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**Recruiting MEPs in difficult times:
an update on legal constraints and soft-law approaches
for further electoral reform**

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Introduction

Historical antecedents

Long before the first direct elections to the European Parliament, in 1979, the treaties and the precursors of the European Parliament, e.g. the Common Assembly and the Ad-hoc Assembly of the ECSC, underlined the need to create a supranational community and to have direct elections. To some extent this may be explained with an automatic mimesis of the national experience of the (seconded) members of these early assemblies. For many years, the guiding principle was to establish a uniform electoral system for the EC/EU. Beyond the fact that most founding Members of the EEC had some kind of parliamentary system the political importance of European elections for the legitimacy of European integration was recognised well before the introduction of direct elections by leading EEC officials such as Walter Hallstein. In 1972, he wrote:

“[Direct election of the European Parliament will] force those entitled to vote to look at and examine the questions and the various options on which the European Parliament would have to decide in the months and years ahead. It would give candidates who emerged victorious from such a campaign a truly European mandate from their electors; and it would encourage the emergence of truly European political parties.”¹

A bit surprisingly, even members of national highest courts such as the German Federal Constitutional Court (FCC), when writing in a personal, scholarly capacity, acknowledge that the main reason for the EU's democratic fragility is the absence of a Europe-wide political debate and the weakness of political parties at the European level. Dieter Grimm devotes a whole chapter of a recent pamphlet to the description of the “necessity” of Europeanised elections and parties.² However, court decisions rarely reflect these insights, with some exceptions from earlier days of European integration (for instance, the famous Maastricht decision of 1993).

It turned out that due to the unanimity requirement in the Council of Ministers for the adoption, revision and ratification of the Electoral Act this ambitious goal had to be abandoned in favour of the more pragmatic solution of finding electoral rules according to common principles to be found in the Member State systems. A few such principles are indeed enshrined in the Electoral Act, notably incompatibility rules and the principle of proportional representation (in particular, after the 2002 revision).

Quite some time ago, Dieter Nohlen coined the term “polymorphous” to characterise the legal and procedural structure of the elections to the European Parliament. The hard-fought adoption and ratification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage (Electoral Act) brought about the direct election of MEPs by the Community's and later the Union's citizens, but many important features of the electoral procedure remained – and still are – firmly under the control of the domestic legislation and practices of the Member States. The European elections have hence been described by most political scientists as separate national elections of a second-order nature. An official report drawn up by the OSCE in 2009 calls them “essentially 27 separate national

¹ Quoted by Hix, S., & Hagemann, S. (2009). Could changing the electoral rules fix European parliament elections? *Politique européenne*, 28(2), 37-52.

² Grimm, D. (2016). *Europa ja - aber welches? Zur Verfassung der europäischen Demokratie*. C.H.Beck. English: (2017). *The constitution of European democracy*. Oxford University Press.

elections to a supra-national body ... characterised by a considerable diversity of national rules, procedures and practices.”³

While some observers consider this an appropriate framework for a halfway federal conglomerate such as the European Union, others have claimed that the new electoral system was only the first step towards a parliamentary system of government for the European Union and needed to be further Europeanised. Decisions taken over the past decades, such as the synchronisation of the length of the mandate of the Commission and the parliamentary term, the financial support for European-level political parties and foundations, or the *Spitzenkandidaten* process, followed this logic. However, the selection of candidates for EP elections stands out as a primary obstacle to EU parliamentarisation, as it remains firmly under the control of national or regional party leadership. Europarties or European parliamentary party groups are not mentioned in any national party statutes when referring to candidate selection, although informally the EP groups and the European Political Parties play a role in the (re-)selection of incumbent MEPs.⁴

The ambivalent nature of the beast

The European Union as a political system and the European Parliament, in particular, face contradictory demands and expectations:

- Those who decry the EU’s democratic deficit mostly concentrate on two key features of (national) parliamentary systems: EP elections don’t offer clear ideological and programmatic alternatives and they don’t lead to a regular or even intermittent alternation of governments and political leaders of different ideological shades. This critique only makes sense under the assumption that there is a European level of governance able to determine policies right down to the national or regional level. Conversely, majoritarian rule is considered by other EU scholars as fundamentally inappropriate because of the EU’s culturally and economically diverse component members and the lack of a European identity.
- In the European Parliament, the absence of a clear tension between government and opposition leads some observers to call for more politicisation at the EU level, including politicisation of the Commission. On the other hand, the EU is often said to be a “regulatory state”, i.e. it supposedly works best in a non-partisan, technocratic manner, e.g. in fields such as competition policy or monetary affairs, which had been depoliticised in many Member States, even before this was enacted at the EU level.
- At the national level, the politicisation of European integration arrived during the Maastricht treaty debates and has grown since the 2008-10 sovereign debt crisis. But under which circumstances would politicisation at the European level be plausible? Can wholesale rejection of the EU as a system be avoided if and when, in an effort to enable “within” opposition to EU policies, the political spectrum at the EU level is widened to include Eurosceptic and far-left or far-right parties?⁵

To find answers to these questions goes well beyond the legal and mathematical detail of electoral procedures. It would require a more general re-assessment of political representation

³ OSCE Office for Democratic Institutions and Human Rights, Elections to the European Parliament 4–7 June 2009; Expert Group Report, Warsaw, 22 September 2009.

⁴ Jean-Benoit Pilet, Emilie Van Haute and Camille Kelbel, Candidate selection procedures for the European elections; Study for the Committee on Constitutional Affairs of the European Parliament (2015), PE 519.206. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/519206/IPOL_STU\(2015\)519206_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/519206/IPOL_STU(2015)519206_EN.pdf)

⁵ Treib, O. (2021). Euroscepticism is here to stay: what cleavage theory can teach us about the 2019 European Parliament elections. *Journal of European Public Policy*, 28(2), 174-189

and contestation at the EU level. Nevertheless, electoral rules have been intensively discussed in several liberal democracies, for reasons that will be outlined below. To start, the next section will provide an empirical baseline and a descriptive analysis of the current rules determining the political and participatory character of the EP elections. A subsequent section will deal with current debates concerning further reform steps, especially the recent resolution adopted by the European Parliament⁶ that includes the proposal to create a single EU-wide constituency with candidates from several member states, complementing to a modest extent the current electoral system based on national or regional lists. In the third section the likelihood for this and other EP proposals to succeed will be discussed. A short conclusion will then distinguish different categories of reform, requiring different legal acts or soft-law decisions, and try to anticipate the odds of implementing them.

The European elections 2019

Objective

The purpose of this section is to document the legal and procedural diversity of the 2019 elections on the basis of a complete empirical analysis of 28 national systems to convert votes to seats, including the different methods to select and rank candidates, to apportion the seat contingent of a Member State to the different parties and to assign the seats won by a party to its candidates. The paper is partially based on data collected in a previous study carried out with the support of the European Parliament, which was published in July 2020.⁷ To our knowledge, it is the only research project collecting complete data on electoral candidates, rules and results of all Member States.

Data collection and modelling

Based on work carried out for previous European Parliament elections the paper comprises the following elements:

- Analysis of pertinent rules in the Member State legislation concerning the European elections
- Data collection of all candidates participating in the EP elections
- Application of the statutory rules to calculate the ranking and apportionment of candidates
- Presentation of an online collection of ballot sheets of the 2019 elections in most Member States⁸
- Complete list of online references to national electoral laws
- Presentation of a model for Union-wide representation based on double proportionality between political parties and Member States, the tandem system

Research to identify the names and party affiliations of the 2019 candidates was carried out in cooperation with dpa-infocom, the online research arm of a major German news corporation. The project was in part commissioned by online search engines such as Google and social media such as Facebook for their coverage of the electoral campaign and the outcome of the election. A team of 20 freelance researchers participated, covering all official languages and posted in

⁶ P9_TA(2022)0129, adopted on 3 May 2022.

⁷ *The European elections of 2019: Electoral systems and outcomes*, European Parliamentary Research Service study series (doc. PE 652.037).

⁸ https://www.kai-friederike.de/EP2019_ballots.html

Hamburg during the project. The main sources were social media, party internet portals and official websites (e.g., electoral authorities). Regular meetings were held to compare results and streamline the evaluation and presentation of data. The authors participated in some of these meetings. In total, 15.526 candidates (EP 2014: 11.590) participating in the electoral contest were identified, representing 540 national political parties (EP 2014: 560).

A statistical software dedicated to electoral calculus (Bazi) was used to carry out the modelling of a Union-wide double proportionality or tandem system and to doublecheck selected electoral results.⁹

Results: from Member States to parties to seats

Apportionment between Member States

The result of the British Brexit referendum in June 2016 radically changed the legal and political context of the elections to the European Parliament. In view of the uncertainty if, when, and how the UK would withdraw from the European Union, and the time necessary for transposing changes to the Electoral Act into national electoral law, it became clear that a rapid and pragmatic interim solution would need to be found. Concerning the composition of the Parliament, the proposal submitted by Parliament for the 2019 elections and adopted by the European Council in 2018 provided for a reduction of the total number of members from 751 to 705 in case the UK had left the Union by election date. The difference of 27 seats between the number of former UK seats (73) and the reduction of the total (46) was used to correct the violation of the treaty principle of degressive proportionality that still existed for several Member States in the previous distribution of seats. This correction was inspired by expertise submitted by one of the authors during previous hearings and workshops organised in the EP.¹⁰

The Member States whose seat contingents were increased are Spain and France (each by five seats), Italy and the Netherlands (three), Ireland (two), and Austria, Denmark, Estonia, Finland, Croatia, Poland, Romania, Sweden and Slovakia (one). The seat numbers reproduced in the next section correspond to the pre-Brexit situation (early July 2019). At that time three Spanish MEPs could not yet be accredited, hence the total number of MEPs was 748.

Apportionment between parties

The next step concerns the apportionment of seats among parties. Since most proportional representation systems provide for electoral thresholds, only the subgroup of parties having passed these thresholds are “apportionment parties” taking part in the distribution of the national contingent of seats. Only valid votes cast for apportionment parties are effective votes. The apportionment of seats among (apportionment) parties proportionally to (effective) votes is accomplished by various apportionment methods, many of which have a history of more than two centuries. This is reflected not only by the diversity of methods implemented by the Member States, but also by the designations used for identical methods in different domestic provisions (e.g., d’Hondt, also called Jefferson, or Saint-Lagüe, also called Webster).

Typically, the vote counts of all parties are divided by a common electoral key (interim quotient). In the second step, the interim quotient is turned into the seat number by rounding

⁹ <http://www.th-rosenheim.de/bazi/>

¹⁰ See Friedrich Pukelsheim and Geoffrey Grimmett (2018): Degressive representation of Member States in the European Parliament 2019–2024. *Representation – Journal of Representative Democracy* 54, 147–158.

the quotient to a neighbouring whole integer. In order to arrive at this result, either divisor, quota or single transferable vote (STV) methods are used.¹¹ In the 2019 elections, three divisor and six quota methods were applied. Table 1 provides an overview.

Method	No of Member States	Member States
Divisor method with downward rounding (e.g., d'Hondt)	14 plus UK	AT, BE, CZ, DK, EE, ES, FI, FR, HU, IE, LU, NL, PL, PT, RO, SI
Divisor method with standard rounding (e.g., Sainte-Laguë)	2	DE, LV
Swedish modified divisor method with standard rounding	1	SE
Hare-quota method with fit by greatest remainders	3	BG, PL*
Dto., variant 1	1	IT
Dto., variant 2	1	LT
Dto., variant 3	1	CY
Hare-quota variant-3 method with Greek fit	1	EL
Droop-quota variant-3 method with fit by greatest remainders	1	SK
STV scheme with random transfers	2	IE, MT
<i>STV scheme with fractional transfers</i>		<i>Northern Ireland</i>

* for electoral districts

Table 1: Apportionment methods

Assigning seats to candidates

Assigning seats to candidates is usually done by electoral lists or in Single Transferable Vote (STV) systems. List systems may vary considerably between closed, semi-open, open and *panachage* systems, allowing for more or less choice for voters within or even between party lists. We distinguish between two principal vote patterns, list votes and candidate votes. The term list vote indicates that the vote is cast in the first place for a list of candidates, notwithstanding the possibility that the voting system may grant voters additional preference votes to express their particular support for some of the candidates. The term candidate vote is used when voters must vote for a person, the attribution to a party being implied only through the person's party affiliation. In the 2019 elections, 15 Member States (and the UK) used list votes, 10 Member States candidate votes and two STV votes.

¹¹ A **divisor method** applies a fixed rounding rule in the second step and, in order to reach the targeted seat total, invokes flexible electoral keys in the first step. Jargon refers to a flexible electoral key as a divisor, which is why the methods are called divisor methods. From the ensemble of all flexible divisors that reach the targeted seat total we quote in every instance a select divisor which has as many trailing zeros as possible. A **quota method** uses a fixed electoral key in the first, scaling step and, in order to match the given seat total, invokes flexible split-points in the second, rounding step. Jargon refers to a fixed electoral key as a quota, thereby justifying the term quota methods. From the ensemble of all split points that accomplish the fitting in the rounding step we quote in each case a select split which has as few decimal digits as possible. **STV schemes** ask voters to mark on the ballot sheet their preference order of the candidates. A candidate whose tally of top preferences (first preferences in the first count, first plus lower-order preferences in later counts) meets or exceeds the Droop-quota is assigned a seat. Surplus ballots in excess of the quota as well as ballots of eliminated lower ranked candidates are transferred to the remaining candidates for second and subsequent counts. See section 2.2 of the 2020 study by Oelbermann and Pukelsheim for more details.

Semi-open list systems usually provide for bypass rules specifying when the sum of a candidate's preference votes lets her or him bypass the predetermined rank-order on the official party list. There are two types of bypass rules. A percentage bypass rule requires the candidate's preference votes to meet or exceed a certain percentage of the party's total vote (e.g., AT 5%, BG 15%, HR 10%, SE 5%). A quorum bypass rule defines a quorum that preference votes must reach for a candidate to be placed on top (e.g., BE, NL, SI). When several candidates succeed to overcome this hurdle, they are ranked by their preference vote tallies.

As we have seen, MEPs are assigned parliamentary seats by their domestic Member State party. However, parliamentary business in the EP is predominantly, if not exclusively, organised by pan-European political groups. In the majority of cases all MEPs of a national party join the same political group. In some instances, MEPs of one national party become members of different EP groups (e.g., some German, Spanish, Dutch, Polish and Slovak MEPs). The distribution of seats in the European Parliament at the constitutive part-session in July 2019 is provided in Table 2.

EPP	Group of the European People's Party (Christian Democrats)	182
S&D	Group of the Progressive Alliance of Socialists and Democrats in the EP	154
Renew Europe	Renew Europe Group	108
Greens/EFA	Group of the Greens / European Free Alliance	74
ID	Identity and Democracy Group	73
ECR	European Conservatives and Reformists Group	62
GUE/NGL	Confederal Group of the European United Left – Nordic Green Left	41
NI	Non-attached Members	54
Sum		748¹²

Table 2: EP political groups as of 2 July 2019

The tandem system: a model facilitating a Union-wide perspective

The core of the tandem system is the aggregation for the European-level parties of votes originally cast for national parties/candidates. For modelling purposes, the European parties are operationalised as the respective political groups that constitute themselves in the Parliament.¹³ The available seats are apportioned among European parties in proportion to their vote sums ("apportionment of seats at Union level"). Then the seats of a European party are allotted to its domestic affiliates in the Member States ("allotment of seats by Member State and European party"). In a final step the seats of a domestic party are assigned to the candidates of this party ("assignment of seats to candidates"). The model comprises supplementary features such as soft-law rules for increasing the visibility of Europarties or the creation of a European Electoral Authority. As we will see below, several of these proposals are also included in the latest resolution adopted by the European Parliament on 3 May 2022.

¹² Three Spanish MEPs were barred from taking their seats due to pending litigation.

¹³ See Leinen J. & Pukelsheim, F. (2021). The tandem system: a new electoral frame for the European Parliament; MIP – Zeitschrift für Parteienwissenschaften 27(2), p. 115-124, for a more detailed exposition of the ideas that led to the development of the system.

The tandem system aims to assess the 2019 European elections from a unified EU-wide standpoint. This may serve as a preparatory tool for a Europeanised electoral system. To this end, instead of the mostly invisible European parties their parliamentary counterparts, the political groups in the EP, were used as the reference point for identifying which political family a national party finally adhered to. As mentioned, in DE, ES, NL, PL and SK some parties split their seats between several Political Groups, which is reproduced in calculations below. In IE, MT, and the Northern Ireland region of the UK, where STV schemes are used, we aggregate only first preferences. Domestic parties not affiliated to a Political Group nor obtaining a seat are omitted. By adding the vote counts for the domestic parties joining a particular political group 'hypothetical votes' are generated. These hypothetical votes provide the basis to apportion the 748 EP seats among the Political Groups. Every 236 000 votes justify roughly one seat (Table 3).

Political Group	Actual Size	Hypothetical Votes	Quotient [Divisor]	Hypothetical Seats (DivStd)	Difference
EPP	182	39 665 362	168.1	168	-14
S&D	154	36 585 197	155.0	155	+1
RenewEurope	108	23 466 081	99.4	99	-9
Greens/EFA	74	19 804 837	83.9	84	+10
ID	73	20 837 020	88.3	88	+15
ECR	62	14 537 613	61.6	62	0
GUE/NGL	41	10 134 340	42.9	43	+2
NI	54	11 455 280	48.54	49	-5
Sum	748	176 485 730	[236 000]	748	0

Table 3: Actual vs hypothetical seats of EP groups (July 2019 composition before Brexit)

While a single Union-wide apportionment would faithfully reflect the political division of the Union's electorate, it would miss out on the geographical dimension of the Union being composed of 27 Member States. Therefore, it is important to remember that divisor methods allow a double proportional variant that honours both dimensions simultaneously: the geographical distribution of the Union's citizens across Member States, and the political division of the electorate as expressed by their votes for certain parties and candidates. Double proportionality is a powerful concept that would allow the EP to improve the design of the European elections according to the political objectives set by parliament, e.g. by maintaining degressive representation of Member States, or by introducing transnational lists, or by incorporating other desirable features. Since the concept of double proportionality may invite misunderstandings in the EU context, notably with respect to the geographical dimension of the electoral system, a slight modification called tandem system was recently proposed.¹⁴

Recent developments in electoral reform

The 2018 Council decision

It is an open secret that the latest reform step of the Electoral Act was promoted by the German government after of two consecutive decisions by the German Federal Constitutional Court (FCC) declaring the electoral threshold for the European elections in Germany unconstitutional (first the hitherto applied 5% threshold, then a newly enacted 3% threshold).¹⁵ The reasons spelled out in the decision are related to the lack of equal representation in the European

¹⁴ Leinen J. & Pukelsheim, F. (2021), op.cit.

¹⁵ Accessible from www.bverfg.de/entscheidungen/cs20111109_2bvc000410.html and www.bverfg.de/entscheidungen/es20140226_2bve000213.html

Parliament and the absence of a governmental majority (see below). On 13 July 2018 the new rules were adopted by the Council¹⁶ and will apply once all EU countries approve them. It is telling, though, that two of the three Member States which have not yet ratified are the same ones that are primarily affected by the new provision (Spain and Germany). In most other Member States that currently have no electoral threshold (Belgium, Denmark, Estonia, Finland, Ireland, Malta, Luxembourg, Portugal and Slovenia), it is in any event, with a contingent of less than 20 EP seats or with a division into electoral districts, very unlikely for small parties to gain a seat in the European Parliament.

The new Act defines a common European minimum threshold (of between 2 % and 5 % for constituencies with more than 35 seats), to apply from 2024 at the latest. It should also make voting easier by allowing for the possibility of different voting methods (advance, postal, electronic, and internet voting), while ensuring the secrecy of votes and protection of voters' personal data. It should be made easier to see which (national) EP candidates are affiliated to which European political party because the new provision allows EU countries to display European party logos on the ballot. It also provides for the possibility for EU citizens to vote from third countries. Many of these additional improvements are soft law options rather than binding provisions, underlining the strong position of Member State authorities in electoral politics.

Stocktaking of the 2019 elections

An own-initiative resolution based on a report drawn up by Pascal Durand (Renew) in autumn 2020 welcomed the higher turnout in the 2019 elections, especially among younger generations, and the improved gender balance among Members of the European Parliament (41 % women compared with 37 % for the previous elections). Acknowledging the failure of the *Spitzenkandidaten* process in 2019,¹⁷ the resolution recommends reforms ahead of the next elections (in 2024), insisting that all EU voters should be able to vote for their preferred lead candidates. The *Spitzenkandidaten* process should be discussed at the forthcoming Conference on the Future of Europe, together with transnational lists and other institutional matters (e.g., rules on the collective responsibility of the Commission).¹⁸ The resolution, furthermore, proposes to modify the current rules applicable to European political parties to allow them to participate fully in European electoral campaigns, including national referendums on European matters, use campaign funds, stand in European elections, and increase funding transparency, limiting donations from foreign private or public bodies. The resolution also suggests that European parties and movements could form coalitions ahead of the European elections and put forward joint programmes and a coalition *Spitzenkandidat*.

Towards the 2024 elections: an EU-wide constituency, finally?

Right after the resolution prepared by Durand was adopted in plenary in November 2020, the Committee on Constitutional Affairs (AFCO) held a first debate on further Electoral Act reform (rapporteur: Domènec Ruiz Devesa, S&D). In a first exchange of views on 4 February 2021 the

¹⁶ OJ L 178 of 16 July 2018

¹⁷ Lehmann, W. (2019). How (not) to take into account the European elections: The open future of an incomplete system; EUIdeas Blog, 11 July 2019. At: <https://euideas.eui.eu/2019/07/11/how-not-to-take-into-account-the-european-elections-the-open-future-of-an-incomplete-system/>

¹⁸ The research service of the EP has just published a study on the advantages and risks of transnational lists, including a thorough examination of the legal requirements to implement them (Maria Diaz Crego, Transnational electoral lists: ways to Europeanise elections to the European Parliament, PE679.084, February 2021)

rapporteur considered that some of the points appearing already in the 2018 Council decision, which is still awaiting ratification, should be put forward once again. Issues such as the transnational lists and the *Spitzenkandidaten* will also be on the table. The committee is aware of multiple cleavages in the Parliament concerning transnational lists, including within political groups. Perhaps the most virulent of those is the fear in small and medium-sized Member States that a transnational list would almost exclusively be composed of MEPs from the most populous States. It therefore recommends a close dialogue internally, but also with national parliaments and with the Council. Even among AFCO members important disagreements exist regarding transnational lists or the *Spitzenkandidaten* model. Notably the effect of an EU-wide constituency on small and medium sized countries was highlighted. The committee originally intended to present a draft report in April 2021 and to vote in committee in July 2021.

This schedule could not be kept as planned because of Covid-related slowdowns and intense discussions among EP groups as well as between the EP and national parliaments. The Ruiz Devesa report was finally adopted in committee end of March 2022 and tabled in the first May plenary. On 3 May 2022 the resolution based on the report was adopted by a slim majority, without major changes. The new elements of electoral reform are sent to the Council now, which has to adopt by unanimity before returning the dossier to the European Parliament for its consent to the version coming out of Council negotiations. If consent is given, the new electoral act must be approved in all Member States according to their respective constitutional requirements.

The proposal in the resolution is radical in the sense that it proposes to repeal the existing Council decision and to replace it with a new Council Regulation on the election of the members of the European Parliament by direct universal suffrage. The new text is significantly more detailed than the current Electoral Act and introduces several important elements:

- A minimum common age of 18 to stand as candidate in European elections and a minimum common **voting age** of 16, except in Member States where the constitutional order establishes a minimum voting age of 17 or 18.
- An obligation for Member States to ensure the right to vote in European elections to EU **citizens living in a third country**, those without a permanent residence, those living in closed residential settings, those experiencing homelessness or those serving a prison sentence
- An obligation for Member States to ensure accessibility to relevant materials, voting facilities and polling stations, including for persons with **disabilities**.
- An obligation for Member States to provide for **postal voting**, including for EU citizens living abroad, and the possibility to allow advance physical voting, proxy voting, electronic and internet systems for voting.
- A **fixed day** for holding European elections in the whole EU (9 May, every 5 years) and the obligation for Member States to finalise the electoral roll 14 weeks in advance of the elections.
- The obligation for all political parties and other entities participating in European elections to observe “democratic procedures and transparency” when electing their candidates for European elections and to ensure **gender equality** in their candidatures, either by using a zipper system (alternation of candidates of both genders in the ballot paper) or quotas.
- An obligatory **electoral threshold** of 3.5% is introduced for constituencies covering at least 60 parliamentary seats.
- The creation of a **Union-wide constituency**, comprising the territory of all Member States, in which 28 Members of the European Parliament would be elected through

transnational electoral lists in the up-coming European elections (2024). In the Union-wide constituency, a uniform electoral system and procedure would apply:

- Beyond European political parties different European political “entities”, e.g. European associations of voters or European electoral coalitions, would be entitled to submit candidacies for the Union-wide constituency;
 - the candidature lists would be divided in sections of three slots and, in every section, there shall be a candidate from each of these slots. Slots would comprise Member States with large, medium-sized and small populations. Thus candidates from small and medium Member States would appear in electable places of every candidature list, ensuring balanced geographical representation;
 - the electoral campaign in the pan-European constituency would start eight weeks before the day of the elections and would finalise 48 hours before election day;
 - Members would be elected through a closed-list system;
 - the D’Hondt formula would be used for the allocation of seats in the pan-European constituency after the elections.
- The creation of a **European Electoral Authority**, comprised by 27 members appointed by each Member State among professors of law or political science, or other experts, that would be in charge of monitoring the elections in the pan-European constituency, but also of coordinating the exchange of information among national electoral authorities and the implementation of the Regulation. A report after each election shall take stock of experiences made and, if appropriate, submit suggestions for the further evolution of the electoral system.
 - In future, the **size** of the EU-wide constituency may be modified by a European Council decision.

The plenary debate on the resolution, the day before, was unusually dynamic and included a high number of blue card interventions by MEPs responding directly to previous interventions. Several pros and cons of transnational lists and lead candidates were discussed with reference to different conceptions of federalism. Prominently, MEP Paolo Rangel, who is also explicitly mentioned in the final report of the Conference on the Future of Europe,¹⁹ rehearsed his scepticism as to the EU-wide constituency, reiterating the fear that small and medium-sized Member States might be disadvantaged in the lists drawn up for it and criticising that the transnational list “will create two kinds of MEPs: the ones that feel themselves Europeans and the others that will be the locals”. He also raised the hypothetical question whether it could lead to “nationalistic debates” if some lists did not comprise candidates from a certain Member State (e.g., in a certain country the social-democratic list would have a national of that country but not the Green and conservative lists.)

In summary, the adopted resolution responds to current debates in several democratic systems, not least in the US, to facilitate and open up electoral participation, especially for the young and for disadvantaged groups of the electorate. It also takes into account the recommendations made by the Conference on the Future of Europe, and in particular the proposals formulated by the European Citizens’ Panel 2 (“European democracy/values and rights, rule of law, security”) in December 2021 at the EUI in Florence. Most conference recommendations are not drafted in a legally precise language. They need to be reconsidered and formalised by the institutions over the next few months, as the European Parliament has announced in its resolution on “the follow up of the Conference on the Future of Europe”.²⁰ Proposal 38, on democracy and elections, includes four major themes (democratic values, an EU-wide referendum, reform of the electoral law and stronger links between citizens and elected representatives). All innovations included

¹⁹ See [CoFE Final report](#) May 2022, in particular p. 81.

²⁰ P9_TA(2022)0141, adopted on 4 May 2022.

in the resolution based on the Ruiz Devesa report can be found in the final conference report, contrary to some polemical remarks made in the EP plenary debate. Some footnotes and endnotes duly mention reservations the Council and the Commission had expressed during the discussions in the framework of the Conference.²¹ Overall, however, some hopes that the Conference might give a push towards electoral reform were fulfilled.²²

The reform bill adopted by Parliament and Council in 2018 is still not ratified. Therefore, the rapporteur on the current reform proposal intended from the start to include all major elements of the previous Council decision, notably the electoral threshold strongly desired by the German government and parliament, in the new resolution. The new draft decision comprises some elements that could be traded in final bargains with the Council against the transnational lists. For instance, the obligatory electoral threshold concerning almost exclusively Germany might be modified or abandoned to obtain unanimity. Some German MEPs from the small parties which got seats thanks to the above-mentioned decisions of the German FCC are naturally opposed to its re-introduction. The magnanimity of German MEP Boeselager, elected on the multinational list VOLT, and now member of the Green group in the EP, may not be the standard position. In the plenary debate on 2 May 2022 he remarked on the article introducing the 3.5% threshold for constituencies of at least 60 seats:

“I would still ask you to vote in favour, even though it reduces my likelihood of getting re-elected, because I think it’s so important that we give citizens a voice, and that we dare more democracy with the second vote.”

The Ruiz Devesa resolution was subject to a roll-call vote for each individual article and paragraph. Hence the support for the electoral threshold (407 to 171) can be compared with that for the transnational list (314 to 297). Unsurprisingly, the threshold is less contested as it does not concern most Member States. The majority for the transnational list is tenuous, although the final vote on the entire resolution was slightly better (323 to 262). Should the Council come back with a modified proposal the outcome of Parliament’s consent vote can, however, not be taken for granted.

The tandem electoral model cannot solve the problem of the lack of equality of the effective weight of vote construed by some national highest courts as a legal obstacle for political representation at the European level. It aims to define an alternative to the EU-wide constituency, considered as a risky political endeavour. There are some important commonalities between the tandem system and the draft Council decision submitted by Parliament, such as several soft-law elements increasing the visibility of pan-European political parties and associations, and the creation of a European Electoral Authority. The resolution also envisages instruments to develop the transnational element after future elections, including its size. Its adoption is a statement in favour of experimenting with the EU-wide constituency and other innovative elements. The addition of 28 MEPs should not constitute a major turbulence in the internal procedures of the Parliament but the political fall-out is difficult to anticipate.

²¹ E.g., the Commission held that the EU-wide constituency should be implemented after a transition period, not to rush things through. The Council considered that the proposal to let the Parliament have the final say on the EU budget was not based on a recommendation from the citizens and was therefore not in line with the agreed Conference methodology.

²² Cf. Costa, O. (2020). Can the Conference on the Future of Europe unlock the EU elections reform? Reflections on transnational lists and the lead-candidate system. *European Law Journal*, 26, 460-471.

Can (and should) electoral reform in the EU succeed?

Electoral law and (con-)federalism: a testing relationship

During and after the American 2020 Presidential election, we were reminded that in the US, even for national elections, many electoral rules and procedures remain under the control of the individual states. There is a traditional sentiment in most federal or quasi-federal systems that the organisation of elections and the counting of votes are better placed at the local or regional level. In the European Union context, it is often held that the rules governing the electoral procedure should strictly respect the principle of subsidiarity.

On the other hand, the US experience has also provided evidence for the harmful effects of differing rules and practices on the representativity and legitimacy of the presidential and Congress elections. The American debate often underlines the need for electoral reform, with activist groups, academic experts and editors of influential mainstream media offering their opinions and expertise, usually in favour of reform of the extant rules. Problems such as the different weights of vote in smaller and larger federal states or the creative design of electoral districts leading to a virtual guarantee for one of the two major parties to keep the seat (gerrymandering), not to mention the discrepancy between the results of the popular and the Electoral College vote, reduce the legitimacy of US elections. Hence, according to historians of American electoral law, there have been at least 900 attempts to improve US electoral rules since the late 18th century. However, only few features of the US elections have changed since then.

The American experience is just one illustration of the general lesson that electoral law is notoriously hard to change. Groups such as the Electoral Reform Society in the United Kingdom or *Mehr Demokratie* in Germany could also serve as examples that there is a wealth of expertise and activism that does mostly not lead to subsequent reform steps. Incumbents who have attained their positions of influence through the existing electoral system are usually not enthusiastic to experiment with new rules and features, which always carry some risk of unintended effects. More specifically, political parties operating in a competitive electoral system are keen observers of the likely impact of novel rules on their respective chances of winning future elections. The long story of trying to control and reduce the ever-higher number of MPs in the German *Bundestag* is another model case of conflicting party interests and strategies that block any serious initiative to solve this problem, in spite of a clear decision by the FCC, instructing the *Bundestag* party groups to find a solution before the next elections.

Are voters interested in electoral reform?

Electoral rules are mostly considered as very important for political leaders and pundits but not as a topic gaining traction in electoral campaigns or ideological conflicts. As we have seen, there are activist groups urging for electoral reform in most democratic countries, for various reasons. Some may want to reduce the size of the parliament, others would like to replace a majority/plurality system with a proportional system, still others may argue against indirectly or non-elected chambers such as the German *Bundesrat*, the French Senate or the House of Lords. Some would even be proponents of a complete revision of the constitution. Many of these groups have developed policy strategies based on academic input from various disciplines.²³

²³ See, for instance, Kai-Friederike Oelbermann and Friedrich Pukelsheim (2011), Future European Parliament elections: ten steps towards uniform procedures; *Zeitschrift für Staats- und Europawissenschaften* (ZSE) 1, 9-28.

In contrast to the EU situation, there is little controversy in a domestic context on who constitutes the legitimate community of electors entitled to express their preferences on national governance options. Voters and their elected representatives are seen as having a natural mutual bond of trust and responsibility for the political system and its constituents. There may be debates on outlier groups such as non-national residents or different categories of immigrants. But they usually concern migration management or social policy rather than questions of electoral procedure. Procedural technicalities may sometimes serve as vehicles for creating or exploiting political cleavages by parties at the fringe of the political mainstream. However, compared to redistributive or security policies, they don't have a strong impact on voter turnout, or the interest brought to elections. This could be another reason why electoral reform is rare, in national as well as transnational systems.

List systems can provide different options for voters to choose (or not) persons they prefer/reject, sometimes across parties. Many reform proposals, both at the domestic and the transnational level, advocate for open lists or similar methods to empower voters. On the other hand, closed lists enable party leadership to ensure the respect of rules such as gender quotas or geographical balance. This is one of the reasons why the drafters of the latest reform proposals opted for a closed transnational list. Otherwise it would be very difficult to achieve a balanced representation of smaller Member States.

The normative case: voting calculus and democratic legitimacy

Responding to appeals submitted by Eurosceptic plaintiffs, over the past decades the German FCC has repeatedly made use of a mathematical feature of European electoral law (the so-called principle of degressive proportionality) to put in doubt the democratic credentials of the European Parliament.²⁴ According to the court, the European Parliament can never evolve into a fully developed representative institution, at the same level as national parliaments, because European elections are free, secret and fair but not equal. The fact that smaller Member States are overrepresented in the EP suffices for the court to say that the EP is not a "truly representative parliament".²⁵ The court also mentions the fact that the composition of the Parliament follows predefined Member State contingents which, according to the FCC, underlines its confederal nature. Constitutionalists and historians in several Member States agree.

The court's statements in this matter demonstrate that electoral procedure, or its public perception, can and does have a strong effect on the legitimacy and authority of the elected institution, in particular in the European context. Other constitutional courts were also obliged to decide on questions of the principle of equality in the European elections.²⁶

The lack of electoral equality that is of such great importance for the German court and its followers can probably not be rectified entirely in a Union with large differences in the size and

²⁴ Wilhelm Lehmann, *Constitutional identity politics? The German Constitutional Court, the Lisbon treaty and Europe's constitutional doctrine*, *Studies in Public Policy* 475, 2010.

²⁵ A linked argument used in the two threshold decisions mentioned above is that the EP does not form a government and that its internal organization is therefore not in need of efficient political organization between the majority and the opposition. The court then proceeds to the rather disingenuous observation that, overall, the number of national political parties represented in the EP would not decrease significantly if the German threshold were re-introduced.

²⁶ E.g., *Judgement No. 239 of the Italian Constitutional Court (2018)*. See Giacomo DelleDonne, *Rationalising political representation within the European Parliament: the Italian Constitutional Court rules on the threshold for the European elections*, *VerfBlog*, 2019/1/11.

political influence of its component members. However, analytically the equation of formal electoral equality and the effectiveness of the vote does not hold. Comparative politics shows many examples of important differences in the effectiveness of the individual vote, notably in first-past-the-post and in federal systems. Examples can be drawn from the USA, Canada or Switzerland, to name but a few federal polities where vote weights are very different from one region to the other.²⁷ Similar differences exist, between political parties, in unitary states with first-past-the-post systems, such as the UK.

It seems, then, that such differences in vote effectiveness do not necessarily jeopardize the legitimacy of a democratic system if it has other features, such as clear visibility of the main contenders in elections, campaigns reflecting common issues at the appropriate political level, or the possibility to have an impact on policy-making by selecting (and de-selecting, if necessary) an executive with a clearly defined political program. However, at least in some Member States, they seem to serve as normative arguments against further parliamentarisation at the EU level.

Promoting an EU-wide list is an experiment in electoral politics. Some MEPs are not convinced that such “shenanigans around the allocation”²⁸ of votes are what it takes to raise the game of European elections. Others warn: “We can always argue Europe is *sui generis*. It is! But let’s not experiment. [...] Talk to our voters, connect with them, and do this through diligent work, not through social engineering, such as transnational lists.” Beyond electoral matters, serious reflection should include some political risks involved in EU parliamentarisation. As the UK, after changing from a plurality to a proportional system in the European elections, has shown, EP elections may be good opportunities for challenger parties to acquire visibility and resources they never obtained at the national level. The *Front/Rassemblement national* in France also benefitted from higher visibility and respectability after winning seats in the EP. To what extent such electoral success fuels Eurosceptic activism and deepens the rejection of the EU as a political system is an important consideration.²⁹

Discussion

Electoral engineering has to be seen in the context of strengthening political parties at the European level, building up resources to enable the EU to intervene in moments of crisis and following up on earlier efforts to enable better citizen participation. It is not a sufficient, but probably a necessary element of making European representative democracy more visible and convincing. To achieve more Europeanisation of the EP elections electoral reform needs to be linked to related projects such as the visibility and resources of European-level parties, a change of focus in national parties and the widening of EU citizens’ range of electoral choice. A few other proposals such as the direct popular election of the Commission President or his/her

²⁷ To provide two examples: as Jon G Bradley and Sam Allison (2021), Canada’s Unreasonable Electoral Districts; *Inroads – The Canadian Journal of Opinion* 48, 27-32, show, the largest Canadian Federal Electoral District is Niagara Falls (101 505 eligible voters), the smallest Labrador (20 084). Secondly, in the Swiss canton of Graubünden at the latest elections there was a more than 10-fold difference in the number of votes required for a seat in the Canton assembly (*Großer Rat*, a legislative assembly based on proportional representation) between the smallest (Avers, 160 voters) and the most populous constituency (Churwalden, 1920 voters). Leaving aside the three EU Member States with less than 1 million inhabitants (Cyprus, Luxembourg and Malta) the maximum spread between the smallest and the biggest Member State is about 1 to 5, just like in Canada.

²⁸ Plenary debate of 2 May 2022

²⁹ There is recent evidence indicating that the radical right might “capitalise from the institutional feature of European direct elections that bolsters their national electoral success” and that “the EP elections offer an opportunity structure for the populist right to make their antagonism towards further integration domestically salient” (Julia Schulte-Cloos, *European integration and the surge of the populist radical Right*, PhD Thesis, EUI, Florence, 2019, p. 82).

election by national parliaments have been tabled from time to time.³⁰ They would require treaty change and they fit uneasily with the dominant model of establishing a parliamentary system of governance in the EU.

Within the parliamentary system approach to which most political actors subscribe, different models of trans-nationalisation have been discussed, some in favour, some critical of creating an EU-wide constituency as a first step.³¹ At this moment, however, the “holy trinity” of transnational lists, lead candidates and a stronger European Parliament³² determines most debates on how to strengthen European democracy. The Parliament has just taken an important step in that direction and the current president of the Council is also arguing in favour of the EU-wide constituency. Similar ideas are expressed in the coalition agreement of the new German government.

The experience of the last revision of the Electoral Act in 2018, not yet in force, reminds us of the difficulty to achieve unanimity for electoral reform. Pushed through at the behest of one Member State, which then has significant problems to ratify, the fate of the Council decision shows that to realise more ambitious ideas will be a long-term project, especially if legal change at both the EU and the Member State level is required.³³ Domestic party preferences and expectations about the effect of such proposals on the likelihood of electoral success will remain a determining factor.

In times of an ever more developed audience democracy,³⁴ personalities and party brand recognition are important determinants of electoral success. Electoral technique also plays an underrated role in assuring transparency and choice in the European elections. Even arcane methodological differences, for instance that between the Divisor method with downward rounding and the Hare-quota method with fit by greatest remainders, can have some impact on the relative weight of rural vs urban regions or between small and big parties and their electoral lists. The same goes for changes in district size. France, for instance, has changed twice from national constituency to regional ones and back to a national one. These changes have made it easier (national constituency) or more difficult (regional constituency) for smaller parties to gain seats in the EP.³⁵

It will be essential for future reform efforts to develop a sensible combination of ideas that require reform of the Electoral Act (i.e., unanimity among Member States) and of options that

³⁰ Early: Hix, S. (2002). Why the EU should have a single president, and how she should be elected. Paper for the Working Group on Democracy in the EU for the UK Cabinet Office.

³¹ Among others, Jouvenat, P. (2017). Transnational lists, a false good idea? *The New Federalist*. (<https://www.thenewfederalist.eu/transnational-lists-a-false-good-idea?lang=fr>); Duff, A. (2017). The rise of post-national democracy: Macron, Brexit and the electoral reform of the European Parliament. EPC Discussion Paper; Van Hecke, S. (2018). Transnational lists – a bad good idea. *euractiv*. (<https://www.euractiv.com/section/elections/opinion/transnational-lists-a-bad-good-idea/>); Costa, O., & Jouvenat, P. (2021). Towards a European political space: The challenges of European electoral law. *College of Europe Policy Brief*, 2; Grillo, F., & Nanetti, R. (2022). Flexible transnational electoral constituencies: a proposal to Europeanise EU elections. *European Liberal Forum Papers - Policy Paper*, 11.

³² Nguyen, T. (2021). The holy trinity of EU elections: Transnational lists, *Spitzenkandidaten* procedure and a stronger European Parliament. *Visions for Europe*. Delors Centre, Berlin.

³³ Diaz Crego, M. (2021). Transnational electoral lists: ways to Europeanise elections to the European Parliament (PE 679.084).

³⁴ Bernard Manin (1997). *Principles of Representative Government*, Cambridge University Press, p. 223. In 2011, Jean-Marie Le Pen famously said about his party “Quand on a une marque comme celle-là, on la garde”.

³⁵ Reungoat, É. (2016). Modes de scrutin, financement des campagnes et émergence des opposants à l’UE lors des élections européennes en France. In : M. Libera, S. Schirmann, & B. Wassenberg (Eds.), *Abstentionnisme, euroscepticisme et anti-européisme dans les élections européennes de 1979 à nos jours* (Vol. 30, pp. 137-156). Franz Steiner Verlag. Similar observations can already be found in Hix/Hagemann (2009), *op.cit.*, p. 51

could be implemented by changing secondary law or through soft law and other informal provisions, including at the national level. Re-attributing control over the selection of MEP candidates is still an under-researched element for an upgrade of the European elections, especially as concerns their salience for voters. Reform in this area could even be enabled without enacting new primary law. However, to achieve the necessary change of mentality in the party leadership of hundreds of domestic parties remains a daunting task. The ostensible tension between the Treaty text, providing in Art. 10(2) TEU that “Citizens are directly represented at Union level in the European Parliament”, and the reality of European elections, make it a mandatory long-term challenge.

Costa, O. (2020). Can the Conference on the Future of Europe unlock the EU elections reform? Reflections on transnational lists and the lead-candidate system. *European Law Journal*, 26, 460-471.