

PRESIDENCY NON-PAPER

Subject: 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

I. Introduction

On 11 November 2015, the European Parliament adopted 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"), accompanied by a resolution on the reform of the electoral law of the European Union.¹ The EP's proposal is based on Article 223(1) TFEU, pursuant 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."

To facilitate the examination of the proposal, the Presidency organised a full table-round (three consecutive meetings), during which the Working Party on General Affairs heard the initial positions of all the delegations. On 13 January 2016, the Council Legal Service was asked to give its opinion. Following the discussion of this opinion in the working party in March and April 2016², delegations were given the opportunity to update their positions.

The aim of this Presidency non-paper is to give an overview of the current state of discussions on the EP's text and to propose a way forward with a view to further elaborating the Council's position.

¹ 14743/15.

² 7038/16.

II. General assessment

Delegations support efforts to enhance interest and voter turnout in European Parliament elections. Member States have shown openness to several provisions to this end. Yet, during the initial discussions about the proposal many questions and concerns have been raised. Many delegations have remained hesitant as regards a number of proposals aimed at creating a uniform electoral procedure for the EP elections and enhancing their transnational dimension. Delegations have stressed the particular importance of respecting Member States' constitutional traditions, as well as the principles of subsidiarity and proportionality. Several delegations have expressed their opposition to harmonisation as a goal in itself, suggesting that it should be pursued only in case of strict necessity and after a rigorous examination of its added value.

Delegations therefore stand ready to consider the EP's proposals outlined under III.A below. However, more clarifications are needed on the proposals under III.B, before conclusions can be drawn as to their possible acceptability for the delegations. Furthermore, delegations have expressed substantial concerns about the provisions under III.C, as currently drafted. Finally, the provisions under III.D appear to be unacceptable to the delegations, both as a matter of principle and on legal grounds.

In addition, some delegations have pointed out that the EP has not assessed the proportionality nor the financial and administrative impact of its proposals. As regards implementation, two delegations have pointed to their constitutional limitations: in one Member State, the changes to the electoral Act would have to be ratified at least one year before the next EP elections, i.e. by May 2018; in another Member State, changes to the electoral Act could only be applicable as from the 2024 EP elections.

In its legal opinion, the Council Legal Service has pointed out that the legal basis allows the Council to go beyond the scope of the draft submitted by the Parliament. In that regard, at least one delegation has expressed its interest to further assess the need and support for an additional provision to the text concerning the temporary replacement of MEPs on maternity or long term sick leave.

The Council Legal Service has also drawn attention to the changes introduced by the Lisbon Treaty to the legal basis, which has altered the legal nature of the act to be adopted. Unlike the electoral act currently in force, which has the nature of primary law, the new act will be one of secondary law. As a consequence, it will have to fully respect the Treaty provisions and the Court of Justice will exert its control of legality on it. As a matter of legal clarity, and depending on the extent of the changes to the existing act, the Council Legal Service has therefore advised the Working Party on

D. On the basis of the discussions in the Working Party on General Affairs to date, the following provisions appear to be unacceptable to the delegations as a matter of principle and on legal grounds:

- Joint constituency and "Spitzenkandidaten" (Articles 2a and 3f)

Articles 2a and 3f of the draft proposal provide, respectively, for the establishment of a "*joint constituency in which lists are headed by each political family's candidate for the post of President of the Commission*", and for a deadline by which European political parties are to nominate those candidates.

All delegations but one are opposed to these provisions. They concur with the Council Legal Service that the institutionalisation of the 2014 "*Spitzenkandidaten*" precedent raises concerns and is not in line with the institutional prerogatives of the European Council defined in Article 17(7) TEU. In addition, delegations have pointed out that the EP text does not detail the specific features of the proposed joint constituency, leading to a general lack of clarity as to its scope and effects. A few delegations have also underlined that creating a joint constituency is a political decision and is equivalent to the contested proposals for transnational lists.

- Implementing measures (new Articles 11 and 14)

The proposed Article 11 would give the European Parliament and no longer the Council the power to determine the electoral period. The new Article 14 modifies the procedure for the adoption of "measures to implement" the electoral Act, so as to give the EP the power to propose such measures and to provide for their adoption by the Council by QMV, after obtaining the EP's consent.

Most delegations have rejected the proposed amendments. As underlined in the opinion of the Council Legal Service, both provisions have to be brought in line with Treaty provisions and in particular with Article 291 TFEU, which excludes any role for the EP and imposes strict requirements for the attribution of implementing powers to the Council, which are not satisfied in the proposed Article 14. As regards the determination of the electoral period (Article 11), the Council Legal Service has proposed to either (i) maintain the currently applicable Article 11, or (ii) devise a new system that complies with the treaties. Regarding Article 14, which is no longer compatible with the treaties in its current version either, the two possibilities envisaged by the Council Legal Service are (i) to repeal the current Article 14 altogether or (ii) to identify precisely which provisions of the electoral Act require to be implemented uniformly at EU level and then introduce a new provision that complies with Article 291 TFEU.