

Examining changes to EU electoral law

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Public Law analysis: Will changes to EU electoral law create a simpler European electoral framework? Pavlos Eleftheriadis, barrister at Francis Taylor Building, suggests there is a long way to go before these changes take hold and argues that, if rejected by certain national governments, the changes may prove counter-productive.

Original news

EU Parliament approves changes to EU electoral law, LNB News 16/11/2015 118

A series of reforms to EU electoral law were approved by 315 votes to 241, with 55 abstentions to, among other things, introduce electronic voting across all EU countries, create mandatory thresholds for obtaining seats and give equal visibility to the names and logos of both national and European political parties as they appear on ballot papers. The EU Parliament has also recommended that formally endorsed, EU-wide lead candidates should be put forward for the role of president of the EU Commission.

What difficulties have been identified with the existing legal framework in this area? How significant a problem are they?

The election of members of the European Parliament has traditionally been a matter covered by both EU law and Member States' law. The original electoral law was outlined in a council decision of 1976, widely known as the 'Electoral Act'. Nevertheless, even after its amendment in 2002, this Act does not provide for a uniform procedure for European elections. States more or less have a free hand in choosing procedures and mechanisms for the election of MEPs.

This lack of uniformity has been a source of some embarrassment for the European Parliament, since it appears that in this most sensitive of issues, Member State discretion dominates. A uniform electoral law will be symbolically important.

The Lisbon Treaty makes it possible to have a common electoral law, under article 223(1) of the Treaty on the Functioning of the European Union (TFEU), but only if there was unanimity among the Member States and with the consent of the European Parliament and only if the law was incorporated by the states 'in accordance with their respective constitutional requirements'. This is an entirely unique area of EU law-making, where the creation of a uniform law does not follow the ordinary mechanisms we see for regulations and directives. But this is not a treaty amendment either. It is a unique process.

What are the key changes being proposed? Why are they significant?

The European Parliament is now triggering the application of TFEU, art 223(1). Its proposal--on 11 November 2015--includes several important innovations.

The most visible is the proposal to lower the voting age to 16, but perhaps the most important is its proposal to institutionalise the system of European political parties proposing their own 'lead candidates' (or Spitzenkandidaten) for European Commission President. This is something that was followed in 2014 when the heads of government chose Mr Juncker as the next President of the Commission when the European People's Party, which had nominated him, emerged victorious from the election.

This practice followed the fact that the TFEU, art 17(7) now says that the European Council must 'take into account the elections to the European Parliament' when proposing to Parliament a candidate for President of the Commission. 'Taking into account', does not mean, of course, that Member States are legally bound to select the person chosen by the political parties.

The Parliament's proposal suggests that a process of nomination of 'lead candidates' should be included in the new electoral law, alongside other reasonable reforms, such as the duty to nominate candidates at least 12 weeks before the start of the election and the availability of electronic voting.

Of course, this process alone cannot change TFEU, art 17(7), so the powers of the heads of Member States will remain the same.

How effective are the changes likely to be in dealing with existing problems in this area? Could there be any practical challenges involved in implementing these changes?

If the new electoral law is agreed and approved by national constitutional mechanisms, it will create a simple European electoral framework. It will increase transparency and make the process more intelligible to ordinary people. It will also concentrate the campaign on a debate on the identity of the new Commission President, as it happened in 2014.

These are all welcome changes because the European Parliament has real power and voters should be more involved in its election. In my view, however, these steps are unlikely, by themselves, to increase voter turnout--which fell further in 2014. Voter turnout has been falling in national elections as well. This is a much broader problem.

Moreover, once the process of lead candidates becomes permanent it is likely to affect the role of the Commission President, whose functions are not the traditional powers of the leader of a state's executive. A clearly politicised Commission may not then be the best placed institution for decisions in the sensitive areas of competition or state aid. This may be a problem in the future.

What does all this mean for lawyers? What should they do next?

Nothing. There is a very long way to go before the law is changed. In fact, the proposal may prove entirely counter-productive. If the proposal is rejected by some national governments or Parliaments, then the informal process of electing 'lead candidates' may then seem untenable.

The 2014 process was allowed to go ahead on the basis of its informality. But if a formal, uniform electoral law failed to be enacted as this proposal goes through the system, then those opposed to the 2014 experiment would have new grounds on which to argue that repeating the process will be an illegitimate imposition.

In my view the European Parliament is taking a great risk here. Failure to pass this law could weaken the process of proposing lead candidates, which is the last thing the Parliament wants.

How does this fit in with other developments in this area? Do you have any predictions for future developments?

There is a great deal of talk of reform in the EU. In my view the most important area in need of reform is the institutional structure of the Eurozone. Nevertheless, Member States seem unwilling to open that can of worms, in case the permanent sharing of risks already in place changes shape. The winners of the Eurozone seem content with the status quo.

I hope they will not remain complacent for long. The credibility of the EU is now on the line. It is not an accident in my view that Eurosceptic and anti-European parties are making such headway in electoral results. The answer in my view is for the leaders of the EU to provide leadership with bold proposals for carefully targeted integration. The dream of 'ever closer' integration may well be over, but this does not mean that nothing can be done. The best policy proposal in selected areas may well be more--and more intelligent--integration.

Pavlos Eleftheriadis is a barrister at Francis Taylor Building and a Fellow of Mansfield College, Oxford. He practises in all aspects of European Union law and especially in the law of state aid and public procurement.

Interviewed by Barbara Bergin.

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