



HOUSE OF LORDS

European Union Committee

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7th Report of Session 2015–16

# **Subsidiarity Assessment: reform of the electoral law of the EU**

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The Members of the EU Justice Sub-Committee, which agreed this Report, are:

<a href="#"><u>Lord Blair of Boughton</u></a>	<a href="#"><u>Lord Cromwell</u></a>	<a href="#"><u>Baroness Eccles of Moulton</u></a>
<a href="#"><u>Baroness Hughes of Stretford</u></a>	<a href="#"><u>Lord Judd</u></a>	<a href="#"><u>Baroness Kennedy of The Shaws (Chairman)</u></a>
<a href="#"><u>Baroness Ludford</u></a>	<a href="#"><u>Baroness Neuberger</u></a>	<a href="#"><u>Baroness Newlove</u></a>
<a href="#"><u>Lord Richard</u></a>	<a href="#"><u>Baroness Shackleton of Belgravia</u></a>	<a href="#"><u>Baroness Shackleton of Belgravia</u></a>

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### *Sub-Committee staff*

The current staff of the Sub-Committee are Paul Hardy (Legal Adviser), Tim Mitchell (Assistant Legal Adviser), Megan Conway (Clerk) and Amanda McGrath (Committee Assistant).

### *Contact details*

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. Telephone 020 7219 5791. Email [euclords@parliament.uk](mailto:euclords@parliament.uk).

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# Subsidiarity Assessment: reform of the electoral law of the EU

**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**

## Recommendation

1. We recommend that the House of Lords should issue the reasoned opinion set out below (in paragraphs 7–16) concluding that the European Parliament’s proposed Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage does not comply with the principle of subsidiarity; and should send it to the Presidents of the European Parliament, the Council and the Commission, in accordance with the provisions of the EU Treaties.<sup>1</sup>

## Scrutiny reserve

2. This report does not complete our consideration of this proposal, which we retain under scrutiny. It will be the subject of further detailed examination and correspondence with the Government.

## Our report

3. This report was prepared by the Justice Sub-Committee of the EU Select Committee. Its members are listed in the appendix.

## The European Parliament’s proposal

4. The Treaty of Lisbon includes a provision calling on the European Parliament to bring forward a legislative proposal laying down “the provisions necessary for the election of its members” in accordance with a uniform procedure in all Member States (or with principles common to all Member States).<sup>2</sup> This proposal, agreed by the European Parliament on 11 November 2015, is its formal response to the Treaty’s invitation.<sup>3</sup>
5. The European Parliament’s proposed draft legislation suggests the introduction of a number of new rules and a range of amendments to the existing EU legislation governing elections to the European Parliament.<sup>4</sup> The proposed changes can be categorised into three broad areas:<sup>5</sup>

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1 Under the Subsidiarity Protocol national Parliaments can challenge EU legislation for any failure to comply with the principle of subsidiarity within eight weeks from the date that the proposed legislation is transmitted to them in the official languages of the Union. The application of the eight week window to this matter is unclear because the Dutch Parliament has not yet received notification of the proposal. The UK Parliament received the European Parliament’s proposal on 11 December, therefore, in the interests of issuing a Reasoned Opinion in time, we are proceeding on the basis that the eight week period within which the House can express its views expires on 5 February.

2 Article 223(1), Treaty on the Functioning of the European Union

3 European Parliament resolution of 11 November 2015 on the reform of the electoral law of the European Union ([2015/2035\(INL\)](#)). The proposal for a Council Decision is annexed to this Resolution. Since being agreed by the European Parliament the proposal has passed to the Council for its consideration. The Council must agree any reforms unanimously.

4 See for example, Council Decisions [2002/772 EC](#) and [76/787 ECSC](#), EEC, Euratom.

5 The references in brackets refer to the relevant Article in the European Parliament’s proposal.

- (1) Rules governing the roles and responsibilities of individual Members of the European Parliament (MEP). The European Parliament proposal emphasises the fact that MEPs are “representatives of the Citizens of the Union” (Article 1); and, introduces a new requirement that the office of MEP be incompatible with membership of a regional assembly (Article 7).<sup>6</sup>
  - (2) Rules governing the conduct of European elections. In this category, amongst other matters, the European Parliament has suggested: the introduction of common deadlines governing the establishment of candidate lists (Article 3a) and, the establishment of the electoral register (Article 3b);<sup>7</sup> a requirement that political parties observe democratic and transparent candidate selection procedures (Article 3c); a requirement that the subsequent candidate lists “ensure gender equality” (Article 3d); and, a new rule that ballot papers used in European elections must give equal visibility to the names and logos of national parties and those of European political parties (Article 3e). Additionally, Member States are encouraged to promote European political party affiliation in radio and television campaign broadcasts and on election campaign material (Article 3e).
  - (3) The rights of EU citizens to vote in European elections. The European Parliament has proposed an expansion of an EU citizen’s right to vote in European elections, from wherever they live in the EU to all EU citizens “living or working in a third [i.e. non-EU] country” (Article 9a). The scope of the right to vote thereby appears unlimited.<sup>8</sup>
6. The proposal also includes provisions addressing the European Parliament’s role in appointing the President of the Commission.<sup>9</sup>

### Reasoned opinion

7. We have examined the European Parliament’s proposal for a Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by universal suffrage for compliance with the principle of subsidiarity. The principle of subsidiarity provides that, in policy areas which do not fall within the exclusive competence of the European Union, but where competence is shared with the Member States, the Union can act “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States”.<sup>10</sup> Therefore, to comply with the principle of subsidiarity, EU action must ‘add value’ as compared to action at Member State level, and be ‘necessary’.
8. This is a significant legislative proposal, whose intention is to reform the European Parliament’s electoral procedure before the 2019 elections “with the aim of enhancing the democratic and transnational dimension of the European elections and the democratic legitimacy of the EU decision-making

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6 The current rules already render the office of MEP incompatible with membership of one of the EU’s institutions, a national government, and/or national assembly.

7 12 weeks and eight weeks respectively.

8 For example, under current UK rules, British citizens living overseas, regardless of whether they are resident in an EU Member State, can register to vote in EU elections for a maximum of 15 years after they were last registered to vote in the UK. In its manifesto, the Government committed to scrapping the 15-year bar.

9 See proposed Articles 2a and 3f.

10 Article 5, Treaty on European Union

process”.<sup>11</sup> In making the proposal, however, the European Parliament should act within the limits of the competence conferred on it 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.”<sup>12</sup> It follows from this that each provision of the proposal must be necessary for the election of MEPs by direct universal suffrage in accordance with a uniform procedure.

9. We recognise that the test for what is necessary in this context is finely balanced. Only the European Parliament can propose a procedure for electing MEPs to be applied uniformly across the EU. If, however, the proposal goes beyond what is strictly necessary for the election of MEPs, it runs the risk of interfering with the coherence of national electoral rules which are better regulated at Member State level.
10. As we explain below, assessing whether the right balance has been struck has been made much harder by the lack of a detailed justification for each provision.

#### *Two problematical provisions*

11. In our view, two aspects of this proposal are difficult to justify in subsidiarity terms. These are:
  - (1) The proposed rules governing the selection of candidates for election to the European Parliament, particularly the imposition of a gender balance requirement (Article 3d). Regardless of the arguments in favour of achieving greater representation of women, the power in the Treaty under which this proposal is made is designed for the adoption of “provisions necessary for the election of [the European Parliament’s] Members”. We are not convinced that the imposition of a gender balance requirement on the list of candidates for election in Member States is a matter which should be regulated at EU level under the test of necessity.
  - (2) The proposed expansion of the existing right to vote in European elections for all EU citizens resident in the EU, to encompass all EU citizens regardless of whether they live in or outside the EU (Article 9a). In our view, this is an extensive right, and in the terms proposed by the European Parliament, unlimited. Again, we are not convinced that such a considerable extension of the right to vote in European elections for the election of MEPs is a matter which should be regulated at EU level under the test of necessity.

#### *European Parliament’s failure to comply with procedural requirements*

12. Article 5 of Protocol No 2 on the Application of the principles of Subsidiarity and Proportionality (the Subsidiarity Protocol) is clear that a draft legislative act proposed by an EU institution “should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”. This statement should comprise:
  - (1) “some assessment of the proposal’s financial impact”;

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11 See paragraph 1 of the European Parliament’s resolution of 11 November 2015 on the reform of the electoral law of the European Union ([2015/2035\(INL\)](#))

12 See footnote 1.

- (2) “in the case of a Directive, some assessment of the proposal’s implications for national and, where necessary, regional legislation”; and,
  - (3) “the reasons for concluding that a Union objective can be better achieved at Union level substantiated by qualitative and, wherever possible, quantitative indicators”.
13. The European Parliament’s failure to observe the obligations placed on it by Article 5 of the Subsidiarity Protocol, particularly at points (1) and (3) above, makes it very difficult for individual national parliaments to assess this proposal’s compatibility with the principle of subsidiarity.
14. We consider this to be a significant omission. The assumption underpinning the principle of subsidiarity in Article 5 of the Treaty on European Union is that decisions to legislate should be taken as closely as possible to the EU citizen.<sup>13</sup> Any departure from this presumption should, therefore, be justified with sufficient detail and clarity so that EU citizens, and their representatives in national parliaments, can understand the qualitative and quantitative reasons for action at EU level.
15. In our view, this omission constitutes a clear failure to comply with the essential procedural requirements in the Subsidiarity Protocol. We note that failure to respect an essential procedural obligation constitutes a ground for judicial review under EU law

*Conclusion*

16. The European Parliament’s failure to produce the requisite detailed statement, taken in conjunction with the two provisions highlighted above (see paragraph 11), leads the House of Lords to conclude that the European Parliament’s proposed Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by universal suffrage does not comply with the principle of subsidiarity.

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13 See footnote 9.

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Blair of Boughton  
 Lord Cromwell  
 Baroness Eccles of Moulton  
 Baroness Hughes of Stretford  
 Lord Judd  
 Baroness Kennedy of The Shaws (Chairman)  
 Baroness Ludford  
 Baroness Neuberger  
 Baroness Newlove  
 Lord Richard  
 Baroness Shackleton of Belgravia

### Declarations of Interest

Lord Blair of Boughton  
*No relevant interests declared*  
 Lord Cromwell  
*No relevant interests declared*  
 Baroness Eccles of Moulton  
*No relevant interests declared*  
 Baroness Hughes of Stretford  
*No relevant interests declared*  
 Lord Judd  
*No relevant interests declared*  
 Baroness Kennedy of The Shaws (Chairman)  
*No relevant interests declared*  
 Baroness Ludford  
*Former member of the European Parliament and in receipt of a pension in respect of service in that capacity*  
 Baroness Neuberger  
*No relevant interests declared*  
 Baroness Newlove  
*No relevant interests declared*  
 Lord Richard  
*No relevant interests declared*  
 Baroness Shackleton of Belgravia  
*No relevant interests declared*

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top  
Lord Borwick  
Lord Boswell of Aynho (Chairman)  
Earl of Caithness  
Lord Green of Hurstpierpoint  
Lord Jay of Ewelme  
Lord Liddle  
Lord Mawson  
Baroness Prashar  
Baroness Suttie  
Lord Tugendhat  
Lord Whitty  
Baroness Wilcox

During consideration of the report the following Member declared an interest:

Lord Jay of Ewelme  
*Vice Chair, Business for New Europe*  
*Member, Senior European Experts Group*

A full list of Members' interests can be found in the Register of Lords Interests <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>