The electoral Act is therefore now an act of secondary legislation, albeit of a special nature, whose legality requires compliance with the provisions of the Treaties and which is subject to the review of the Court of Justice. The legality of the European Parliament's proposal must therefore be assessed within the legal framework of the Treaties as they currently stand.

7. As for the respective roles of the European Parliament and the Council in the procedure, the Treaty is clear in entrusting to the Council the task of laying down the provisions of the electoral law (second indent Article 223(1)). The LS is of the opinion that the Council enjoys the widest possible discretion when exercising this competence, and that, more specifically, it is not bound by the scope or object of the European Parliament's proposal. For a start, while the English-language version of the first indent of Article 223 TFEU refers to the European Parliament's "proposal", other language versions use expressions (for instance: in French "projet", in Italian "progetto", in German "Entwurf") which exclude any parallelism between the European Parliament's role under Article 223 TFEU and the Commission's power of proposal under the legislative procedure.

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[3] Note from the General Secretariat of the Council of the European Communities, 4 December 1969, S/1173/69

8. Arguments of a systemic nature support the same conclusion. The role of the European Parliament under Article 223 TFEU is not supported by the same safeguards that, according to Article 293 TFEU, support the Commission in the exercise of its right of initiative under the ordinary legislative procedure. Moreover, the second indent of Article 223 TFEU does not mention that the Council has to act on the basis of the European Parliament's "proposal", but rather provides that the Council should adopt its decision "after obtaining the consent of the European Parliament". Thus, provided that the consent of the EP is eventually obtained, the Council remains free to determine the provisions for the election of the European Parliament.

9. The Union competence established by Article 223 TFEU is one which is shared with the Member States within the meaning of Article 2(2) TFEU .[4] A number of arguments plead in favour of such a conclusion. For a start, despite the changes introduced by the Lisbon Treaty, the drafters of the Treaties have confirmed their willingness to associate the Member States – and, as may be required by MS' constitutional requirements, their national Parliaments – with the procedure leading to the entry into force of EU electoral law. Secondly, the legal basis allows the EU legislator to opt for the adoption of provisions either in accordance with a uniform procedure or in accordance with principles common to all Member States. In that regard, it has to be stressed that even the first and more ambitious regulatory option offered by Article 223 TFEU still leaves the Member States some scope for exercising their competence in electoral matters, since the notion of uniform procedure differs from that of a single or identical procedure[5]. Of course, the scope for Member States' competence remains much greater if the Union legislator decides, as it has done so far, to limit its intervention to the definition of certain common principles. Thus, from a substantive point of view as well, Article 223 TFEU envisages the participation of both the Union and the MS in the definition of the EU electoral procedure. [6]

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[4] Since the Act in question exclusively concerns an EU institution, even if limited to common principles, it could be argued that the competence is exclusive in nature, as is the case for EU own resources, which also associate MS. If such an argument were to be followed, Protocol 2 would not apply (Article 5(3) TEU). But such a conclusion is not to be retained.

[5] As the LS has made clear in previous opinions.

[6] In that connection, see the opinion of the AG Cruz Villalon of 4 June 2015 in case C-650/13, and particularly para. 94 and 96, in which the AG considers that "*whether by establishing a procedure for the election of members of the European Parliament or by laying down the common principles on the basis of which that election should take place, the Union legislature participates in the exercise of a particular competence that could perhaps be described as 'shared', but which at all events involves the Union legislature directly*".

10. Thirdly and most importantly, it has to be stressed that a strict relationship exists between electoral rights in European elections and the concept of European citizenship.[7] Since European citizenship is not an autonomous status insofar as it is a consequence of citizenship of the Member States, it remains up to the Member States to define both the subjective scope of the citizenship and the way in which the rights associated with that status are provided for. This of course also includes defining the limitations of and conditions for the exercise of the electoral rights, including in European elections, at least insofar as common principles or a uniform procedure for the election of the European Parliament are not adopted at EU level.[8]

11. It follows from the above that the exercise of the shared Union competence in the field of electoral law is subject to compliance with the principles of subsidiarity and proportionality and that, more specifically, *Protocol 2 on subsidiarity* is fully applicable to the present case.

12. This means that the EP is under both procedural and substantive obligations when exercising the legislative initiative as provided for in Article 223(1). More specifically, under Article 4(2) of Protocol 2, the European Parliament shall "forward its draft legislative acts…. to national Parliaments", while under Article 5 of Protocol 2, the EP is required to justify its draft legislative act "with regard to the principles of subsidiarity and proportionality", which also entails an obligation to substantiate with qualitative and, whenever possible, quantitative indicators the reasons for concluding that a Union objective can be better achieved at Union level, and to take account of the need for any financial or administrative burden to be minimised and be in proportion to the objective to be achieved.

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[7] Although the right to vote and the right to stand for election do not strictly overlap with the notion of citizenship (since it may well be that a legislator decides, in certain peculiar circumstances, to exclude from the electoral rights certain categories of citizens or, on the contrary, to attribute those rights to non-citizens), the principles of democracy upon which the Union is based (Article 2 TEU) and the principle of direct universal suffrage for the election of the European Parliament (Article 14(3) TEU) militate in favour of considering that citizens are *in principle* the vestees of those rights.

[8] See the joined opinion of the AG Tizzano of 6 April 2006 in joined cases C-145/04 *Spain v United Kingdom* and C-300/04 *Eman and Sevinger v College van burgemeester Den Haag*, ECLI:EU:C:2006:231, in particular para. 94 and ff. and 150 and ff., and especially para. 153.

13. Several delegations have expressed concerns about the transmission of the current proposal by the European Parliament to the national Parliaments and in particular have pointed to the EP's failure to make any explicit reference to the procedure referred to in Protocol 2 and its deadlines. The LS points out that, in line with well-established case-law on the infringement of essential procedural requirements, a procedural flaw can affect the legality of an act only if it is capable of influencing the content of the act concerned, for example by preventing the exercise of participation rights or the compulsory consultation of third parties altogether and therefore affecting the institutional balance or the rights of the persons concerned. Mere transmission irregularities, such as delays or the absence of a transmission letter, cannot be considered sufficient to meet the threshold established by the Court.

14. Other concerns regard the compliance by the EP with the obligation to state reasons in support of its initiative. In particular it has been pointed out that the "proposal for a Council decision" transmitted by the European Parliament to the national Parliaments does not contain any element of motivation in relation to the principles of subsidiarity and proportionality. In that regard it should be stressed, however, that the "proposal" itself is annexed to a EP resolution which provides a rather detailed explanation of its elements and which sets out the reasons why, according to the EP, action would be needed at European level.

15. In the view of the LS, the proposal for a draft Council Decision amending the 1976 electoral Act and the resolution that has led to its adoption (and to which it is attached) cannot be considered separately and indeed form integral parts of the EP legislative “proposal” addressed to the Council and transmitted to the national Parliaments. Consequently, the EP's obligation to justify the draft legislative act with regard to the principles of subsidiarity and proportionality as provided for by Article 5 of Protocol 2 can effectively be met by a statement of reasons included in the resolution only, if adequate.

16. The statement of reasons included in the resolution adopting the European Parliament's "proposal" cannot, however, satisfy the obligation to state reasons established by Article 296 TFEU in relation to the legislative act itself. In fact, according to well-established case-law, the statement of reasons in support of an act must appear in the act and must be adopted by the author of the act - which in this case is the Council.[9] In order to ensure the legality of the final Council decision, it therefore appears necessary to include in its preamble a statement of reasons that justifies its provisions in view of the principles of subsidiarity and proportionality.

17. Finally, it has to be stressed that, despite the conclusions reached in paragraphs 13 to 15 above, nothing prevents the Council from asking the European Parliament, by way of exercising the broad discretion that it enjoys under Article 223(1) second indent (see paragraph 7 above), to better inform the national Parliaments or to provide additional reasons for the proposal, if it deems that necessary in order to be able to reach a decision.

18. Finally, under Articles 6 and 7 of Protocol 2, national Parliaments are empowered to submit a reasoned opinion as to non-compliance with the principle of subsidiarity within eight weeks from the date of transmission of the European Parliament´s draft. The European Parliament shall take account of the reasoned opinions issued by national Parliaments (Article 7(1)), and where reasoned opinions represent at least one third of all the votes allocated to the national Parliaments in accordance with Article 7(1) second indent, the European Parliament must review its project and decide to maintain, amend or withdraw it (the "yellow card" mechanism). However, the stricter provisions provided for in Article 7(3) (the "orange card" mechanism) apply only under the ordinary legislative procedure and are therefore not relevant to the present proposal.

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[9] See Case C-378/00 *Commission v European Parliament and Council*, ECLI:EU:C:2003:42, para. 66.

19. The LS stresses that control of the adequacy of the Parliament´s statement of reasons in relation to compliance with the principles of subsidiarity and proportionality implies a political assessment. It therefore pertains to the appreciation of national Parliaments to assess whether the objectives of the proposed measures could not be adequately achieved at Member State level and as a result are better achieved by action at Union level. In that regard it should however be stressed that the mere circumstance that the proposed measures require changes in national practices or legislation or entail certain practical difficulties are not valid arguments that can be invoked to call into question the need for action at Union level, since, by its very nature, the exercise of a shared competence by the Union implies the adoption of common rules.

20. Such circumstances can however be taken into consideration in order to appreciate the cost-benefit assessment of the proposal and therefore the added value of adopting a measure at European level.

21. Finally, in view of the large number of changes proposed by the European Parliament to the electoral Act and the need for legal clarity ensuing from the change in the legal framework applicable to the electoral matter following the entry into force of the Treaty of Lisbon (and that considerably affects certain existing provisions - see the section on proposed new Article 14 below), the Council may consider, when exercising the broad discretion that it enjoys when acting under Article 223, the adoption of an entirely new act repealing the existing one rather than proceed through amending it.

III. LEGAL ANALYSIS OF THE OPERATIVE PARTS OF THE PROPOSAL[10]

New Article 1 and new Article 6 (MPs as representatives of the citizens of the Union)

22. The proposed text for new Article 1 reproduces the existing provision of the 1976 Act but specifies that MEPs shall be elected "*as representatives of the citizens of the Union*". Along the same lines, the European Parliament´s proposal for Article 6 adds to the first indent of that Article a reference to the fact that MEPs "*shall represent all Union citizens*".[11]

23. In both cases the addition is unproblematic since the wording follows that already used in Article 14(2) TEU, as modified by the Lisbon Treaty (*"the Parliament shall be composed of representatives of the Union´s citizens").*

New Article 2a and Article 3f (joint constituency and Spitzenkandidaten)

24. New Articles 2a and 3f aim to institutionalise the practice of "Spitzenkandidaten", with the main European political parties putting forward candidates for the post of President of the Commission. In particular, new Article 2a envisages the establishment by the Council of a joint constituency in which "*lists are headed by each political family´s candidate for the post of President of the Commission*". Article 3f provides for the deadline by which European political parties shall nominate their candidates for the position of President of the Commission.

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10 Nothing in the present opinion is intended to give political support to the justifications offered for specific measures or to restrict the Council's broad discretion in determining which rules should be set at Union level or left for the Member States to decide.

11 The Parliament also proposes to redraft the second indent of Article 6 so as to take into account the change in the numbering and denomination of the Protocol on the privileges and immunities of the European Union. The proposed change is unproblematic.

25. The EP justifies the proposed new Articles on the grounds that the nomination of lead candidates for the office of President of the European Commission provides a link between votes cast at national level and the European context and increases the involvement of citizens in European elections while reinforcing democratic legitimacy and strengthening accountability.[12]

26. For a start, draft Article 2 does not provide any element substantiating the features of the proposed joint constituency (number of seats, relationship with national constituencies, composition of the list of candidates, etc.). Nor does the resolution to which the EP proposal is annexed provide more clarifications on the points that are obscure.[13]

27. More crucially, the provisions are highly problematic in terms of compliance with the institutional balance resulting from the Treaties. In particular, the institutionalisation of a "Spitzenkandidaten" practice based on the so-called precedent of 2014 might end up encroaching on the institutional prerogatives of the European Council as defined in the Treaties.

28. This results from the fact that the provision states that each "political family" should put forward its candidate for the post of President of the Commission who will head the electoral list in the proposed joint constituency. However, according to Article 17(7) TEU, the prerogative to propose a candidate for President of the Commission rests with the European Council only. While there is no direct conflict between the text of the proposed Article 2a and Article 17(7) (Article 2(a) technically concerning the presentation of electoral lists rather than the power to propose the President of the Commission), it is nonetheless clear that, by allowing *via* the elections for the European Parliament a popular vote on the prospective candidates for President of the Commission, the proposal fundamentally alters the institutional balance established by the Treaties.

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12 See points Parliament´s resolution, letters from V to Y.

13 Including the European added-value assessment drafted by the EP.

29. In the added-value assessment of its proposal, the EP suggests that the institutionalisation of the "Spitzenkandidaten" method would be justified in view of the changes made to the procedure of the appointment of the President of the Commission by the Lisbon Treaty. In particular, the EP mentions the fact that the European Council is now bound to put forward its proposal "*taking into account the elections to the European Parliament*", and that the EP now elects and no longer merely approves the Commission President. According to the EP, the election by the European Parliament of the Commission President presupposes a political choice, rather than a mere rubber-stamping of the selection made by the European Council.

30. The arguments put forward by the EP are unconvincing. Contrary to the EP's claims, the new wording of Article 17(7) TEU clearly defines the scope of the European Council´s discretion, which has to be exercised taking into account the result of the elections, but is not otherwise limited. The authors of the Treaties therefore left the European Council a wide margin of appreciation, which is accentuated by the proportional character of the representation in the European Parliament (art. 14(2) TEU), and therefore of the difficulty of having clear-cut electoral results. In such circumstances, the possibility for the European Council to indicate a candidate that is not the direct expression of a political force appears to be in line not only with the wording of the provision but also with the objective of ensuring an effective election of the President of the Commission.

31. As for the fact that the EP now "elects" rather than approves the election of the Commission President, the CLS would stress that this term is used in a non-technical way, since the intervention of the European Parliament lacks the features that are generally associated with an election (*in primis* the plurality of candidates). According to the CLS, therefore, the new terminology is meant only to better reflect the political dimension of the relationship existing between the European Parliament and Commission, but it has no direct bearing on the institutional balance between the European Parliament and European Council when it comes to the appointment of the President of the Commission.

New Article 3 (compulsory threshold)

32. New Article 3 establishes the obligation for Member States to introduce a threshold for the allocation of the seats. The obligation only concerns constituencies (i) in which the list system[14] is used and (ii) which comprise more than 26 seats, and consequently applies to only a limited number of Member States. The provision allows the Member States concerned to set the threshold at between 3 and 5 per cent of the votes cast in the constituency. The new norm aims to replace a provision which allows (but does not oblige) Member States to set a minimum threshold and establishes that such a threshold may not exceed 5 per cent of the votes cast at national level. Unlike the current provision, the draft article associates the threshold with the number of votes cast in the constituency and not at national level.

33. The European Parliament justifies the introduction of a compulsory threshold on the grounds of the need to avoid fragmentation in its composition and therefore of guaranteeing its functionality. It further stresses that the impact of the new provision will be limited since, on the one hand, various Member States have already introduced thresholds while, on the other hand, in the case of smaller MS and MS that have divided their electoral areas into constituencies, the de facto threshold lies above 3 per cent even if no legal threshold exists.

[14] Article 1 of the electoral Act provides that the election of the members of the European Parliament has to take place on the basis of proportional representation, but leaves it up to the Member States to decide whether to adopt a list system or the single transferable vote system. Currently, the Member States that have opted for the single transferable vote are Ireland, Malta and part of the UK (limited to the Northern Ireland constituency) .

34. The LS considers that the new provision does not pose any particular problems of compatibility with the treaties. The establishment of a threshold for the allocation of seats and the definition of its features is a central aspect of the electoral mechanism and therefore falls within the scope of the EU competence defined by Article 223(1) TFEU. As regards the limitations to the right to vote introduced by the provision, a useful reference is provided by the case-law of the European Court of Human Rights (ECHR) in the application of the European Convention of Human Rights, to which Article 6(3) TEU refers for establishing the general principles of Union law. In particular, according to settled ECHR case-law, setting electoral thresholds falls within the wide margin of discretion that the legislator enjoys in the choice of the electoral system and responds to the legitimate aim of avoiding excessive parliamentary fragmentation. Thus the ECHR has acknowledged that electoral thresholds at 4,[15] 5[16] or even 6 per cent of the valid votes cast [17] are compatible with the right to free elections as laid down in Article 3 of Protocol 1 of the European Convention on Human Rights.

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15 See *Magnago and Südtiroler Volkspartei v. Italy*, application no. 25035/94, Commission decision of 15 April 1996), DR 85-A, p. 112.

16 See *Tête v. France*, application no. 11123/84, Commission decision of 9 December 1987, DR 52, p. 68, which concerned a 5% threshold applied to the allocation of seats in elections to the European Parliament.

17 See *Federación nacionalista Canaria v. Spain*, application no. 56618/00, ECHR 2001-VI. In a recent case against Turkey, the ECHR found that a threshold of 10 per cent is in principle excessive but, taking into account the circumstances of the case - and in particular the specific context of the elections in question and the correctives and other safeguards that limited the effect of the threshold - it concluded that the Convention had not been violated: *Yumak and Sadak v. Turkey*, application no. 10226/03, ECHR 2008-III.

35. As regards the merits of the European Parliament´s proposal, the LS points out that, due to the restrictive conditions set out in draft article 3, various Member States which currently apply thresholds will not be covered by the proposed obligation. In that regard, in view of Article 8 of the current electoral Act, the LS takes the view that the introduction of an obligation to set up an electoral threshold in constituencies of a certain size does not prevent Member States from voluntarily introducing (or maintaining) thresholds in smaller constituencies too. For the purposes of clarity, however, the Council may deem it useful to amend the proposed article by introducing wording aiming to assert the faculty of the Member States to introduce an electoral threshold along the lines of current Article 3.

New Articles 3a and 3b (deadlines for electoral lists and electoral roll)

36. New Article 3a harmonises the deadline for the "establishment of lists of candidates" for the election ("at least 12 weeks before the start of the electoral period"). New Article 3b sets a uniform deadline of eight weeks before the election for the "establishment and finalisation of the electoral roll".

37. The European Parliament considers that a harmonised deadline for submitting the lists of candidates responds to the need for electoral equality: to put voters and candidates across Europe in the same position and harmonise the timing of the electoral campaign.[18] As for the introduction of a uniform deadline for the establishment of the electoral roll, the European Parliament refers to the need to allow Member States to effectively exchange information on voters in order to avoid double voting (see draft Article 9b).[19]

[18] Parliament´s Resolution, letter O.
[19] Parliament´s Resolution, letter P.

38. The two provisions do not pose any specific problems of compatibility with the Treaties. However, they suffer from a certain degree of imprecision or ambiguity in terms of their legal drafting. In particular, the reference to the "establishment of lists of candidates" in Article 3a does not seem pertinent, since the relevant act to be performed by the deadline appears to be the official submission of the list rather than its establishment. Moreover, in Article 3b the reference to both "establishment" and "finalisation" remains unclear.

39. In relation to the concerns voiced by different MS as regards the practical impact of the proposed norms, and more specifically the existence of different national rules and traditions when it comes to electoral deadlines, the LS refers to the considerations already developed above in paragraphs 19 and 20.

New Article 3c (selection of candidates according to a democratic procedure)

40. New draft Article 3c requires that political parties participating in the elections to the European Parliament "shall observe democratic procedures and transparency in selecting their candidates". The European Parliament considers that these requirements are "essential for building trust in the political system".[20]

41. This provision is unclear in many respects. First, it is not clear whether it is addressed to the Member States, to the political parties or to the candidates in the election. Secondly, it does not clarify what is meant by the "democratic procedures" according to which candidates shall be selected (e.g. many alternative models of democratic procedures for the selection of candidates could be envisaged) . Finally, it is not clear what consequences would ensue from its violation, and in particular whether the failure to apply democratic procedures in the selection of candidates would result in them being excluded from the election.

[20] Parliament's Resolution, letter N.

42. Such ambiguity poses a number of legal problems. The first relates to the scope of the legal basis. Article 223(1) TFEU covers the adoption of "provisions necessary for the election" of the European Parliament, i.e. the rules pertaining to the electoral procedure. While the LS maintains the view that the notion of electoral procedure can be broadly interpreted,[21] it is not convinced that draft Article 3c as it is currently worded falls within the scope of that concept. In fact, the norm aims expressly at regulating the internal organisation and functioning of the political parties as much as the conduct of elections. The reference made by the draft article to the selection of candidates for the elections does not as such establish a sufficient link with the electoral procedure, since the selection of candidates pertains to the pre-electoral phase. A different conclusion would be possible if the rules on the selection of candidates were translated into conditions for the admissibility of the electoral lists (or into eligibility criteria for the individual candidates). However, this does not seem to be so in the present case.

[21] In early opinions issued during the debates on the adoption of the 1976 electoral act, the LS has considered that the notion of electoral procedure includes (i) the substantive and procedural conditions for the exercise of the right to vote, (ii) the eligibility conditions, (iii) the voting system, (iv) the electoral procedures and (v) the conditions for the exercise of the electoral mandate.

43. A second series of problems concern the compatibility of the proposed provision with fundamental rights, and in particular with the right to stand in elections and the freedom of association provided for in Article 12 of the Charter. In principle, as parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections, some regulation of internal party activities can be considered necessary in order to ensure the proper functioning of a democratic society. These limitations can of course take the form of a requirement for the parties to be transparent in their internal decision-making and to seek input from the membership when determining their candidates, provided that the specific measures taken in order to achieve those results are both necessary and proportionate.[22] The proposed text therefore does not seem to pose any problem of compatibility with fundamental rights but, due to its extreme vagueness, it leaves the issue open in relation to its future implementation.

44. A third problem would arise if the enunciation of undefined concepts in the provisions were intended as a basis upon which implementation by the Member States could be monitored and reviewed, politically and judicially, by the Union institutions and upon which a doctrine and case-law could be elaborated with binding effect.

New Article 3d (gender equality)

45. The proposed new Article 3d establishes the obligation to set up gender quotas in electoral lists. The consequence of non-compliance with this obligation seems to be the admissibility of the list.

[22] European Commission for Democracy through Law (Venice Commission – CoE), Report on the method of nomination of candidates within political parties, CDL-AD(2015)020, para.11 and ff.

46. The proposal poses particularly delicate problems as to the balancing of fundamental rights, since the subject-matter in which it intervenes is at the crossroads of the right to stand for elections and to vote, the freedom of association (in particular of the political parties) and the principle of equality.

47. According to current MS and Council of Europe practice, it is admitted that a "gender quota" in electoral lists can pursue the legitimate aims of enhancing the democratic character (because more representative of society) of the election and of the legislature, and that this in turn can have a positive effect on its action, enhancing the promotion of gender equality.[23]

48. Along those lines, the Code of Good Practice in Electoral Matters of the Venice Commission of the Council of Europe states that, provided that "*there is a specific constitutional basis, rules could be adopted guaranteeing some degree of balance between the two sexes in elected bodies, or even parity. In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality and freedom of association.*" [24]

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[23] For a detailed account of current practices, see the Report on the impact of electoral systems on women´s representation in politics, Council for Democratic Elections and Venice Convention, 16 June 2009, CDL-AD(2009)029.

[24] Code of Good Practice in Electoral Matters of the Venice Commission, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002).
See also the Venice Commission´s Declaration on Women´s participation in elections of 13 June 2006, CDL-AD(2006)020.

49. In the EU legal order, such a constitutional basis may be found in Article 3(3) second indent TEU and Article 23 of the EU Charter of Fundamental Rights which, while guaranteeing equality of treatment between the two sexes, also allows "*the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex*".

50. While the legislator enjoys a margin of discretion in defining the balance between the various fundamental rights at stake, it needs to be satisfied that the proposed measures are necessary for achieving the aim pursued and in particular that no other less intrusive means exist for achieving the same objective (e.g. a system of non-binding quotas, or the penalisation of violations of quotas with fines rather than the exclusion of the list).

51. The legislator also needs to assess the proportionality of the measure at stake. In that regard, it should be noted that the proposed draft article provides little detail concerning the implementation of the quota and leaves the design of the quotas to the discretion of the Member States.[25] However, the specific features of the quota mechanism can have a crucial role in determining its effect and therefore its proportionality. Thus for instance the design of the quota can enhance or greatly reduce its impact.

52. Finally, the impact of the quota will vary greatly in accordance with the specific features of the electoral system, as defined by the Member States, in accordance with Article 8 of the electoral Act. Where a list system is used, especially if based on closed lists, there will be maximum impact, while in the case of a system based on the single transferable vote or which allows preferences, the effect of quotas will be greatly reduced.

[25] The only aspect provided for is the need for the list to "ensure gender equality" and therefore to consist of an equal number of men and women. However, it remains to be assessed, in terms of proportionality, whether a lower and less intrusive quota could nonetheless be considered sufficient to pursue the aim of a more balanced representation of the genders in the legislature.

New Article 3e (visibility of European political parties on ballot papers and during the electoral campaign)

53. The proposed new Article 3e establishes that "[t]he ballot papers used in elections to the European Parliament shall give equal visibility to the names and logos of national parties and to those of the European political parties". The second paragraph of the new Article requires the Member States to promote the visibility of the affiliations to European political parties. It further adds an obligation for parties to introduce in electoral campaign materials the reference to the manifesto of the European political party, if any, to which they are affiliated. In the view of the European Parliament, the aim of the provision is to strengthen the link between national and European parties and to contribute to the formation of "European political awareness".[26]

54. As far as the ballot papers are concerned, the LS considers that this provision does not pose any particular problem, provided that it is interpreted in the sense of requiring the compulsory display of European political parties´ logos only where the relevant national rules admit or require the publication of the logos of political parties on the ballot paper. Moreover, the way in which the obligation is implemented should not disadvantage those political forces that decide not to affiliate themselves with a European political party. A change in the wording of the article could better reflect those concerns.

[26] See Parliament´s Resolution, letter M.

55. As regards the provisions on the regulation of the electoral campaign, the specific obligation for the political forces to make reference to the manifesto of the European political party to which they are affiliated in their electoral campaign materials is a clear restriction on freedom of expression, which moreover intervenes in the particularly sensitive context of the electoral debate. In that regard, while the objective of making the affiliation of national parties to the European political parties more transparent could be legitimate[27], the legislator has to assess whether the proposed intervention in the modalities of the electoral campaign is justified in order to attain that objective (necessity test).

56. Moreover, the legislator needs to assess whether the aim pursued could not be achieved in a way that is less restrictive for the fundamental right at stake. In the circumstances of the case in question a number of alternative measures could be envisaged, such as having recourse to the self-regulation of the political forces (e.g. European political parties could make the admission of political forces subject to compliance with certain rules concerning the visibility to be accorded to the common manifesto during the electoral campaign).

New Articles 4a and 4b (postal and electronic voting)

57. These two provisions introduce the possibility for the Member States to allow electronic and internet voting (Article 4a) or postal voting (4b) for European elections. The provisions are legally unproblematic since they do not introduce any new obligations for the Member States.

[27] The fact that some draft provisions are not contrary to EU law does not of course entail any obligation for the Council to adopt them.

New Article 7 (incompatibility for members of regional parliaments or assemblies)

58. The European Parliament´s proposal introduces a new incompatibility with the office of a member of the European Parliament, namely being a member of a "*regional parliament or assembly vested with legislative powers*". Furthermore, the proposal repeals two temporary derogations relating to the incompatibility regimes for members of the Irish National Parliament and of the United Kingdom Parliament.

59. The additional restriction attached to the right to stand for election does not pose any problem of compatibility with fundamental rights. In the international context, in particular, the ECHR has already regarded as compatible with the European Convention on Human Rights a condition of eligibility that excludes the possibility for members of other legislatures to stand for elections.[28] In that regard, the proposed addition supplements the regime of incompatibility already provided for by Article 6 in the case of members of national legislatures and removes a potential instance of discrimination.

60. However, the drafting of the norm suffers from a certain lack of clarity, in particular as regards the reference to "regional" legislative bodies. Such terminology does not necessarily reflect the territorial articulation of all Member States and may therefore create ambiguities in defining the scope of the incompatibility regime.

New article 9a (vote of citizens residing in a third country)

61. The new provision extends the right to vote in European elections to all Union citizens, including those who are "living or working in a third country", and requires the Member States to take all the measures necessary to ensure the exercise of that right.

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28 M. v. the United Kingdom, no. 10316/83, Commission decision of 7 March 1984, DR 37, p. 129.

62. The European Parliament justifies the proposal in view of the significant differences existing between the various Member States as regards the possibility for their citizens living in a third country to vote in European elections and the need for greater electoral equality. It also refers to the possible increase in voter turnout that could result from an extended electoral base.

63. The determination of the conditions for the exercise of the right to vote, including residency requirements, is a central aspect of any electoral procedure and as such undoubtedly falls within the scope of EU competence as defined by Article 223(1). Such a conclusion is not altered by the fact that the Court of Justice has acknowledged on various occasions that "*the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State*".[29] In fact, such a statement simply reflects the state of EU law as it currently stands and in particular the fact that the Electoral Act does not lay down any common principle on the matter but rather leaves it to the Member States to deal with the conditions for the exercise of the right to vote (Article 8 of the Electoral Act).

64. As regards the merits, the European Parliament´s proposal entails an expansion of the electoral rights and as such does not raise any particular problems of compatibility with fundamental rights. However, some issues could emerge in the provision's implementation phase. In particular, the expansion of the electoral base, which we can imagine being different from one Member State to another and which will take place without changing the overall number of MEPs assigned to each Member State, would have an impact in terms of the representativeness of the elected MEPs - and therefore on the electoral equality of electors - both within the Member States and in relation to other Member States.

[29] Case C-145/04 Spain v United Kingdom, ECLI:EU:C:2006:543, para 78; Case C-300/04 Eman and Sevinger v College van burgemeester Den Haag, ECLI:EU:C:2006:545, para. 45; Case C-650/13, Delvigne v Commune de Lesparre-Médoc, ECLI:EU:C:2015:648 , para. 31.

65. Finally, as regards the drafting of the provision, the reference to citizens "living or working in a third country" is not legally sound. While the concept of "living in a third country" is unclear, the reference to a citizen "working in a third country" does not seem pertinent (either the worker already resides in a Member State or he or she resides in a third country). It therefore seems preferable to replace both concepts with that of "residence".

New article 9b (exchange of information)

66. New article 9b provides for an obligation for Member States to designate the contact authority which shall exchange the data concerning Union citizens who are i) nationals of more than one Member State and ii) not nationals of the Member State in which they reside, six weeks before the first day of election. The article further specifies that the data exchanged "shall include at least the surname and forename, age, city of residence and date of arrival in the Member State concerned, of the citizen in question". The aim of the provision is to avoid electoral fraud and prevent citizens from casting multiple votes.[30]

67. The exchange of information provided for in Article 9b clearly interferes with the individual right to the protection of personal data established by Article 8 of the Charter of Fundamental Rights of the European Union. While the aim pursued by the proposed norm is undoubtedly legitimate, it seems necessary to introduce certain wording which could ensure full compatibility with the relevant EU legislation on data protection. This could be achieved by introducing a reference to the obligations stemming from the Data Protection Directive, as implemented in national legislation.[31] Certain changes to the wording also appear necessary in order to ensure that the data collected are adequate, relevant and not excessive in relation to the purpose for which they are collected (Article 6(1)c of the Data Protection Directive).

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30 Parliament´s Resolution, letters AA and AB.

31 *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (Official Journal of the European Communities No L 281 /31 of 23 November 1995), currently being revised.

68. It also seems necessary to coordinate the proposed obligation to exchange information with that already established by Council Directive 93/109/EC[32] concerning the arrangements for the exercise of the right to vote in European elections for citizens of a Member State residing in another Member State. [33] The two obligations partially overlap (Article 13 of Directive 93/109/EC already provides for the exchange of information concerning citizens who are not nationals of the Member State in which they are residing), but are not subject to the same conditions since, for instance, the deadlines for transmitting the data differ.[34] There is therefore the risk of duplication and contradiction, and this should be avoided by a proper drafting of the provision and by coordination in the implementation phase.

69. At the same time, however, the experience already acquired by the Member States in implementing the mechanism of exchange of information established by Article 13 of Council Directive 93/109/EC offers important elements for assessing the viability, advantages and possible drawbacks of the proposed solution.

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32 *Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals* (Official Journal L 329 , 30/12/1993 P. 0034 – 0038) amended by Article 1 of Council Directive 2013/1/EU of 20 December 2012 (Official Journal C 26,26/1/2013 P.27-29)

33 According to Article 13, "*Member States shall exchange the information required for the implementation of Article 4. To that end, the Member State of residence shall, on the basis of the formal declaration referred to in Articles 9 and 10, supply the home Member State, sufficiently in advance of polling day, with information on the latter State's nationals entered on electoral rolls or standing as candidates. The home Member State shall, in accordance with its national legislation, take appropriate measures to ensure that its nationals do not vote more than once or stand as candidates in more than one Member State*".

34 Article 13 of Directive 93/109/EC does not specify the deadline ("sufficiently in advance of polling day"), while the proposed article 9b stipulates that the transmission shall happen "at least 6 weeks before the first day of the election."

New article 10 (draft elections and publication of results)

70. New article 10 adds to the existing provision on the time period for the conduct of the elections the indication that "the election shall end in all Member States by 21:00 hours CET" on Sunday. The norm introduces an obligation for Member States to abstain from making the result of the vote count officially public until after the close of polling and to communicate official projections simultaneously at the end of the electoral period. The provision also introduces a broader prohibition on the publication of exit poll forecasts prior to the end of the electoral period. Finally, the new draft article 10 provides that the counting of postal votes in all Member States shall begin after all the polls are closed. The declared aim of the new provisions is to contribute to safeguarding equality between voters from different Member States, and to make the whole process more democratic, while at the same time strengthening the European character of the elections by allowing the simultaneous announcement of the results.[35]

71. The draft proposal does not pose any particular problems of a legal character. Most of the obligations are aimed at the Member States and concern the organisation of the electoral operations, falling within the scope of Article 223 TFEU. The provision suffers from certain ambiguities due to its drafting, especially as regards the new end time of the elections. However, systemic reasons (notably the fact that it is up to each Member State to fix "the date or dates" of the elections) plead against that provision establishing a common closing time, but rather a latest possible one.

[35] European Added Value Assessment drafted by the EP, page 20.

72. Slightly more problematic is the ban on the publication of exit poll-based forecasts, which is addressed to the public (and the media) and which clearly introduces a restriction on freedom of expression (Article 11 of the Charter). In that regard, the ECHR has recognised that the need to ensure the freedom of electors´ choices may justify a restriction on freedom of expression, and that authorities enjoy a margin of appreciation in reconciling the two conflicting interests.[36] In this case too, the measure needs to undergo a necessity and proportionality test in order to ascertain whether less restrictive options (e.g. self-regulation) could be used to achieve the same aim.

New article 11 (electoral period)

73. New Article 11 attributes to the European Parliament, after consulting the Council, the power to determine the electoral period. In so doing, the proposal radically changes the current provision according to which the electoral period is determined by the Council acting unanimously, after consulting the European Parliament. The proposal also simplifies the modalities for the determination of the electoral period by repealing the provisions that currently allow for the automatic determination of the period in relation to the first elections of the European Parliament. The EP does not provide any explanation for its proposal.

74. The proposal is highly problematic. As has been pointed out in section II of the present opinion, the Lisbon Treaty substantially modified the nature of the electoral Act to be adopted according to Article 223(1). The electoral law is now contained in an act of secondary legislation that, as such, has to comply with the relevant provisions of the Treaties and is subject to review by the Court of Justice.

[36] See also Recommendation No. R. (99) 15 of the Committee of Ministers to Member States of the Council of Europe on measures concerning media coverage of election campaigns of 9 September 1999, page 3.

75. These conclusions are particularly relevant when it comes to the inclusion in the electoral Act of provisions empowering the institutions to adopt an implementing act. Such empowerment must, within the current framework of primary law, comply fully with the principles that Article 291 TFEU sets out as regards the modalities of implementation of EU law. Those principles provide no role for the European Parliament.

76. In the present case there is little doubt that the determination of the electoral period does not supplement the normative content of the electoral Act, but simply triggers its implementation. We are therefore faced with the exercise of an implementing power which cannot be conferred on the European Parliament.

New article 14 (implementing measures)

77. Draft Article 14 proposes to modify the procedure for the adoption of "measures to implement" the electoral Act. In particular, the European Parliament suggests modifying the voting rule for the adoption of such measures by the Council from unanimity to qualified majority. The European Parliament also proposes replacing the consultation of a conciliation committee composed of Council and Parliament representatives with the need to obtain the consent of the European Parliament. The EP does not provide any explanations in support of the new draft Article.

78. In view of the considerations developed in section II of this opinion and further developed in relation to draft new article 11, the LS takes the view that the suggested procedure to adopt "measures to implement the Act" is not in line with the legal framework resulting from the Treaty of Lisbon.

79. More specifically, the procedure fails to satisfy the requirements that Article 291(2) now establishes for the attribution to and exercise by the Council of implementing powers, and namely (i) the existence of a proven need for uniform conditions for implementing the act[37], (ii) the existence of reasons that would justify conferring to the Council - and not to the Commission - implementing powers[38], and (iii) the fact that implementing measures cannot amend or supplement essential elements of basic legislation[39], let alone (iv) compliance with the rules laid down for the adoption of the basic legislation.[40]

80. It must be added that the same conclusion also applies to the current version of Article 14. The norm, originally drafted as a provision of an act of primary law, is no longer compatible with the legal framework set up by the Treaties.

81. Under those circumstances, the LS takes the view that the Council should consider rejecting the proposal of the European Parliament and either (i) proposing the repeal of current Article 14 altogether or (ii) introducing a new provision on implementing powers that complies with the requirements established by article 291(2).

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37 This requirement needs in particular to be reconciled with the approach taken by Article 8 of the Electoral Act, which, subject to the provisions of that Act, establishes that the electoral procedure shall be governed in each Member State by its national provisions.

38 According to the Court, the Council "*must properly explain, by reference to the nature and content of the basic instrument to be implemented, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power*". See cases C-133/06 *European Parliament v Council,* ECLI:EU:C:2008:257, para. 47; C-257/01 *Commission v Council,* ECLI:EU:C:2005:25, para. 51.

39 Case C-355/10 *European Parliament v Council*, ECLI:EU:C:2012:516, para. 66.

40 Joined cases C-317/13 and C-679/13, *European Parliament v Council*, ECLI:EU:C:2015:223 para 42 and ff. But on this specific point, see also the opposite view in case C-133/06 *European Parliament v Council,* Opinion of the AG Maduro, ECLI:EU:C:2008:551, para. 17, based on a previous judgment C-303/94 *European Parliament v Council,* , ECLI:EU:C:1996:238, para. 23.

IV. CONCLUSION

82. The Council Legal Service is of the opinion that:

- the Union competence established by Article 223 TFEU is of a shared nature. Protocol 2 on the Principles of Subsidiarity and Proportionality applies to the proposal submitted by the European Parliament. The preamble of the final Council decision should include an adequate statement of reasons in relation to the principles of subsidiarity and proportionality;

- draft Article 2a and Article 3f are contrary to the principle of institutional balance, and more specifically to Article 17(7) TEU;

- as it is currently worded, draft Article 3c falls outside the scope of the legal basis provided for in Article 223(1) TFEU;

- Article 9b should be drafted so as to ensure full compatibility with the relevant EU legislation on data protection;

- draft Article 11 is contrary to Article 291 TFEU and to the principle of conferral as regards the attribution of implementing powers;

- draft Article 14 is contrary to Article 291 TFEU and to the principle of conferral as regards the attribution of implementing powers;

- various proposed norms suffer from a lack of clarity, ambiguities or imprecisions that need to be addressed if the Council is to consider retaining them.