



Council of the
European Union

Brussels, 14 October 2022
(OR. en)

13586/22

LIMITE

JUR 648
AG 127
INST 376
PE 122

OPINION OF THE LEGAL SERVICE¹

From: Legal Service

Subject: The Electoral Law proposal - Compatibility with the Treaties

I. INTRODUCTION

1. At its meetings on 1 June and 15 July 2022, the Working Party on General Affairs examined the European Parliament's proposal for a Council Regulation on the election of the Members of the European Parliament (MEPs) by direct universal suffrage, adopted by the European Parliament (EP) on 3 May 2022² (the EP proposal), and requested the Council Legal Service (CLS) to examine the compatibility of that proposal with the Treaties.

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² Proposal for a Council Regulation on the election of the Members of the European Parliament by direct universal suffrage, repealing Council Decision 76/787/ECSC, Euratom and the Act concerning the election of the Members of the European Parliament by direct universal suffrage annexed to that Decision (document 9333/22).

2. In response to this request, the present opinion assesses the main legal issues raised by the EP proposal, i.e. the respect of the principle of subsidiarity and of the principle of proportionality, as well as the compatibility with the Treaties of a Union-wide constituency under Article 14(2) TEU and of the lead candidates process. For the rest, the CLS refers in particular to its opinion of 15 March 2016³ on the EP proposal of 11 November 2015 for a Council Decision amending the Act concerning the election of the Members of the European Parliament by direct universal suffrage⁴ which, despite some changes in the present EP proposal compared to the 2015 proposal, remains relevant, in particular as regards Articles 3 and 10 of the current EP proposal on national provisions and the principles of selection of candidates⁵, as well as Article 6 of the current EP proposal on the exercise of the right to vote.⁶ Furthermore, the CLS will, as appropriate, come back on other legal questions which may arise in the course of the debate on the EP proposal.

II. LEGAL FRAMEWORK

3. The EP proposal is based on Article 223(1) TFEU, according to which:

"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."

³ Document 7038/16.

⁴ Document 14743/15.

⁵ See paragraphs 40 to 52 of document 7038/16.

⁶ See paragraphs 61 to 65 of document 7038/16.

III. COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY

4. Pursuant to the first subparagraph of Article 5(3) TEU, *"under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"*.
5. Article 223(1) TFEU allows the Council, with the consent of the EP, to lay down the provisions necessary for the election of the MEPs either in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. As both a uniform procedure and principles common to all Member States can by definition only be established at Union level, the act to be adopted under Article 223(1) TEU arguably falls within the exercise of a competence of the European Union relating to its functioning, which, by its nature, can be exercised only by the Union itself, with the consequence that the principle of subsidiarity and Protocol No 2 on the application of the principles of subsidiarity and proportionality (Protocol No 2) should not apply⁷.
6. This being said, the EP appears to accept that the principle of subsidiarity applies, as it affirms in general terms that its proposal complies with the principles of subsidiarity and proportionality (Recital 23 of the EP proposal). Indeed, to the extent that the EP proposal does not provide for a completely uniform electoral procedure, but establishes certain common principles (see paragraph 16 below) which are to be complemented in certain cases by national provisions (as indicated in Article 1, paragraph 1, of the proposal itself), it would be necessary to justify the choices made by the legislator as regards the intensity of its regulatory intervention, applying in substance the principles of subsidiarity and proportionality.

⁷ See in this sense judgment of 16 February 2022, Poland v Parliament and Council, C-157/21, EU:C:2022:98, paragraph 241.

7. To this effect, Article 5 of Protocol No 2 would require the EP to justify its draft legislative act with regard to the principles of subsidiarity and proportionality by means of a detailed statement, "*substantiated by qualitative and, wherever possible, quantitative indicators*". The EP proposal should also include "*some assessment of the proposal's financial impact*" and "*take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens to be minimised and commensurate with the objective to be achieved*".
8. The EP has not provided such a detailed statement, which would be however essential to enable the Council and the Member States' national parliaments⁸ to appraise compliance of the act with the principle of subsidiarity and ultimately the Court of Justice to carry out its review of the validity of the act, which extends to compliance with the principle of subsidiarity⁹, including the respect of both the substantive requirements laid down in Article 5(3) TEU and the procedural requirements laid down in Protocol No 2.¹⁰
9. Hence, the Council may ask the EP to provide additional reasons for the proposal. This being said, it ultimately pertains to the Council, as the author of the legislative act to be adopted, to ensure compliance of this act with the principles of subsidiarity and proportionality.

⁸ Five national parliaments - the Irish Parliament (document 12148/22), the Swedish Parliament (Riksdagen) (document 10652/22), the Senate of the Kingdom of the Netherlands (document 12153/22), the House of Representatives of the Kingdom of the Netherlands (document 12266/22) and the Danish Parliament (Folketinget) (document 12267/22) - have issued reasoned opinions under Article 6 of Protocol No 2, which the EP is obliged to take into account in accordance with Article 7(1) of Protocol No 2.

⁹ See e.g. judgment of 9 October 2001, *Netherlands v European Parliament and Council*, C-377/98, EU:C:2001:523, paragraphs 30 to 33; judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 180 to 183; judgment of 12 July 2005, *Alliance for Natural Health*, C-154/04 and C-155/04, EU:C:2005:449, paragraphs 104 to 108.

¹⁰ Judgment of 4 May 2016, *Poland v European Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 113.

10. In this context, it is to be noted that some provisions in the EP proposal, such as those in Article 10 pertaining to the selection of candidates and thus to the pre-electoral phase, go beyond the adoption of "provisions necessary for the election" of MEPs within the meaning of Article 223(1) TFEU. For such rules, a sufficient link with the electoral procedure¹¹ needs to be demonstrated further, and the Council should invite the EP to provide the necessary justification in this respect.

IV. FORM OF THE ACT AND COMPLIANCE WITH THE PRINCIPLE OF PROPORTIONALITY

11. The first subparagraph of Article 5(4) TEU provides that *"under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."*
12. It should be recalled at the outset that the Council enjoys the widest possible discretion when exercising its competence under Article 223(1) TFEU and is not bound by the scope or object of the EP proposal¹², including as regards the form of the proposed act. Indeed, Article 223(1) TFEU does not specify the type of the act to be adopted, but merely foresees that the Council *"shall lay down the necessary provisions."* In such a case, Article 296, first paragraph, TFEU provides that the institutions are to select the type of the instrument, i.e. whether to adopt a regulation, a directive or a decision, *"on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality"*.

¹¹ See also in this sense the CLS opinion of 15 March 2016, document 7038/16, paragraph 42.

¹² See the opinion of 15 March 2016, document 7038/16, paragraphs 7 and 8, with more detailed arguments.

13. In this respect, it is useful to recall that there is a graduation between the different types of instruments foreseen in Article 288 TFEU as regards their regulatory intensity and, conversely, the degree to which they constrain the leeway enjoyed by Member States.
- a) Pursuant to the second paragraph of Article 288 TFEU, a regulation is binding in its entirety and directly applicable in all Member States. According to settled case-law, a regulation automatically forms part of a Member State's legal system without it being necessary to transpose it in any way.¹³ Nonetheless, some of its provisions may necessitate, for their implementation, the adoption of measures of application by the Member States.¹⁴ The Court of Justice has held that by reason of their nature and their function in the system of the sources of Union law, regulations have direct effect and are, as such, capable of creating individual rights which national courts must protect.¹⁵
 - b) The third paragraph of Article 288 TFEU provides that a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. Unlike regulations, directives are thus not directly applicable in Member States' domestic legal systems and they have to be implemented in national law¹⁶. Pursuant to settled case-law, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty, under Article 4(3) TEU and Article 288 TFEU, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.¹⁷ Whenever the provisions of a directive appear to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement that directive.¹⁸

¹³ Judgment of 14 July 2011, Bureau national interprofessionnel du Cognac, C-4/10 and C-27/10, EU:C:2011:484, paragraph 66.

¹⁴ Judgment of 15 June 2021, Facebook, C-645/19, EU:C:2021:48, paragraphs 109 and 110 and case-law cited.

¹⁵ Judgment of 14 December 1971, Politi, 43/71, EU:C:1971:122, paragraph 9; judgment of 17 May 1972, Leonasio, 93/71, EU:C:1972:39, paragraphs 5 and 22.

¹⁶ Judgment of 6 May 1980, Commission v. Belgium, 102/79, EU:C:1980:120, paragraph 12.

¹⁷ Judgment of 17 March 2021, UH, C-64/20, EU:C:2021:207, paragraph 31 and case-law cited.

¹⁸ Judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, paragraph 51 and case-law cited.

c) Pursuant to the fourth paragraph of Article 288 TFEU, a decision is binding in its entirety. A decision which specifies those to whom it is addressed is binding only on them. It follows that a decision is not necessarily addressed to specific persons and can be general in scope. Indeed, the institutions have been using the form of a decision when adopting acts on the basis of Treaty provisions that do not require the use of a particular legal instrument¹⁹ or for their internal organisation.²⁰ Decisions addressed to the Member States are binding on all institutions of the State concerned, including the judiciary. Accordingly, national courts are under a duty, by virtue of the primacy of Union law, to refrain from applying any national provisions which would be likely to hinder the implementation of a decision.²¹ In certain circumstances the provisions of a decision may have direct effect in the sense that an individual may rely on them in a dispute with a public authority.²² To this effect, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationship between the addressee of the act and third parties.²³

14. The choice between the above-mentioned legal instruments must be guided in particular by the principle of proportionality, which requires action to be both ‘appropriate’ to attain its objectives and not go beyond what is ‘necessary’ to that effect. Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued²⁴.

¹⁹ See for example Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, OJ L 178 of 16.7.2018, p. 1-3.

²⁰ See for example Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325 11.12.2009, p. 35, and Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information, OJ L 274 15.10.2013, p. 1.

²¹ Judgment of 21 May 1987, Albako, 249/85, EU:C:1987:245, paragraph 17 ; judgment of 30 April 2020, D.Z., C-584/18, EU:C:2020:324, paragraphs 49 to 63.

²² Judgment of 21 May 1987, Albako, 249/85, EU:C:1987:245, paragraph 10.

²³ Judgment of 6 October 1970, Grad, 9/70, EU:C:1970:78, paragraph 6.

²⁴ See e.g. judgment of 30 April 2019, Italy v Council, C-611/17, EU:C:2019:332, paragraph 55 and case-law cited ; judgment of 3 December 2019, Czech Republic v European Parliament and Council C-482/17, EU:C:2019:1035, paragraph 76 and case-law cited.

15. As stated above, Article 223(1) TFEU allows the Council to lay down the provisions necessary for the election of MEPs either in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. These two options imply differences in the regulatory intensity of the provisions adopted at Union level.
- If the Council were to opt for establishing a uniform procedure, a regulation may be the most appropriate instrument. Indeed, a uniform procedure in all Member States for the election of MEPs requires a high degree of harmonisation, which can best be achieved by a regulation, given its characteristics as set out above (paragraph 13, under a)).²⁵
 - If, on the contrary, the Council were to limit its regulatory intervention to the definition of common principles, a less intense form of the act, like a directive or a decision, may be appropriate, as they would leave Member States a margin as to the choice of form and methods for the attainment of the common principles laid down at Union level.

²⁵ It should however be noted that, since Article 223(1) TFEU explicitly allows the Council to lay down a uniform procedure, this option cannot be excluded a priori on grounds of the principle of proportionality.

16. It follows from Article 1 of the EP proposal that it purports to establish the provisions for the elections of MEPs *"in accordance with a uniform electoral procedure as regards the Union-wide constituency referred to in Article 15 and with principles common to all Member States"*. However, in substance, the EP proposal contains a mixture of elements of a uniform procedure and of common principles, concerning both the Union-wide constituency and the national constituencies.
- Provisions which lay down elements of a uniform procedure are, for instance, those on the right to vote (Article 4(1) and (2)), the right to stand as a candidate (Article 5), the establishment of electoral rolls (Article 9), the tabling of the lists of candidates (Article 11), the electoral system (Article 12), the election day (Article 19) and the European electoral authority (Article 28).
 - Provisions laying down common principles, which leave a certain margin to Member States for the attainment of those principles, are for example those on the prevention of double voting (Article 4(3)), the exercise of the right to vote (Article 6), accessibility (Article 7) and measures to ensure the reliability and secrecy of postal voting (Article 8(1)).
17. Arguably, the provisions of the EP proposal laying down elements of a uniform procedure prevail in number and in importance, so that the form a regulation appears appropriate in the light of the text as it presently stands.

18. However, in exercising its wide margin of appreciation, the Council may also adopt an act which comprises a mixture of elements of a uniform procedure and elements establishing common principles and change the balance between the two types of elements as compared with the balance proposed by the EP. Ultimately, the choice of the appropriate type of instrument will thus depend on its final content and the level of regulatory intensity pursued by the Union legislator. The reasons for this choice should be set out in the recitals of the act in order to enable the Court of Justice to exercise its review (see point 8 above and the case-law cited).
19. It should also be noted that by virtue of the principle of primacy of Union law²⁶, directly applicable measures of the institutions, including in particular regulations and decisions addressed to the Member States, render automatically inapplicable any conflicting provision of current national law and preclude the adoption of new national legislative measures to the extent that they would be incompatible with Union provisions.²⁷ According to established case-law, the maintenance in the legislation of a Member State of a provision which is incompatible with a provision of Union law gives rise to ambiguity and uncertainty as to the possibilities for individuals to rely on Union law. Such maintenance therefore constitutes a failure on the part of that State to fulfil its obligations under the Treaty.²⁸ Moreover, it is recalled that, regardless of the type of legally binding Union act, Member States are under the general obligation to “*adopt all measures of national law necessary to implement [such acts]*” (Article 291(1) TFEU).

²⁶ See judgment of 15 July 1964, *Costa v. E.N.E.L.*, 6/64, EU:C:1964:66.

²⁷ Judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 17.

²⁸ Judgment of 18 January 2001, *Commission v Italy*, C-162/99, EU:C:2001:35, paragraph 33 and case-law cited.

**V. COMPATIBILITY OF A UNION-WIDE CONSTITUENCY WITH
ARTICLE 14(2) TEU**

20. Pursuant to Recital 9 of the EP proposal, *"a Union-wide constituency, in which lists are headed by each political family's candidate for President of the Commission, should be created in addition to the national constituencies, in order to enhance the democratic and pan-European dimension of the European elections."*
21. Article 12(1) of the EP proposal provides that each voter has two votes, one to elect the MEPs in the national constituencies and one to elect MEPs in the Union-wide constituency.
22. Article 15(1) of the EP proposal reads as follows :
- "There shall be one constituency formed of the entire territory of the European Union from which 28 [MEPs] shall be elected at the first election of [MEPs] following the entry into force of this Regulation.*
- For the elections of [MEPs] thereafter, the size of the Union-wide constituency shall be determined by the European Council Decision establishing the composition of the European Parliament".*
23. Independently of the question of the compatibility of the proposed Union-wide constituency with the first subparagraph of Article 14(2) TEU, which will be examined below, it must be noted at the outset that Article 15(1) of the EP proposal does not respect the distribution of competences between the European Council and the Council as provided in the Treaties.
24. It follows from the second subparagraph of Article 14(2) TEU that it is for *"the European Council [to] adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph."* The size of the Union-wide constituency is an element which has direct implications on the composition of the EP, as it would determine the number of MEPs whose seats are not attributed to specific Member States. The setting out of the size of the Union-wide constituency therefore falls within the competence of the European Council, acting under the procedure laid down in the second subparagraph of Article 14(2) TEU.

25. Conversely, Article 223(1) TFEU constitutes the legal basis for the adoption by the Council, under the special legislative procedure foreseen by that article, of *"the provisions necessary for the election of its Members by direct universal suffrage ..."*. Under this provision, the Council may therefore lay down the provisions on the electoral procedure, including the rules to be applied for the election of MEPs in the Union-wide constituency, but it may not determine the size of this Union-wide constituency, which is a prerogative of the European Council. Article 15(1) of the EP proposal should therefore be modified accordingly, and the European Council, acting in accordance with the second subparagraph of Article 14(2) TEU, should in due time adopt the necessary decision determining the size of the Union-wide constituency. The provisions necessary for the election of MEPs from the Union-wide constituency (Article 15(2) to (13) of the EP proposal) and all other provisions of the EP proposal which apply equally to the election of MEPs in national constituencies and in the Union-wide constituency are in return correctly based on Article 223(1) TFEU.
26. Pursuant to Article 15(3) of the EP proposal, all European electoral entities as defined in Article 2 may submit Union-wide lists, which shall include a number of candidates equal to the number MEPs to be elected from the Union-wide constituency. The notion of Union-wide list is defined as *"the list of candidates fielded in the Union-wide constituency by a European electoral entity"* (Article 2(9) of the EP proposal).
27. This raises the question of the compatibility of the Union-wide constituency with the first subparagraph of Article 14(2) TEU, a question which the EP has addressed in its legislative resolution stating that this, in its view, is compatible with the Treaty.²⁹
28. The first subparagraph of Article 14(2) TEU reads as follows:
- "The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats."*

²⁹ See point 19 of the EP's legislative resolution.

29. As this provision establishes several conditions related to the EP composition, it is appropriate to examine each of those conditions separately.

A) Representation of the Union's citizens (first sentence)

30. The first sentence of the first subparagraph of Article 14(2) TEU foresees that "*the European Parliament shall be composed of representatives of the Union's citizens.*"³⁰ This follows Article 10(2) TEU, which provides that "*citizens* [i.e. citizens of the Union, as defined in Article 9 TEU and Article 20(1) TFEU)] *are directly represented at Union level in the European Parliament.*" Both provisions replaced former Article 189 of the EC Treaty, which, prior to the Lisbon Treaty, provided that the EP consisted of "*representatives of the peoples of the States brought together in the Community.*"
31. In the light of these provisions, it is clear that both the MEPs to be elected in national constituencies and those to be elected in the Union-wide constituency represent the Union's citizens. This is re-affirmed by Article 12(2) of the EP proposal, which provides that MEPs "*shall be elected as representatives of the Union citizens on the basis of proportional representation, in the national constituencies and in the Union-wide constituency.*" It follows that the provisions of the EP proposal on the Union-wide list respect the condition laid down in the first sentence of the first subparagraph of Article 14(2) TEU of the EP being composed of "*representatives of the Union's citizens*".

³⁰ See in this sense also the judgment of 6 October 2021, *Rivière a.o v Parliament*, T-88/20, EU:T:2021:664, paragraph 49.

B) A maximum of 751 MEPs in total (second sentence)

32. The second sentence of the first subparagraph of Article 14(2) TEU requires that the number of MEPs *"shall not exceed seven hundred and fifty in number, plus the President."*
33. Given that the EP currently has 705 members, this means that the European Council may decide that a maximum of 46 MEPs are to be elected from the Union-wide constituency. The number of 28 MEPs to be elected from that list, envisaged by the EP, would thus not exceed the threshold of 751 MEPs in total. It will be of course for the European Council, to which the competence to establish the size of the Union-wide constituency belongs, in accordance with the second subparagraph of Article 14(2) TEU, to ensure the respect of this condition in its future decision.

C) Representation of citizens must be degressively proportional, with a minimum threshold of 6 members per Member State and no Member State being allocated more than 96 seats (third and fourth sentences)

34. The third and fourth sentences of the first subparagraph of Article 14(2) TEU provide that *"representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than 96 seats."*

35. The principles for the application of Article 14(2) TEU are specified in Article 1 of European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the EP³¹ as follows:

- "- *the allocation of seats in the European Parliament is to fully utilise the minimum and maximum thresholds per Member State set by the TEU in order to reflect as closely as possible the sizes of the respective populations of the Member States,*
- *degressive proportionality is to be defined as follows: the ratio between the population and the number of seats of each Member State before rounding to whole numbers is to vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member of the European Parliament from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats in the European Parliament,*
- *the allocation of seats in the European Parliament is to reflect demographic developments in the Member States."*

³¹ OJ L 164 of 2.7.2018, p. 1

36. Article 15(9) and (10) of the EP proposal provides for a system which is meant to ensure a balance within the Union-wide lists between three groups of Member States determined according to their population size³². Under the assumption that the Union-wide constituency would comprise 28 seats, Article 15(10) of the EP proposal imposes a variation of the order of candidates resident in any of the Member States in each of the three groups of Member States up to the list slot number 14, which *de facto* would most likely be the maximum number of MEPs elected on each list. As illustrated in Annex II of the EP proposal, this will ensure a fair distribution of seats among the three "baskets" of Member States, respectively belonging to the group of the five most populous Member States (group A, with population sizes between 37,9 million and 83,1 million), the group of ten medium-sized Member States (group B, with population sizes between 6,9 million and 19,3 million) and the group of the twelve smaller Member States (group C, with population sizes between 0,5 million and 5,8 million).
37. While this system aims to ensure geographical balance amongst MEPs elected in the Union-wide constituency, it also respects the principle of degressive proportionality. Indeed, the first subparagraph of Article 14(2) TEU, as specified in the second indent of Article 1 of European Council Decision 2018/937, does not define this principle in precise mathematical terms, but in essence merely aims to ensure a meaningful correlation between each Member States' population and the number of MEPs representing the citizens within each Member State, reflecting demographic developments in the Member States.

³² In essence, this system foresees that the Union-wide lists are divided in sections of three slots. Each of these three slots is to be filled with one candidate coming from each of the three groups of Member States, which are defined in Annex I on the basis of the population of the Member States concerned. The order of candidates resident in any of the Member States in each of these three groups of Member States shall vary in each list section of three slots up to the list slot number 14. It is thus possible that the candidates in each of these sections come from the same Member State within the group of Member States concerned (A, B and C). From slot number 15 until slot number 28, no restrictions as to the order of candidates in each section of three slots apply. These figures would of course need to be adapted if the European Council were to decide on a different size of the Union-wide constituency.

38. Such a meaningful correlation appears to be ensured by the system proposed by the EP. Indeed, the system described in paragraph 36 above ensures that those MEP's elected in the Union-wide constituency resident in one of the five most populous Member States (group A) will represent more citizens than those resident in the ten medium-sized Member States (group B), who will in turn represent more citizens than those resident in the twelve smaller Member States (group C), and thus fulfils the first condition laid down in the second indent of Article 1 of European Council Decision 2018/937. Conversely, this system also ensures that among the MEPs elected in the Union-wide constituency those who are resident in the more populous Member States will be represented in larger numbers than those resident in the less populous Member States, thus fulfilling in substance the second condition laid down in the second indent of Article 1 of European Council Decision 2018/937. Moreover, the EP envisages that the number of MEPs to be elected in the Union-wide constituency would be relatively small (28 of a total of 733 MEPs). The *effet utile* of the principle of degressive proportionality laid down in the first subparagraph of Article 14(2) TEU is thus maintained.
39. In any event, it will be for the European Council, acting by unanimity, on the initiative of the European Parliament and with its consent, in accordance with the second subparagraph of Article 14(2) TEU, to establish the number of MEPs to be elected in the Union-wide constituency which in its view respects the principles referred to in the first subparagraph of Article 14(2) TEU and, if necessary, adapt accordingly the principles for the application of this provision laid down in Article 1 of European Council Decision 2018/937.

40. It has also to be noted that, as it is already the case for the national constituencies, the criterion for assigning candidates on Union-wide lists to a certain Member State is not nationality, but residence (see Article 20(2)(b) TFEU and Article 15(10) of the EP proposal). The establishment of sections of three slots is intended to ensure that there is a proper representation of citizens voting in Member States with different population sizes, while not predetermining in advance in a fixed manner the position on the list of a candidate residing in a given Member State. It belongs to each European electoral entity to determine the order on the list of the candidates within each section of three slots of its Union-wide list (see Article 15(10) of the EP proposal).
41. It remains to be examined whether the introduction of a Union-wide constituency is compatible with the fourth sentence of the first subparagraph of Article 14(2) TEU, pursuant to which "*no Member State shall be allocated more than ninety-six seats*".
42. To this effect, it is necessary to read the first and the fourth sentence of the first subparagraph of Article 14(2) TEU together.
43. The first sentence of the first subparagraph of Article 14(2) TEU provides that "*the European Parliament shall be composed of representatives of the Union's citizens*" which, as stated above (paragraphs 30 and 31), is respected both as regards MEPs elected in national constituencies and those elected in the Union-wide constituency.
44. Next, the term "*allocation*" of seats to Member States, used in the fourth sentence of the first subparagraph of Article 14(2) TEU, is to be interpreted in the sense that there is a guarantee that each Member State is entitled to a pre-defined number of MEPs residing in that Member State, independently of the outcome of the elections. This guarantee is given to each Member State through Article 3 of European Council Decision 2018/937, taken under the second subparagraph of Article 14(2) TEU, which sets, for each Member State, the number of MEPs allocated to it.

45. However, under the system proposed by the EP for the election of MEPs in the Union-wide constituency, there is no such allocation for each Member State.

- First, that system is not based on the criterion of residence of a candidate in a specific Member State, but on the criterion of his/her residence in any one of the Member States belonging respectively to any one of the three groups of Member States defined in Annex I of the EP proposal.
- Secondly, each European electoral entity is free to determine the order on the list of the candidates within each section of three slots of its Union-wide list (Article 15(10) of the EP proposal).
- Thirdly, the apportionment of seats to the Union-wide lists based on the aggregated results in the Union-wide constituency is to be carried out in accordance with the d'Hondt system (Article 15(12) of the EP proposal).

46. For all these reasons, it is impossible to determine in advance the number of MEPs resident in a given Member State who will be elected in the Union-wide constituency. Hence, the fourth sentence of the first subparagraph of Article 14(2) TEU on the allocation of seats to individual Member States cannot be interpreted as applying to MEPs elected in the Union-wide constituency, but only to MEPs elected in national constituencies, as it is only in respect of those MEPs that the seats are allocated to specific Member States.
47. This conclusion is also corroborated by Article 27(2) and (6) of the EP proposal, pursuant to which vacancies of seats of MEPs elected in the Union-wide constituency are to be filled by the next candidate in the list of candidates in which the MEP whose seat has fallen vacant was originally elected, according to the order of precedence. As a rule, the new MEP will thus not be resident in the same Member State as the MEP whose mandate has ended.
48. In the light of the foregoing, it appears that the establishment of a Union-wide list as foreseen in the EP proposal respects the conditions laid down in the third and fourth sentences of the first subparagraph of Article 14(2) TEU. This being said, the legislator might consider it opportune to improve the drafting of Article 15 of the EP proposal, for instance in order to strengthen the geographical balance between MEPs to be elected in the Union-wide constituency.

VI. THE LEAD CANDIDATES PROCESS ("SPITZENKANDIDATEN")

49. In Recitals 8 and 9 of its proposal, the EP puts forward a process of lead candidates ("Spitzenkandidaten") in view of choosing the future President of the Commission, which the EP links to the establishment of a Union-wide constituency. In essence, it follows from these recitals that the Union-wide lists drawn up by European electoral entities should be headed by each political family's candidate for President of the Commission, who should be able to stand behind a common electoral programme in all Member States. On the basis of a political agreement between the European political entities, the lead candidate whose European political entity has received the overall highest number of seats should be tasked first with forming a coalition majority in the newly elected Parliament as regards the nomination of a candidate for President of the Commission. Furthermore, *"in order to inform the nomination process, the President of the European Council should consult the said leaders of the European political entities and parliamentary groups. The lead candidate process could be formalised by a political agreement between the European political entities and by an Interinstitutional Agreement between Parliament and European Council"* (see Recital 8, in fine).
50. These recitals are not accompanied by corresponding provisions in the operative part of the proposed regulation. It is clear that if they were to be accepted by the Council, they would be interpreted as an expression of the Council's political acceptance of the process proposed by the EP. However, that process is legally highly problematic, for the following reasons.
51. The first subparagraph of Article 17(7) TEU reads as follows:

"Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure."

52. This provision is specified in Declaration No 11³³, pursuant to which "*prior to the decision of the European Council*", representatives of the EP and of the European Council will "*conduct the necessary consultations in the framework deemed the most appropriate*". These consultations "*will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament (...)*." Furthermore, it results from Declaration No 6³⁴ that "*in choosing the persons called upon to hold the offices of President of the European Council, President of the Commission and High Representative of the Union (...), due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its Member States.*"
53. It follows, firstly, that it is for the European Council to propose to the EP the candidate for President of the Commission. The Council has no role in this process and cannot therefore, in an act adopted on the basis of Article 223(1) TFEU, enter into political commitments, through recitals, on matters which the Treaty reserves for the European Council.
54. Secondly, within the framework set by Article 17(7) TEU and Declarations No 6 and 11 (see paragraph 52 above), the European Council has a wide margin of appreciation in the choice of the candidate for President of the Commission. The establishment or reinforcement of a lead candidates practice, as proposed by the EP, would however seriously reduce, if not exclude, this margin of appreciation. The fact that, since the entry into force of the Lisbon Treaty, the EP is called upon to "*elect*", and not any longer to "*approve*", the President of the Commission, has to be read as an expression of the political dimension of the relationship between the EP and the Commission, but has no consequence as regards the role and prerogatives of the European Council in the appointment procedure of the President of the Commission.³⁵
55. It follows from the foregoing that the envisaged process of lead candidates ("Spitzenkandidaten") would profoundly alter, to the detriment of the European Council, the constitutional setup of the Union and the institutional balance as enshrined in the Treaties. Recitals 8 and 9 of the EP proposal should therefore be deleted.

³³ Annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

³⁴ Annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

³⁵ See also in this sense the CLS opinion of 15 March 2016, document 7038/16, paragraphs 27 to 31.

VII. CONCLUSIONS

56. In the light of the foregoing, the CLS is of the opinion that:

- a) the act to be adopted under Article 223(1) TEU arguably falls within the exercise of a competence of the Union relating to its functioning, which, by its nature, can be exercised only by the Union itself; however, to the extent that the EP proposal does not provide for a completely uniform electoral procedure, but also establishes certain common principles, it is necessary to justify, in an adequate statement of reasons, the choices made by the legislator as regards the intensity of its regulatory intervention;
- b) the proposed Union-wide constituency is compatible with the first subparagraph of Article 14(2) TEU;
- c) recitals 8 and 9 of the EP proposal relating to the lead candidate process ("Spitzenkandidaten") for choosing the future President of the Commission would profoundly alter, to the detriment of the European Council, the constitutional setup of the Union and the institutional balance as enshrined in the Treaties and should therefore be deleted.