

# Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

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Lleoliad:  
Ystafell Bwyllgora 2 – y Senedd

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Dyddiad:  
Dydd Llun, 25 Ionawr 2016

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Amser:  
14.30

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Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



I gael rhagor o wybodaeth, cysylltwch a:

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Clerc y Pwyllgor

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## Agenda

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**1 Cyflwyniad, ymddiheuriadau, dirprwyon a datganiadau o fuddiant**

**2 Offerynnau nad ydynt yn cynnwys unrhyw faterion i'w codi o dan Reol Sefydlog 21.2 neu 21.3**

(Tudalennau 1 – 2)

**CLA(4)-02-16 – Papur 1 – Offerynnau statudol sydd ag adroddiadau clir**

**CLA641 – Rheoliadau Cyngor y Gweithlu Addysg (Prif Swyddogaethau) (Cymru) (Diwygio) 2016**

Y weithdrefn negyddol: Fe'u gwnaed ar: 6 Ionawr 2016; Fe'u gosodwyd ar: 8 Ionawr 2016; Yn dod i rym ar: 1 Ebrill 2016

**CLA643 – Rheoliadau Cynllunio Strategol (Cyfansoddiad Paneli a Gwariant Cymwys) Rheoliadau (Cymru) 2016**

Y weithdrefn negyddol: Fe'u gwnaed ar: 11 Ionawr 2016; Fe'u gosodwyd ar: 13 Ionawr 2016; Yn dod i rym ar: 16 Mawrth 2016

**CLA644 – Gorchymyn Ardrethu Annomestig (Diffiniad o Eiddo Domestig) (Cymru) 2016**

Y weithdrefn negyddol: Fe'i gwnaed ar: 13 Ionawr 2016; Fe'i gosodwyd ar: 15 Ionawr 2016; Yn dod i rym ar: 1 Ebrill 2016

**CLA645 – Gorchymyn Ardrethu Annomestig (Rhyddhad Ardrethi i Fusnesau Bach) (Cymru) (Diwygio) 2016**

Y weithdrefn negyddol: Fe'i gwnaed ar: 12 Ionawr 2016; Fe'i gosodwyd ar: 18 Ionawr 2016; Yn dod i rym ar: 8 Chwefror 2016

**CLA646 – Gorchymyn Cynllunio Gwlad a Thref (Datblygu Cyffredinol a Ganiateir) (Diwygio) (Cymru) 2016**

Y weithdrefn negyddol: Fe'i gwnaed ar: 13 Ionawr 2016; Fe'i gosodwyd ar: 18 Ionawr 2016; Yn dod i rym ar: 25 Chwefror 2016

**3 Offerynnau sy'n cynnwys materion i gyflwyno adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3**

Offerynnau'r Weithdrefn Penderfyniad Cadarnhaol

**CLA642 – Rheoliadau Mangreoedd etc. Di-fwg (Cymru) (Diwygio) 2016 (Tudalennau 3 – 32)**

Y weithdrefn gadarnhaol; Fe'u gwnaed ar: dyddiad heb ei nodi; Fe'u gosodwyd ar: 11 Ionawr 2016; Yn dod i rym ar: 4 Chwefror 2016

**CLA(4)-02-16 – Papur 2 – Adroddiad**

**CLA(4)-02-16 – Papur 3 – Rheoliadau**

**CLA(4)-02-16 – Papur 4 – Memorandwm Esboniadol**

**4 Papurau i'w nodi (Tudalennau 33 – 84)**

**CLA(4)-02-16 – Papur 5 – Llythyr oddi wrth y Llywydd at Ysgrifennydd Gwladol Cymru: Bil Cymru drafft**

## Diwygio cyfraith etholiadol yr UE.

- CLA(4)-02-16 – Papur 6 – Penderfyniad gan Senedd Ewrop
- CLA(4)-02-16 – Papur 7 – Memorandwm Esboniadol Llywodraeth y DU
- CLA(4)-02-16 – Papur 8 – Adroddiad Pwyllgor Craffu Ewropeaidd Tŷ'r Cyffredin

## **5 Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer y busnes a ganlyn:**

(ix) lle mae unrhyw fater sy'n ymwneud â busnes mewnol y pwyllgor, neu fusnes mewnol y Cynulliad, i gael ei drafod

**Etifeddiaeth Pwyllgor y Pedwerydd Cynulliad: (Tudalennau 85 – 95)**

**CLA(4)-2-16 – Papur 9 – Papur Etifeddiaeth**

### Offerynnau Statudol sydd ag Adroddiadau Clir

25 Ionawr 2016

CLA641 - Rheoliadau Cyngor y Gweithlu Addysg (Prif Swyddogaethau) (Cymru) (Diwygio) 2016

Gweithdrefn: Negyddol

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Mae'r offeryn statudol hwn yn diwygio Rheoliadau Cyngor y Gweithlu Addysg (Prif Swyddogaethau) (Cymru) 2015. Mae'r Rheoliadau'n nodi'r gwasanaethau penodol a'r meini prawf ar gyfer darparu'r gwasanaethau hynny gan weithwyr cymorth dysgu mewn ysgolion, sy'n gweithio mewn ysgol a gynhelir yng Nghymru.

CLA643 - Rheoliadau Cynllunio Strategol (Cyfansoddiad Paneli a Gwariant Cymwys) (Cymru) 2016

Gweithdrefn: Negyddol

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Mae'r Rheoliadau hyn yn gwneud darpariaeth ynghylch cyfansoddiad panel cynllunio strategol ("panel") o ran rhyw ac ynghylch gwariant cymwys panel sydd i'w dalu gan ei awdurdodau cynllunio lleol cyfansoddol.

CLA644 – Gorchymyn Ardrethu Annomestig (Diffiniad o Eiddo Domestig) (Cymru) 2016

Gweithdrefn: Negyddol

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Mae'r Gorchymyn hwn yn diwygio adran 66 o Ddeddf Cyllid Llywodraeth Leol 1988 ('Deddf 1998') sy'n diffinio eiddo domestig at ddibenion Rhan III (ardrethu annomestig) o'r Ddeddf honno.

Mae adran 66 o Ddeddf 1998 hefyd yn diffinio llety hunanddarpar ac yn darparu nad yw llety o'r fath yn eiddo domestig. Mae erthygl 2 (2) o'r Gorchymyn hwn yn diwygio'r diffiniad hwnnw er mwyn ychwanegu amgylchiadau pellach lle y mae adeilad neu ran hunangynhaliol o adeilad yn llety hunanddarpar ac felly heb fod yn eiddo domestig.



## CLA645 – Gorchymyn Ardrethu Annomestig (Rhyddhad Ardrethi i Fusnesau Bach) (Cymru) (Diwygio) 2016

### Gweithdrefn: Negyddol

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Mae'r Gorchymyn hwn yn diwygio Gorchymyn Ardrethu Annomestig (Rhyddhad Ardrethi i Fusnesau Bach) (Cymru) 2015 (O.S. 2015/229 (Cy. 11)) ("Gorchymyn 2015"). Mae Gorchymyn 2015 yn darparu ar gyfer cynllun rhyddhad ardrethi a chynllun rhyddhad ardrethi dros dro sydd i redeg o 1 Ebrill 2015 i 31 Mawrth 2016, ac sy'n berthnasol i gategorïau penodol o eiddo yn unig.

Mae Erthygl 2 o'r Gorchymyn hwn yn diwygio Gorchymyn 2015 drwy estyn y cyfnod amser y mae'r cynllun rhyddhad ardrethi dros dro i fod yn gymwys, i 31 Mawrth 2017.

## CLA646 - Gorchymyn Cynllunio Gwlad a Thref (Datblygu Cyffredinol a Ganiateir) (Diwygio) (Cymru) 2016

### Gweithdrefn: Negyddol

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Mae'r Gorchymyn hwn yn diwygio Rhan 3 (newidiadau mewn defnydd) o Atodlen 2 i'r Gorchymyn Cynllunio Gwlad a Thref (Datblygu Cyffredinol a Ganiateir) 1995 i roi hawliau datblygu a ganiateir i newid defnydd adeiladau a ddefnyddir fel tai amlfeddiannaeth ar raddfa fechan (dosbarthiad defnydd C4) i'w defnyddio fel tai annedd (dosbarthiad defnydd C3).



### CLA642 - Rheoliadau Mangreoedd etc Di-fwg (Cymru) (Diwygio) 2016

#### Gweithdrefn

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Cadarnhaol

#### Y cefndir

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Mae'r rheoliadau hyn yn cael eu gwneud o dan ddarpariaethau di-fwg Deddf Iechyd 2006. Mae'r rheoliadau yn eithrio, tan 5 Ebrill 2017, "ystafelloedd dynodedig" ar gyfer oedolion mewn carchardai yng Nghymru o'r gwaharddiad ar ysmegu. Mae "ystafell ddynodedig" yn gell:

- a ddynodwyd yn ysgrifenedig gan y person sy'n gyfrifol am y carchar,
- gwbl gaeëdig,
- nad oes ganddi system awyru (ac nid yw'n awyru i'r unman arall yn y carchar),
- a nodwyd yn glir yn ystafell lle y caniateir ysmegu.

#### Materion technegol: craffu

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Ni nodwyd unrhyw bwyntiau i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.2 mewn perthynas â'r offeryn hwn.

#### Craffu: Rhinweddau

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Nodwyd un pwynt i gyflwyno adroddiad arno o dan Reol Sefydlog 21.3(ii) mewn perthynas â'r offeryn hwn (sef ei fod o bwysigrwydd gwleidyddol neu gyfreithiol neu ei fod yn codi materion polisi cyhoeddus sy'n debyg o fod o ddiddordeb i'r Cynulliad).

Mae achos adolygiad barnwrol wedi cadarnhau bod y darpariaethau di-fwg yn y Ddeddf Iechyd 2006 yn berthnasol i garchardai preifat a charchardai a redir gan y wladwriaeth. Mae hyn yn cadarnhau bod carchardai yng Nghymru yn ddi-fwg, oni bai bod eithriadau yn cael eu gwneud. Mae'r rheoliadau hyn yn darparu eithriad o'r fath, tan 5 Ebrill 2017. O hyn tan 5 Ebrill 2017, caiff carchardai yng Nghymru eu cefnogi i ddog yn ddi-fwg.

Yr achos adolygiad barnwrol yw *Black v Secretary of State for Justice* [2015] EWHC 528 (Admin).



**Cynghorwyr Cyfreithiol**  
**Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol**  
**19 Ionawr 2016**



Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales

**Tudalen y pecyn 4**

*Rheoliadau drafft a osodwyd gerbron Cynulliad Cenedlaethol Cymru o dan adran 79(4) o Ddeddf Iechyd 2006 i'w cymeradwyo drwy benderfyniad gan Gynulliad Cenedlaethol Cymru.*

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OFFERYNNAU STATUDOL  
CYMRU DRAFFT

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**2016 Rhif (Cy. )**

**IECHYD Y CYHOEDD,  
CYMRU**

**Rheoliadau Mangreoedd etc. Di-  
fwg (Cymru) (Diwygio) 2016**

**NODYN ESBONIADOL**

*(Nid yw'r nodyn hwn yn rhan o'r Rheoliadau)*

Mae'r Rheoliadau hyn, a wneir o dan Bennod 1 o Ran 1 o Ddeddf Iechyd 2006, yn mewnosod rheoliad 3A newydd yn Rheoliadau Mangreoedd etc. Di-fwg (Cymru) 2007 i esemptio tan 5 Ebrill 2017 ystafelloedd dynodedig i oedolion mewn carchardai yng Nghymru o'r gofynion di-fwg yn adran 2 o Ddeddf Iechyd 2006.

Mae paragraff (2) o reoliad 3A newydd yn darparu bod "ystafell ddynodedig" yn gell a gafodd ei dynodi'n ysgrifenedig gan y person sydd â gofal y carchar, sy'n hollol gaeedig, nad oes ganddi system awyru sy'n awyru i ran arall o'r fangre, ac sydd wedi ei marcio'n glir yn ystafell lle y caniateir ysmegu.

Ystyriwyd Cod Ymarfer Gweinidogion Cymru ar gynnal Aseidiadau Effaith Rheoleiddiol mewn perthynas â'r Rheoliadau hyn. O ganlyniad, lluniwyd aseiad effaith rheoleiddiol o'r costau a'r manteision sy'n debygol o ddeillio o gydymffurfio â'r Rheoliadau hyn. Gellir cael copi oddi wrth y Gangen Polisi Tybaco yn Is-adran Iechyd y Cyhoedd, Llywodraeth Cymru, Parc Cathays, Caerdydd, CF10 3NQ.



*Rheoliadau drafft a osodwyd gerbron Cynulliad Cenedlaethol Cymru o dan adran 79(4) o Ddeddf Iechyd 2006 i'w cymeradwyo drwy benderfyniad gan Gynulliad Cenedlaethol Cymru.*

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OFFERYNNAU STATUDOL  
CYMRU DRAFFT

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**2016 Rhif (Cy. )**

**IECHYD Y CYHOEDD,  
CYMRU**

**Rheoliadau Mangreoedd etc. Di-  
fwg (Cymru) (Diwygio) 2016**

*Gwnaed*

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*Yn dod i rym*

*4 Chwefror 2016*

Mae Gweinidogion Cymru, drwy arfer y pwerau a roddwyd gan adrannau 3(1), (2), (6) a 79(3) o Ddeddf Iechyd 2006(1), yn gwneud y Rheoliadau a ganlyn, y gosodwyd drafft ohonynt gerbron Cynulliad Cenedlaethol Cymru yn unol ag adran 79(4) o'r Ddeddf honno(2).

**Enwi, cychwyn a chymhwyso**

1.—(1) Enw'r Rheoliadau hyn yw Rheoliadau Mangreoedd etc. Di-fwg (Cymru) (Diwygio) 2016 a deuant i rym ar 4 Chwefror 2016.

(2) Mae'r Rheoliadau hyn yn gymwys o ran Cymru.

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- (1) 2006 p. 28. Trosglwyddwyd swyddogaethau Cynulliad Cenedlaethol Cymru fel yr "awdurdod cenedlaethol priodol" o dan y Ddeddf i Weinidogion Cymru gan baragraff 30 o Atodlen 11 i Ddeddf Llywodraeth Cymru 2006 (2006 p. 32).
- (2) Mae adran 79(4) o Ddeddf Iechyd 2006 yn darparu na chaiff yr Ysgrifennydd Gwladol wneud offeryn o dan adran 3(1) o'r un Ddeddf oni bai bod drafft o'r offeryn wedi ei osod gerbron, ac wedi ei gymeradwyo drwy benderfyniad gan, ddau Dŷ'r Senedd. Mae paragraff 34 o Atodlen 11 i Ddeddf Llywodraeth Cymru 2006 yn darparu bod y gofyniad yn adran 79(4) o Ddeddf Iechyd 2006 yn gymwys i offerynnau a wneir gan Weinidogion Cymru fel pe bai'r cyfeiriad at ddau Dŷ'r Senedd yn gyfeiriad at Gynulliad Cenedlaethol Cymru.

**Diwygio Rheoliadau Mangreoedd etc. Di-fwg (Cymru) 2007**

2.—(1) Mae Rheoliadau Mangreoedd etc. Di-fwg (Cymru) 2007(1) wedi eu diwygio fel a ganlyn.

(2) Ar ôl rheoliad 3 (esemptiadau i fangreoedd di-fwg), mewnosoder y rheoliad canlynol —

□3A.Esemptiad dros dro i garchardai

(1) Nid yw ystafell ddynodedig a ddefnyddir fel llety mewn carchar ar gyfer personau sy'n 18 oed neu drosodd yn ddi-fwg.

(2) At ddibenion y rheoliad hwn, ystyr “ystafell ddynodedig” yw cell—

- (a) a gafodd ei dynodi'n ysgrifenedig gan y person sydd â gofal y carchar yn ystafell lle y caniateir ysmygu;
- (b) y mae ganddi nenfwd ac sydd, heblaw am ddrysau a ffenestri, yn hollol gaeedig ar bob ochr gan waliau solet o'r llawr i'r nenfwd;
- (c) nad oes ganddi system awyru sy'n awyru i ran arall o'r fangre (ac eithrio unrhyw ystafelloedd dynodedig eraill);  
a
- (ch) sydd wedi ei marcio'n glir yn ystafell lle y caniateir ysmygu.

(3) Bydd paragraffau (1) a (2) yn peidio â chael effaith ar 5 Ebrill 2017. □.

Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol,  
un o Weinidogion Cymru  
Dyddiad

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(1) O.S. 2007/787 (Cy. 68).

**Explanatory Memorandum to the Smoke-free Premises etc. (Wales)  
(Amendment) Regulations 2016**

This Explanatory Memorandum has been prepared by Health and Social Services Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

**Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016. I am satisfied that the benefits justify the likely costs.

Mark Drakeford  
Minister for Health and Social Services

17 December 2015

# **Explanatory Memorandum to the draft Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016**

This Explanatory Memorandum has been prepared by the Health and Social Services Group to accompany the smoke-free regulations regarding smoking in prisons.

## **1. Description**

1.1 The Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016 (“the Regulations”) introduce a time-limited exemption to the Smoke-free Premises etc. (Wales) Regulations 2007 for designated cells in prisons.

## **2. Matters of special interest to the Constitutional and Legislative Affairs Committee**

2.1 None.

## **3. Legislative background**

3.1 The Health Act 2006 (“the 2006 Act”) applies to England and Wales; Section 2 of the Act prohibits smoking in enclosed and substantially enclosed premises open to the public and/or used as a place of work, thus making those premises “smoke-free”. The policy aim of the legislation is to protect the public and workers from exposure to the harmful effects of second-hand smoke. Section 3 of the 2006 Act provides the Welsh Ministers, in relation to Wales, with the power to make regulations that exempt certain prescribed premises or parts of the premises from the smoke-free requirements of section 2 of the Act. Under section 3(2) the Welsh Ministers can provide an exemption for any premises where a person has his home, or is living whether permanently or temporarily, including prisons. No such exemption was provided for prisons in Wales in the Smoke-free Premises etc. (Wales) Regulations 2007 (“the 2007 Regulations”).

3.2 Smoking is defined in the 2006 Act as including smoking tobacco and being in possession of “lit tobacco” or “anything lit which contains tobacco”, or “being in possession of any other lit substance in a form in which it could be smoked”.

3.3 The High Court has recently decided in the *Black*<sup>1</sup> judicial review proceedings that the 2006 Act’s provisions on smoke-free premises apply to private and state-run prisons in England and Wales. As such, since there are

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<sup>1</sup> Black v Secretary of State for Justice [2015] EWHC 528 (Admin)  
<https://www.judiciary.gov.uk/judgments/black-v-secretary-of-state-for-justice/>

currently no regulations made by the Welsh Ministers to exempt prisons in Wales from the 2006 Act's smoke-free requirements, the 2006 Act requires all prisons in Wales to be smoke-free. The Secretary of State is appealing to the Court of Appeal against the High Court's ruling in *Black* that the 2006 Act applies to state-run prisons. The hearing is scheduled to be heard in February 2016.

3.4 However, despite the 2006 Act's application to prisons in Wales, it is apparent from High Court proceedings in a separate judicial review that, operationally, some prison inmates aged 18 years or over are being permitted to smoke in cells in prisons in Wales, subject to safeguards provided by Prison Service Instruction PSI 09/2007W.

3.5 The UK Government department responsible for the prison estate, the National Offender Management Service ("NOMS"), is committed to introducing a smoke free policy to make sure that staff, visitors and prisoners are protected from risk of exposure to second hand smoke. The priority remains the safe, decent and secure operation of the custodial estate.

3.6 In accordance with section 79 of the 2006 Act, the Regulations are subject to the affirmative resolution procedure.

#### **4. Purpose & intended effect of the legislation**

##### **Context**

4.1 Currently there are four prisons in Wales, with a further prison planned to open in north Wales in 2017. It is noted that all existing prisons in Wales cater exclusively for male prisoners. HMP Parc is privately run, whilst the remainder are part of the Crown estate. Although health is a subject devolved to Welsh Ministers, the management of prisons is not. The Secretary of State for Justice has responsibility for prisons in Wales.

4.2 A report from Public Health England indicates that nationally around 80 per cent of prisoners smoke compared with around 20 per cent in the general population<sup>234</sup>. Data from Wales suggest that 76% of prisoners smoke<sup>56</sup>. Smoking is reported to be an integral part of prison life<sup>7</sup>.

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<sup>2</sup> Public Health England. Reducing Smoking in Prisons. Management of tobacco use and nicotine withdrawal. March 2015

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/412567/Reducing\\_smoking\\_in\\_prisons.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/412567/Reducing_smoking_in_prisons.pdf)

<sup>3</sup> Singleton N, Farrell M & Meltzer H. Substance Misuse among Prisoners in England and Wales. London: Office for National Statistics. 1999

<http://www.tandfonline.com/doi/abs/10.1080/0954026021000046092>

<sup>4</sup> Lester C, Hamilton-Kirkwood L, Jones N. Health Indicators in a prison population: asking prisoners. Health Education Journal 2003;62:341-349. (Awaiting OpenAthens log in details from the library to

4.3 The high rates of smoking among prisoners also causes them to suffer marked health inequalities compared with the general population, both through active smoking and breathing in other people's smoke<sup>2</sup>.

4.4 Recent reviews have identified the various ways prison influences smoking behaviour<sup>7,8</sup>. Smoking is reported to be a coping strategy to manage stressful situations such as imprisonment, transfers, court appearances, sanctions and prison visits, and help to alleviate boredom. Given the high prevalence of smoking, it is thought that prisoners also smoke for social reasons, as being a non-smoker in such a high prevalence population could be socially isolating.

4.5 Offenders are over-represented among deprived and socially excluded communities. For example, around half of prisoners have no educational qualifications, nearly half have experienced exclusion from school and over two-thirds are unemployed prior to entering prison. Offenders are also more likely to have experienced poverty and unemployment than those in the general population. Adverse family and social experience prior to entering prison is common: for example, 24 per cent reported having spent time in local authority care as a child, and homelessness or living in temporary accommodation prior to sentence is prevalent<sup>9</sup>. Smoking prevalence is much higher among prisoners than among lower socio-economic groups as a whole<sup>2</sup>.

4.6 Smoking is also more prevalent among those with mental health problems in the general population (about twice as high on average and it is more common in those with more severe mental health conditions)<sup>10</sup>. There is a very

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access the report)

<sup>5</sup> Smoking rates based on SystemOne data from July/August 2014 and NOMS prisoner questionnaire in Welsh Public Sector Prisons. July 2014. Unpublished. SystemOne data are the LHB healthcare system used within prisons.

<sup>6</sup> Prison population taken from Prison Population Bulletin Monthly September 2014 and annual receptions based on data for 2013/14.

<https://www.gov.uk/government/statistics/prison-population-figures-2014>

<sup>7</sup> MacLeod L, MacAskill S, Eadie D. Rapid Literature Review of smoking cessation and tobacco control issues across criminal justice settings. Stirling: Institute for Social Marketing, 2010.

[https://www.uclan.ac.uk/research/explore/projects/assets/tobacco\\_control\\_cjs\\_lit\\_review\\_aug\\_2010.pdf](https://www.uclan.ac.uk/research/explore/projects/assets/tobacco_control_cjs_lit_review_aug_2010.pdf)

<sup>8</sup> Department of Health. Acquitted: Best practice guidance for developing smoking cessation services in prisons. London, Department of Health, 2003.

[http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_4034484.pdf](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4034484.pdf)

<sup>9</sup> Ministry of Justice. Surveying Prisoner Crime Reduction. 2014.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/261620/re-offending-release-waves-1-3-spcr-findings.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261620/re-offending-release-waves-1-3-spcr-findings.pdf)

strong relationship between offending and having mental health problems which may again help explain the higher smoking prevalence in this population. A recent review identified that 80% of prisoners in England have mental health problems and 72% of convicted male prisoners suffer from two or more mental disorders, compared with 5% in the general population<sup>3,11,12</sup>.

4.7 Most people smoke to ingest nicotine and smoking is now recognised as a drug dependence disorder. In 2001 the RCP stated that *“it is now well established that users of tobacco tend to regulate or titrate their nicotine intake to maintain body levels within a certain range.”* referenced in 2

4.8 When smokers go without nicotine, withdrawal symptoms can begin within hours of the last cigarette and are at maximum intensity for the first week<sup>13</sup>. Some of the characteristic symptoms of nicotine withdrawal include impaired concentration, irritability, tension, disturbed sleep or drowsiness, intense longing or craving for a cigarette, and headaches. These symptoms mean that people frequently relapse back to smoking.

4.9 A variety of measures can be taken to reduce withdrawal and to support people in stopping smoking.

4.10 Some evidence suggests that a significant majority of offenders who smoke are motivated to stop. For example, a study of smokers in Cardiff prison revealed 79% wished to stop<sup>4</sup>. Studies of offenders in contact with other criminal justice service settings have also revealed an interest in support to stop smoking<sup>14</sup>. The prison setting, in particular, presents a valuable

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<sup>10</sup> Royal College of Physicians Tobacco Advisory Group. Smoking and Mental Health. RCP, London 2013.

[https://www.rcplondon.ac.uk/sites/default/files/smoking\\_and\\_mental\\_health\\_-\\_full\\_report\\_web.pdf](https://www.rcplondon.ac.uk/sites/default/files/smoking_and_mental_health_-_full_report_web.pdf)

<sup>11</sup> Mental Health Network NHS Confederation. Key facts and trends in mental health. NHS Confederation 2011.

[http://www.nhsconfed.org/~media/Confederation/Files/Publications/Documents/Key\\_facts\\_mental\\_health\\_080911.pdf](http://www.nhsconfed.org/~media/Confederation/Files/Publications/Documents/Key_facts_mental_health_080911.pdf)

<sup>12</sup> McManus S, Meltzer H, Brugha T, Bebbington P, Jenkins R. Adult psychiatric morbidity in England, 2007. Results of a household survey. 2007. A survey carried out for the NHS Information Centre for health and social care by the National Centre for Social Research and the Department of Health Sciences, University of Leicester.

<http://www.hscic.gov.uk/catalogue/PUB02931/adul-psyc-morb-res-hou-sur-eng-2007-rep.pdf>

<sup>13</sup> Jarvis MJ. Why do people smoke British Medical Journal 2004 Jan;328:277-9.

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC324461/pdf/bmj32800277.pdf>

<sup>14</sup> MacAskill S, Lindridge A, Stead M, Eadie D, Hayton P, Braham M. Social Marketing with challenging target groups: Smoking cessation in prisons in England and Wales. International Journal of

opportunity to engage marginalised groups with very high smoking prevalence in cessation initiatives. Prisoners themselves have described imprisonment as an opportunity to access cessation services, an opportunity that is viewed by some as a means of achieving something positive while in prison<sup>14</sup>.

4.11 An analysis of approaches to prison smoking bans around the world has concluded that total bans appear to be more effective than partial bans, and that successful implementation of such bans seems to be associated with a range of factors which include thorough planning, good communication, effective staff training, comprehensive support for prisoners and effective smoking cessation programmes<sup>15</sup>.

4.12 Prisoners in Welsh prisons can access smoking cessation support, from the relevant health board, within the prison and e-cigarettes are available for purchase from the prison shop. Some prisons have implemented smoke-free areas on a voluntary basis. The new north Wales prison will open as a smoke-free prison.

4.13 The UK Government announced on 29<sup>th</sup> September 2015 its intention to start to implement a full smoke-free policy in all prisons in Wales from January 2016.<sup>16</sup> This announcement included the publication of two recent academic studies commissioned by NOMS which identified that high levels of second-hand smoke are still prevalent in the communal areas of some prisons<sup>17</sup><sup>18</sup>. NOMS is currently working to this timetable across Welsh prisons but in the event of slippage or safety issues a time-limited exemption would allow work to

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Nonprofit and Voluntary Sector Marketing, 2008;13:251-261

<http://onlinelibrary.wiley.com/doi/10.1002/nvsm.327/abstract>

<sup>15</sup> The Offender Health Research Network. Smoking in Prisons in England and Wales: Considerations for Policy Change. University of Manchester. February 2014.

<http://www.ohrn.nhs.uk/OHRNResearch/Smoking.pdf>

<sup>16</sup> National Offender Management Service, UK Government, Letter from Prisons Minister to Robert Neil MP, Chairman of the Justice Select Committee regarding smoking in prisons, published 29 September 2015.

<https://www.gov.uk/government/speeches/smoking-in-prisons>

<sup>17</sup> Division of Epidemiology and Public Health and UK Centre for Tobacco and Alcohol Studies, University of Nottingham, Second-hand smoke in four English prisons an air quality monitoring study, 2015.

<https://www.gov.uk/government/publications/air-quality-reports>

<sup>18</sup> National Offender Management Service, London, Report on Second-hand Smoke in Prisons Final Report, 2015.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/469654/SHS\\_in\\_Prisons\\_Final\\_Report\\_minus\\_Appendix.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469654/SHS_in_Prisons_Final_Report_minus_Appendix.pdf)



continue towards a smoke-free estate in a safe and secure way. Therefore, a time-limited exemption is still required.

### **Purpose of the Provisions**

4.14 The purpose of the Smoke-free Premises etc. (Wales) (Amendment) Regulations 2016 is to amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption.

### **Effect of the Provisions**

4.15 The intended effect of the Regulations is to:

- allow smoking in designated prison cells, for a time-limited period
- allow NOMS in Wales to work towards implementation of smoke-free prisons in a safe and secure way which would not increase the risk to the operational safety and security of Welsh prisons.

4.16 The removal of the exemption after a time-limited period will then:

- protect prisoners and prison staff from the harms associated with smoking and second-hand smoke in prisons
- support inmates to give up smoking
- contribute to a reduction in health conditions in prisoners and prison staff caused by smoking and/or exposure to second-hand smoke.

## **5. Consultation**

5.1 A consultation on draft Regulations was undertaken between 11<sup>th</sup> September and 12<sup>th</sup> November 2015. The consultation summary document can be accessed via the following links:

<http://gov.wales/consultations/healthsocialcare/smokefree/?lang=en>

<http://gov.wales/consultations/healthsocialcare/smokefree/?lang=cy>

### **Detail of the Regulations**

6.1 Under the 2006 Act, a place where smoking is not permitted is termed a 'smoke-free place'. These Regulations amend the 2007 Regulations to exempt designated cells in prisons from being required to be smoke-free places for a time-limited period.

6.2 The Regulations will provide that a "designated room" that is used as accommodation in a prison for a person aged 18 or over is not required to be smoke-free. A "designated room" is defined as a cell which: —

- has been designated by the person in charge of the prison as a room in which smoking is permitted;

- has a ceiling and, except for doors and windows, is completely enclosed on all sides by solid floor to ceiling walls;
- does not have a ventilation system that ventilates into any other part of the premises (except any other designated rooms); and
- is clearly marked as a room in which smoking is permitted.

6.3 The Regulations will come into force on 4 February 2016.

## **7. Regulatory Impact Assessment (RIA)**

7.1 A cost analysis of the impact of the Regulations is included at part 2 of this document.

7.2 Welsh Government officials have held discussions with officials in NOMS to help identify the potential costs and benefits of the various options set out in the Regulatory Impact Assessment.

7.3 Some gaps exist and these have been set out in the impact assessment.

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **Options**

Three options have been considered.

- Option 1 - Make no changes to the 2007 Regulations.
- Option 2 - Amend the 2007 Regulations to include an exemption from the smoke-free requirements for designated cells in prisons in Wales.
- Option 3 - Amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption.

For the purposes of all calculations set out below, it has been assumed that, as per the High Court judgment in the *Black* judicial review proceedings, the 2006 Act applies to all prisons in Wales. However, as noted above, the Secretary of State is appealing against the effect of the ruling that the 2006 Act applies equally to state-run prisons as it does to private ones.

### **Option 1 - Make no changes to the Smoke-free Premises etc. (Wales) Regulations 2007**

#### **Description**

There would be no change to the current legislation under this option. This would mean that smoking would not be legally permitted in prisons in Wales. However, in practice we know that it is currently being allowed, despite existing legislation.

Maintaining the current position could lead to at least two possible different outcomes:

- (i) That, following the High Court's clarification of the law in the *Black* case, a new Prison Service Instruction (PSI) on the application of smoke-free legislation is issued for Wales, and prisons in Wales will immediately become smoke-free;
- (ii) That prisons will continue to allow prisoners aged over 18 to smoke in their cells.

It is acknowledged that other outcomes may occur, for example support to reduce the harmful effects of tobacco smoking and/or a gradual move to becoming smoke-free.

## Option 1 outcome (i) – no change to legislation; immediate move to compliance with legislation

### Costs

#### Health Service

The cost model indicates high level costs rather than the detail of the cessation support offer that local health boards will need to determine. NOMS is working with health boards to refine the cessation support resources and offer that will be in place for prisoners in a smoke free environment.

The costs to the Health Service associated with this option have been calculated using a baseline of 3,486 prisoners in Wales, with an annual turnover of 9,740. Additional costs would be incurred when the new north Wales prison opens in 2017. These are being factored into planning but are not incorporated here.

#### **Prison Population<sup>56\*</sup>**

	<b>Cardiff</b>	<b>Swansea</b>	<b>Parc</b>	<b>Usk</b>	<b>Prescoed</b>	<b>Total</b>
<b>Population</b>	811	449	1,723	273	230	<b>3,486</b>
<b>Churn</b>	4,403	1,732	2,999	241	365	<b>9,740</b>

*\*These figures were used for indicative costings. More recent figures are now available,*

Smoking cessation support and the supply of nicotine replacement therapy (NRT) would be provided by health boards to help support prisons become smoke free in a safe and secure manner. A range of potential smoking cessation costs have been calculated using an assumption that 76% of prisoners in Wales smoke<sup>5</sup>.

NOMS will be working with healthcare providers to determine how to quantify and define a single successful attempt in a custodial environment, and will be developing a care pathway for prisoners, and a prisoner compact for participation in a formal cessation/quit programme.

Two separate scenarios have been calculated; upfront costs for the treatment of the existing prisoner population and an ongoing cost for the treatment of new receptions per annum. Prisoner transfers have been considered as part of this costing process.

Costs per treatment week have been calculated as £10.47 and the cost per treatment period of 12 weeks as £125.64. Treatment is defined as the initial consultation to prescribe NRT and the time taken to collect NRT throughout the 12 week course.

There would also be staff costs for health professionals to dispense NRT. A member of the prison healthcare team would dispense the NRT and these

costs have been calculated using the Grade 5 nurse pay band<sup>19</sup> Treatment comprises of 20 minutes staff time in week one, 10 minutes each week from weeks two to twelve. Therefore, a total of 1.5 hours for each patient to complete their treatment has been calculated.

The costs for the delivery of a smoking cessation programme are based on Stop Smoking Wales Toolkit for delivery of cessation support groups in prison allowing time for preparation and administration. There would be a maximum of 16 prisoners per group; a total of 14.5 hours per group over a 7 week course and would be delivered by a Support Officer Grade at point 3 on the pay scale<sup>20</sup>.

A range of costs have been calculated using three potential uptake rates of support from prisoners:

**Prediction One** – based on 70% uptake of NRT (using SystemOne data from July/August 2014)

**Prediction Two** – based on 44% uptake of NRT (using results from the prisoner questionnaire conducted in Welsh Public Sector Prisons in July 2014).

**Prediction Three** – based on 55% uptake of NRT as a reasonable estimate which also assumes availability of electronic cigarettes for prisoners to purchase.

**Overall predicted healthcare costs** – based on models developed for internal purposes and to inform planning

Prediction	Upfront (per treatment episode)				Ongoing (per annum)			
	NRT	Health	Support groups	Total	NRT	Health	Support groups	Total
One – 70%	£233,006	£40,341	£20,002	£293,349	£651,026	£112,714	£55,887	£819,627
Two – 44%	£146,461	£25,357	£12,537	£184,391	£409,217	£70,849	£35,129	£515,194
Three – 55%	£183,076	£31,696	£15,716	£230,489	£511,521	£88,561	£43,911	£600,081

It is the view of officials that 55% of prisoners will require nicotine replacement therapy (“NRT”) (assumed as a reasonable estimate from prisoner questionnaires indicating that 44% would require NRT<sup>5</sup>, and a 70% uptake predicted from SystemOne data). Total costs are therefore calculated as £230,500 upfront costs for the existing prisoner population, with ongoing annual costs for new receptions of £600,100.

<sup>19</sup> FTE annual cost £27,901

<sup>20</sup> FTE annual cost £22,898pa

Indicative costs have been presented to each local health board with a prison in their area. LHBs will need to meet these costs from their existing budgets, and all have made an 'in principle' commitment to doing so.

### Local authorities

Local authority enforcement officers may undertake prison visits if intelligence is received that smoking is being allowed in prisons which are now smoke-free. However, prison managers may enforce the legislation effectively and so there may not be any intelligence to suggest that enforcement visits are required. The minimum potential cost is zero; the cost for an investigatory visit has been assessed at £120<sup>21</sup>. Therefore a maximum cost of £480, i.e. one visit per prison, has been included for 2016/17 only. An assumption has been made that local authority enforcement officers would support prison governors to comply with their duty to prevent smoking in a smoke-free place in the first instance, and so we would not anticipate cases being taken to court initially. If cases are taken to court then costs would rise to £990 per case, with a maximum of £3960 if cases are taken to court relating to all 4 prisons; these costs have been included in the table as a maximum cost in 2017/18.

### Prisons

An assumption has been made that if prison cells become smoke-free then there will be no opportunities for prisoners to smoke and so the prison shops will cease to sell tobacco and related products, but will continue to sell e-cigarettes. There may be costs to prisons due to reduced sales of tobacco and related products in the prison shops, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

There may also be costs due to safety and security issues. Evidence from other countries and jurisdictions suggests that legislation to ban smoking in prisons can be put in place without major problems. However, media reports of a recent riot in a maximum security prison in Melbourne, Australia, attributed by the media to the introduction of a smoke-free prison estate, estimated that rebuilding costs could be as high as AU\$10 million<sup>22</sup>; with additional costs for emergency services, as well as disruption to the justice system. However, it is important to stress that official reports detailing costs as a result of the Melbourne riot are not available.

Evidence indicates that total bans on smoking in prisons appear to be more effective than partial bans, and that successful implementation of such bans seems to be associated with a range of factors<sup>15</sup>. A key element of success in

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<sup>21</sup> Based on average senior environmental health officer rate, plus on-costs, of £39.60 an hour

<sup>22</sup> Report by Nine News Melbourne, 1 July 2015.

[Nine News Melbourne on Twitter: "Tuesday's prison riots will cost taxpayers \\$10 million in damage repairs. #9News http://t.co/eRaFq59DpB"](https://twitter.com/NineNewsMelb/status/614444444444444444)

other jurisdictions appears to be ensuring that prisoners receive sufficient access to nicotine replacement therapy and smoking cessation support.

### Tobacco industry

If tobacco is no longer available in prison shops in Wales, then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

### Government

Cost will be incurred in producing and implementing a new prison service instruction (PSI) on the application of smoke-free legislation for Wales. These costs have been calculated by NOMS as a minimum £140,000 over one year.

Risks associated with implementation have been estimated by NOMS to be at least a 30% optimism bias added to the minimum implementation cost. Therefore, the minimum costs including optimism bias for risks associated and contingency planning is estimated at £182,000 over one year, and have been shared between 2015/16 and 2016/17

Rapid implementation of policy could increase risks and associated costs. These cannot be quantified, and are not included in the table below

### Courts

It is assumed that this option would have only a limited cost impact on the Courts. If a new PSI were introduced, setting out that, effectively, current legislation is to be complied with, it is not envisaged that many prosecutions would be brought. As there are only 4 prisons in Wales, we have assumed a maximum of 4 prosecutions. A detailed costing framework has not yet been discussed between the Welsh Government and the Ministry of Justice, and so these costs are unknown at present.

Summary of costs associated with Option 1, outcome (i)

Sector	2015/16	2016/17 (£)	2017/18 (£)	2018/19 (£)	2019/20 (£)
NHS	230,500*	600,100	600,100** maximum	600,100** maximum	600,100** maximum
Local Authorities		480 maximum	3,960	-	-
Government	91,000***	91,000***	-	-	-
<b>Total costs per year</b>	<b>321,500</b>	<b>691,580</b>	<b>604,060 maximum</b>	<b>600,100 maximum</b>	<b>600,100 maximum</b>

\*These will be the costs incurred if implementation is in the last quarter of the year.

\*\*It is anticipated that costs will reduce over time, but these reductions cannot be quantified at present.

\*\*\* This figure includes the 30% optimism bias identified for contingency planning purposes.

## **Benefits**

### Health

There would be no changes to the law but if the prison service moves to implement smoke-free policies then there will be benefits to the health of both prisoners and prison staff from cessation of smoking. The current Prison Service Instruction relating to smoking in prisons in Wales<sup>23</sup> states *'Non smokers must not be required to share a cell with smokers who are actively smoking. The status of a prisoner as a smoker or non smoker should be established as part of reception procedures. Thereafter, arrangements must be made to place non-smokers and smokers in separate accommodation.'* Even so there may be benefits from the effect of the absence of second hand smoke.

There have been some studies looking at air quality in prisons, e.g. The US state of North Carolina introduced smoke free prisons for inmates, staff and visitors in 2006. Researchers investigated air quality at six prison facilities 10 to 12 months later and compared their findings to measurements taken before the new regulations went into effect. Tobacco smoke is the major source for tiny disease-causing particulates (RSPs), and researchers found RSP levels had declined by 77 per cent after the regulations took effect<sup>24</sup>.

The Offender Health Research Network report the following from an unpublished report: 'In order to assess the impact of the smoking ban, the Tobacco Control Collaborating Centre (unpublished) measured second hand smoke levels in the Manx prison in the Isle of Man prior to the ban being enforced in March 2008 and then again three months later. Members of staff were asked to wear personal monitors for the duration of their shift which measured airborne particulate matter. The average measure of second hand smoke concentrations (PM<sub>2.5</sub>) was largely reduced (75%), although concentrations varied, depending on location within the prison. Saliva samples were also taken from staff before and after the ban, to measure levels of salivary cotinine, a breakdown product of nicotine. There was no difference reported in average salivary cotinine levels before and after the ban; however, saliva samples were taken from different members of staff before and after, which may explain the lack of difference noted. Interestingly, an increase in salivary cotinine was reported during shifts before the ban, but not after. The Tobacco Control Collaborative concluded that allowing smoking to continue in prisons exposed staff and prisoners to unhealthy levels of particulate

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<sup>23</sup> HM Prison Service. Smoke Free Legislation :Prison Service Application 09/2007 W

<sup>24</sup> Proescholbell SK. Foley KL. Johnson J. Malek SH. Indoor air quality in prisons before and after implementation of a smoking ban law. Tobacco Control 2008; 17: 123-127.



contamination and that this contamination had a cumulative effect, demonstrated by the rising cotinine levels identified during pre-ban working shifts<sup>15</sup>.

In two academic studies commissioned by NOMS<sup>17,18</sup>, sampling was undertaken to measure the levels of second-hand smoke in six prisons in Wales and England (only Cardiff Prison in Wales) by measuring concentrations of fine particulate matter (as PM<sub>2.5</sub> – particulate matter less than 2.5 microns in diameter). Samples were taken from both prisoners and prison staff. Biological markers of second-hand smoke exposure (SHS) including exhaled carbon monoxide and salivary cotinine were also gathered. Questionnaire data to determine how frequently prison staff considered they were exposed to SHS were obtained.

There was clear evidence of second hand smoke in smoking cells, occasionally in non-smoking cells and all prison wing samples measured. Measurements of personal exposure of prison staff also indicate exposure to SHS across the work-shift, with levels varying considerably between each of the six prison establishments. In three of the six prisons the personal exposure of the majority of prison staff measured exceeded the World Health Organisation (WHO) guidance value for PM<sub>2.5</sub>, (25 µg/m<sup>3</sup>).

The two studies found that overall, approximately one-sixth of the time that prison staff spent at work involved exposure to PM<sub>2.5</sub> at concentrations that exceeded the WHO guidance limit. Prison staff were also found to experience considerable short-term peak exposures with the highest 1-minute PM<sub>2.5</sub> measurement being 1,027 µg/m<sup>3</sup>. These peaks are likely to be associated with entering cells where smoking takes place. Cross-shift salivary cotinine measurements also provided data that indicated SHS exposure was apparent among this workforce.

### **Potential health benefits identified in the report**

There is well established evidence that acute exposure to second-hand smoke (SHS) causes a range of harmful health effects including lung cancer, lower respiratory tract infections, asthma, and cardiovascular diseases.<sup>25,26</sup>

The findings from these studies suggest that smoking in prisons is a source of high levels of pollution for both prisoners and staff in Wales and England.

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<sup>25</sup> U.S. Department of Health and Human Services. The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Atlanta, GA: 2006.

[http://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf\\_NBK44324.pdf](http://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf)

<sup>26</sup> Royal College of Physicians. Passive smoking and children. A report by the Tobacco Advisory Group of the Royal College of Physicians. London: 2010.

<https://cdn.shopify.com/s/files/1/0924/4392/files/passive-smoking-and-children.pdf?15599436013786148553>

There is some evidence that suggests that physiological cardiovascular and respiratory changes occur immediately after exposure to second-hand smoke<sup>27</sup>. There is less direct evidence available to suggest that removal of exposure to second-hand smoke reduces the risk of acute coronary events, stroke, acute respiratory infection and asthma.

However, taking all of the evidence from the study in its entirety it seems likely that prison officers who are exposed to second-hand smoke will experience some degree of physiological change as a result. The acute effects of this are uncertain and will vary between workers but at the level of the entire prison officer population this exposure is likely to increase the overall risk of acute adverse cardiovascular and cardiorespiratory health events that are linked to exposure to second-hand smoke.

Thus, removal of second-hand smoke from prisons is likely to be of benefit to the health of both prison staff and prisoners.

In addition, prisoners may also achieve long-term health benefits if they remain smoke-free for a long time, either in prison or if they maintain abstinence on release. However a US study has concluded that: 'Forced tobacco abstinence alone during incarceration has little impact on post-release smoking status. A behavioural intervention provided prior to release greatly improves cotinine-confirmed smoking cessation in the community.'<sup>28</sup> These potential benefits cannot be quantified.

### **Option 1 outcome (ii) – no change to legislation, non-compliance with legislation.**

#### **Costs**

##### Health

A significant proportion of prisoners and prison staff would continue to be exposed to the harms associated with smoking and exposure to second hand smoke in prisons and could be at risk of developing health conditions associated with exposure to second-hand smoke in confined spaces.

It is anticipated that additional smoking cessation services would be made available if legislation is not changed. This may, however, have lower uptake, or be less effective if the smoke-free regime is not being enforced. Existing costs for smoking cessation and smoking-related healthcare will continue. Additional costs to the health service could range from no costs if there is no additional take up, to the full costs outlined in Option 1, outcome (i), that is £0 - £230,500 upfront costs for the existing prisoner population, with ongoing annual costs for new receptions of £0 - £600,100.

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<sup>27</sup> Otsuka et al, 2001. Cited in <sup>18</sup>

<sup>28</sup> Clarke JG, Stein LA, Martin RA, et al. Forced smoking abstinence: not enough for smoking cessation. JAMA Intern Med 2013; 173:789-794

<http://archinte.jamanetwork.com/article.aspx?articleid=1675874&resultclick=1>

## Local authority

In light of evidence being available that smoking is being allowed in prisons, it will be important to increase enforcement activity. This is likely to be limited to enforcement with prison managers regarding failure to prevent smoking in enclosed or substantially enclosed premises, and failure to provide adequate signage that premises are smoke-free. There will be additional costs to local authorities from this outcome, which have been estimated at £990 for investigating and taking one case to court<sup>21</sup>. As there are only 4 prisons in Wales, the maximum cost has been estimated at £3,960, i.e. one prosecution per prison, and has been attributed to 2016/17 only.

## Prisons

There will be no additional costs to prisons from this outcome as shops will still sell tobacco and related products, and the safety and security of prisons will not be compromised.

There will be no changes to operational costs.

## Tobacco industry

There will be no costs to the tobacco industry from this outcome as tobacco and related products will still be available in prison shops.

## Courts

As there are only 4 prisons in Wales, we have assumed a maximum of 4 prosecutions. A detailed costing framework has not yet been discussed between the Welsh Government and the Ministry of Justice, and so these costs are unknown at present.

Summary of costs associated with Option 1, outcome (ii)

<b>Sector</b>	<b>2015/16 (£)</b>	<b>2016/17 (£)</b>	<b>2017/18 (£)</b>	<b>2018/19 (£)</b>	<b>2019/20 (£)</b>
Local Authorities		3,960 maximum	-	-	-
NHS	0 - 230,500*	0 - 600,100	0- 600,100**	0- 600,100**	0- 600,100**
<b>Total costs per year</b>	<b>230,500</b>	<b>604,060 maximum</b>	<b>600,100 maximum</b>	<b>600,100 maximum</b>	<b>600,100 maximum</b>

\*These will be the costs incurred if implementation is in the last quarter of the year.

\*\*It is anticipated that maximum potential costs will reduce over time, but these reductions cannot be quantified at present

## **Benefits**

No benefits have been identified for this option.

**Option 2 - Amend the Smoke-free Premises etc. (Wales) Regulations 2007 to include an exemption from the smoke-free requirements for designated prison cells.**

**Description**

This option would amend the existing Regulations to allow smoking in designated prisons cells permanently.

There are two possible outcomes to this option:

- (i) NOMS maintains the status quo and does not further encourage/support prisons to limit the harms from smoking; or
- (ii) NOMS encourages/supports prisons to limit harms from smoking by encouraging additional cessation attempts, providing smoke-free wings voluntarily, with possible eventual move to becoming smoke-free voluntarily.

**Option 2 outcome (i) legislation to allow smoking in designated prison cells; no additional support for prisons to limit the harms from smoking**

**Costs**

The costs of this option would be the same as the costs for local authorities in Option 1, outcome (ii).

Summary of costs associated with Option 2, outcome (i)

<b>Sector</b>	<b>2016/17 (£)</b>	<b>2017/18 (£)</b>	<b>2018/19 (£)</b>	<b>2019/20 (£)</b>	<b>2020/21 (£)</b>
Local Authorities	3,960 maximum	-	-	-	-
<b>Total costs per year</b>	<b>3,960 maximum</b>	-	-	-	-

**Benefits**

There are no benefits identified for this option, as for Option 1, outcome (ii).

**Option 2 outcome (ii) legislation to allow smoking in designated prison cells; prisons encouraged and supported to limit the harms from smoking**

**Costs**

## Health

If prisons are being encouraged and supported by NOMS to support cessation attempts by more prisoners, and to move voluntarily to becoming smoke-free, then there could be costs to the health service for providing NRT and cessation support. These costs could range from no increase to current costs, to the full costs of all current prisons in Wales becoming smoke-free as calculated in Option 1 outcome 1. The range is therefore £0 - £230,500 upfront costs for the existing prisoner population, with ongoing annual costs for new receptions of £0 - £600,100.

## Local authorities

There is no indication that the enforcement regime will need to change, so no costs have been attributed.

## Prisons

If prisons support more prisoners to quit, and move towards becoming smoke-free, then it is assumed that fewer tobacco products will be purchased from the prison shops. There may be costs to prisons due to reduced sales of tobacco and related products in the prison shops, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

## Tobacco industry

If less tobacco is purchased from prison shops in Wales, then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

## Government

There would be costs to NOMS in providing support for a voluntary approach to becoming smoke-free. These costs are estimated by NOMS to be a minimum of £140,000 over one year; and will be managed, as far as possible, within existing resources and budgets. These costs have been attributed equally to 2015/16 and 2016/17 in the first instance.

### Summary of costs associated with Option 2

<b>Sector</b>	<b>2015/16 (£)</b>	<b>2016/17 (£)</b>	<b>2017/18 (£)</b>	<b>2018/19 (£)</b>	<b>2019/20 (£)</b>
NHS	230,500*	600,100	600,100**	600,100**	600,100**

			maximum	maximum	maximum
Government	70,000	70,000	-	-	-
<b>Total costs per year</b>	<b>300,500</b>	<b>670,100</b>	<b>600,100** maximum</b>	<b>600,100** maximum</b>	<b>600,100** maximum</b>

\*These will be the costs incurred if implementation is in the last quarter of the year.

\*\*It is anticipated that costs will reduce over time, but these reductions cannot be quantified at present

## Benefits

### Health

If the prison service moves to implement smoke-free policies then there will be benefits to the health of both prisoners and prison staff from cessation of smoking, and the effect of the removal of exposure to second-hand smoke. These benefits will range from zero, if no prisons reduce smoking, to the full extent of health benefits which could be achieved if all prisons in Wales become smoke-free voluntarily, as outlined in Option 1, outcome (i).

**Option 3 - Amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be supported to become operationally smoke-free in a safe and secure way during the period of the exemption.**

### Description

An exemption would be put in place so that specific cells can be designated as smoke-free. This exemption would expire on a specific date – possibly 5<sup>th</sup> April 2017 as suggested in the draft regulations. During the period of the exemption NOMS would support prisons to become smoke-free. Enclosed and substantially enclosed areas of prisons would then be required to be smoke-free on the day after the exemption is removed.

As with previous options, there could be more than one different outcome:

- (i) NOMS supports prisons to become smoke-free by the date for removal of the exemption, and a new Prison Service Instruction (PSI) on the application of smoke-free legislation is issued for Wales.
- (ii) NOMS supports prisons, but they do not become smoke-free by the date for removal of the exemption.

**Option 3 outcome (i) a time-limited exemption is put in place and prisons become smoke-free at the expiry of the exemption**

### Costs

- (a) During the time when the exemption is in place

### Health Service

If prisons are supported by NOMS to facilitate cessation attempts by prisoners in advance of the exemption being removed, there will be costs to the health service for providing NRT and cessation support. Assuming 55% of smoking prisoners in Wales take up this support, then the costs will be as calculated in Option 1 outcome (i). There will be £230,500 upfront costs for the existing prisoner population in 2016/17.

### Local authorities

There is no indication that the enforcement regime will need to change, so no costs have been attributed.

### Prisons

If prisons support more prisoners to quit, and sections of prisons become smoke-free, then it is assumed that fewer tobacco products will be purchased from the prison shops. Therefore there may be costs to prisons due to reduced sales of tobacco and related products, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

### Tobacco industry

If less tobacco is purchased from prison shops in Wales during the period of the exemption then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

## **(b) When the exemption is removed**

### Health Service

Assuming 55% of new reception prisoners in Wales who are smokers take up this support, as calculated in Option 1 outcome (i), the ongoing annual costs for support and NRT for new receptions<sup>5</sup> will be £600,100.

### Local authorities

Local authority enforcement officers may undertake prison visits if intelligence is received that smoking is being allowed in prisons which are now smoke-free. However, prison managers may enforce the legislation effectively and so there may not be any intelligence to suggest that enforcement visits are required. The minimum potential cost is zero; the cost for an investigatory visit has been assessed at £120<sup>21</sup>. Therefore a maximum cost of £480, i.e. one visit per prison, has been included for 2017/18 only. An assumption has been made that local authority enforcement officers would support prison governors to comply with their duty to prevent smoking in a smoke-free place in the first instance,

and so we would not anticipate cases being taken to court initially. If cases are taken to court then costs would rise to £990 per case, with a maximum of £3960 if cases are taken to court relating to all 4 prisons; these costs have been included in the table as a maximum cost in 2018/19.

### Prisons

If prisons become smoke-free then it is assumed that tobacco and related products will be removed from the prison shops. There may be costs to prisons due to reduced sales of tobacco and related products in the prison shops, although it is likely that this spending will transfer to other items available for purchase, and has therefore not been included in calculations.

### Tobacco industry

If tobacco and related products are removed from prison then there could be a loss to the industry. No data are available on the current spend on tobacco products in prison shops so these potential costs cannot be quantified.

There is the potential for this policy (in combination with other Welsh Government policies and campaigns) to contribute to the de-normalisation of smoking. There may therefore be an indirect impact on future tobacco consumption with resultant costs to the industry.

### Government

Cost will be incurred in producing and implementing a new prison service instruction (PSI) on the application of smoke-free legislation for Wales. These costs have been calculated by NOMS as a minimum £140,000 over one year.

Risks associated with implementation have been estimated by NOMS to be at least a 30% optimism bias added to the minimum implementation cost. Therefore, the minimum costs including optimism bias for risks associated and contingency planning is estimated at £182,000 over one year. Rapid implementation of policy could increase risks and associated costs. These cannot be quantified, and are not included in the table below.

### Courts

It is assumed that this option would have only a limited cost impact on the Courts. If a new PSI were introduced, setting out that, effectively, current legislation is to be complied with, it is not envisaged that many prosecutions would be brought. As there are only 4 prisons in Wales, we have assumed a maximum of 4 prosecutions. A detailed costing framework has not yet been discussed between the Welsh Government and the Ministry of Justice, and so these costs are unknown at present.

Summary of costs associated with Option 3, outcome (i)

Sector	2016/17	2017/18	2018/19	2019/20	2020/21
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	(£)	(£)	(£)	(£)	(£)
NHS	230,500*	600,100	600,100** maximum	600,100** maximum	600,100** maximum
Local Authorities	-	480 maximum	3,960 maximum	-	-
Government	182,000	-	-	-	-
<b>Total costs per year</b>	<b>412,500</b>	<b>600,580 maximum</b>	<b>604,060 maximum</b>	<b>600,100 maximum</b>	<b>600,100 maximum</b>

\*These will be the costs incurred if implementation is in the last quarter of the year. Costs for supporting new receptions will also be required if implementation is earlier.

\*\*It is anticipated that costs will reduce over time, but these reductions cannot be quantified at present.

\*\*\* This figure includes the 30% optimism bias identified for contingency planning purposes.

## Benefits

### Health

This option would help to protect non smoking offenders and prison staff from the health harms associated with exposure to second-hand smoke in prisons and contribute to a reduction in health conditions caused by smoking, and from exposure to second-hand smoke, as outlined in Option 1 outcome (i); although full realisation of these benefits could be delayed by up to a year in the case of slippage or security issues

### Prisons

Prisons would be supported to become smoke-free in a safe and secure way, thus minimising the risk of disruption to the prison service. This would mean for the duration of the implementation the prisons in Wales would be compliant with legislation and in line with prisons in England thereby regularising the position.

### **Option 3 outcome (ii) a time-limited exemption is put in place and prisons do not become operationally smoke-free at the expiry of the exemption**

It would be necessary to review all options and costs, as outlined above, in order to decide if a further exemption is required. Separate costs for this have not been calculated.

### **Preferred option**

As a result of an analysis of the costs and benefits of each option, draft regulations were prepared for consultation which reflect Option 3 - amend the 2007 Regulations to exempt designated cells in prisons in Wales from the smoking ban for a time-limited period, so that prisons in Wales can be

supported to become operationally smoke-free in a safe and secure way during the period of the exemption. The time limit of the exemption is such that the need for any further exemption can be considered as part of the development of Regulations arising from the Public Health (Wales) Bill. This is the option which is being proposed to the National Assembly for Wales.

## **Consultation**

A summary of consultation responses can be found at:

<http://gov.wales/consultations/healthsocialcare/smokefree/?status=closed&lang=en>

## **Competition Assessment**

9.1 The draft regulations do not affect charities and/or the voluntary sector. The only retail businesses affected will be prison shops which are managed entirely by the prison in which they are situated on a monopoly not-for-profit basis. There may be some effect on tobacco businesses due to reduced sales of tobacco, but these may be offset by sales of electronic cigarettes. Therefore we anticipate only minor impact to business.

## **Post implementation review**

The effect of the any time-limited Regulations, as drafted, will be considered prior to the removal of the time-limited exemption.

## APPENDIX A

### The Competition Assessment

The competition filter test	
Question	Answer yes or no
<b>Q1:</b> In the market(s) affected by the new regulation, does any firm have more than 10% market share?	N*
<b>Q2:</b> In the market(s) affected by the new regulation, does any firm have more than 20% market share?	N*
<b>Q3:</b> In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	N*
<b>Q4:</b> Would the costs of the regulation affect some firms substantially more than others?	N
<b>Q5:</b> Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	N
<b>Q6:</b> Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	N
<b>Q7:</b> Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	N
<b>Q8:</b> Is the sector characterised by rapid technological change?	N
<b>Q9:</b> Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	N

\*The businesses affected are prison shops which are run on a monopoly not-for-profit basis in each individual prison, therefore competition doesn't apply.

Rt Hon Stephen Crabb MP  
Secretary of State for Wales  
1 Caspian Point  
Cardiff Bay  
CF10 4DQ

Your ref:  
Our ref: PO/RB/BA

14 January 2016

Dear Stephen

### **Scrutiny of the Draft Wales Bill in the National Assembly for Wales**

On 13 January the Assembly debated the draft Wales Bill, informed by the pre-legislative scrutiny report of the Constitutional and Legislative Affairs (CLA) Committee. Through a series of unanimously agreed resolutions, the Assembly established its collective view on the main changes required before the Wales Bill itself is introduced to Parliament.

By speaking with one voice, the Assembly has demonstrated how important this issue is for the future of devolution. The debate clearly illustrated the strength and weight of evidence underlying the CLA Committee report and the consistent views on these issues amongst Welsh civic society. There is a clear expectation from all parties that the forthcoming Wales Bill must leave the Assembly with a fuller, clearer and more workable set of powers to make decisions for the people of Wales.

The Assembly welcomed the report of the CLA Committee on the draft Wales Bill and unanimously agreed to note the specific recommendations that the draft Bill should be amended as follows:

- to remove the necessity test, or replace it with a test based on appropriateness;

**Croesewir gohebiaeth yn y Gymraeg neu Saesneg/We welcome correspondence in Welsh or English**

- to include a system for requiring Minister of the Crown consent that reflects the model in the Scotland Act 1998;
- to significantly reduce the number and extent of specific reservations and restrictions consistent with a mature, effective and accountable legislature;
- to include a distinct jurisdiction in which Welsh Acts extend only to Wales and modify England and Wales law as appropriate for reasonable enforcement.

It was also agreed unanimously that, should the UK Government proceed with the planned timetable for the Wales Bill, it should commit to carrying out a bilingual consolidation of Welsh constitutional law during the current Parliament. You are already aware of my concern in respect of the ambitious timetable that has been set out for the Wales Bill, particularly given that the Welsh Affairs Committee has yet to publish its report.

The full transcript of the debate can be accessed on the Assembly's website under the Record of Proceedings. <sup>1</sup>

Ahead of the Welsh Grand Committee next month I shall also be writing to all Welsh MPs in similar terms to ensure that the views of the Assembly are known.

The clear message from the resolutions of the Assembly is that the draft Bill requires significant amendment before it will deliver on those expectations. As ever, if there is anything that I, or my officials, can do to assist you in that task and so deliver a Wales Bill that commands the support of the Assembly, I would be delighted to do so.

Yours sincerely



**Dame Rosemary Butler AM, Presiding Officer**

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<sup>1</sup> (<http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=3522&assembly=4&c=Record%20of%20Proceedings#264778>)



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## TEXTS ADOPTED

*Provisional edition*

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### **P8\_TA-PROV(2015)0395**

#### **Reform of the electoral law of the EU**

##### **European Parliament resolution of 11 November 2015 on the reform of the electoral law of the European Union (2015/2035(INL))**

*The European Parliament,*

- having regard to the Act concerning the election of the members of the European Parliament by direct universal suffrage ("the Electoral Act") annexed to the Council decision of 20 September 1976 as amended<sup>1</sup>, in particular Article 14 thereof,
- having regard to the Treaties and in particular to Articles 9, 10, 14 and 17(7) of the Treaty on European Union (TEU) and to Articles 22, 223(1) and 225 of the Treaty on the Functioning of the European Union (TFEU), and to Article 2 of Protocol No 1 on the role of national parliaments in the European Union,
- having regard to Protocol No 7 on the Privileges and Immunities of the European Union,
- having regard to its previous resolutions on the European Parliament's electoral procedure, and in particular its resolution of 15 July 1998 on a draft electoral procedure incorporating common principles for the election of Members of the European Parliament<sup>2</sup>, its resolution of 22 November 2012 on the elections to the European Parliament in 2014<sup>3</sup> and its resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014<sup>4</sup>,
- having regard to its resolution of 13 March 2013 on the composition of the European Parliament with a view to the 2014 elections<sup>5</sup>,

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<sup>1</sup> Council Decision 76/787/ECSC, EEC, Euratom (OJ L 278, 8.10.1976, p. 1) as amended by Council Decision 93/81/Euratom, ECSC, EEC (OJ L 33, 9.2.1993, p. 15) and by Council Decision 2002/772/EC, Euratom (OJ L 283, 21.10.2002, p. 1).

<sup>2</sup> OJ C 292, 21.9.1998, p. 66.

<sup>3</sup> Texts adopted, P7\_TA(2012)0462.

<sup>4</sup> Texts adopted, P7\_TA(2013)0323.

<sup>5</sup> Texts adopted, P7\_TA(2013)0082.

- having regard to Commission Recommendation 2013/142/EU of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament<sup>1</sup>,
  - having regard to the Commission communication of 8 May 2015 entitled "Report on the 2014 European Parliament elections" (COM(2015)0206),
  - having regard to the European Added Value Assessment on the Reform of the Electoral Law of the European Union<sup>2</sup>,
  - having regard to the Framework Agreement of 20 October 2010 on relations between the European Parliament and the European Commission<sup>3</sup>,
  - having regard to Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals<sup>4</sup>,
  - having regard to Regulation (EU, Euratom) No 1141/2014 of the European Parliament and the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations<sup>5</sup>, and in particular Articles 13, 21 and 31 thereof,
  - having regard to the Charter of Fundamental Rights of the European Union (Charter), and in particular Articles 11, 23 and 39 thereof,
  - having regard to Rules 45 and 52 of its Rules of Procedure,
  - having regard to the report of the Committee on Constitutional Affairs (A8-0286/2015),
- A. whereas Article 223 TFEU gives the European Parliament the right to initiate the reform of its own electoral procedure, with the aim of drawing up a uniform procedure which applies throughout the Union or a procedure that is based on principles common to all the Member States, and to give its consent thereto;
- B. whereas the reform of the European Parliament's electoral procedure should aim to enhance the democratic and transnational dimension of the European elections and the democratic legitimacy of the Union decision-making process, reinforce the concept of citizenship of the Union, improve the functioning of the European Parliament and the governance of the Union, make the work of the European Parliament more legitimate, strengthen the principles of electoral equality and equal opportunities, enhance the effectiveness of the system for conducting European elections, and bring Members of the European Parliament closer to their voters, in particular the youngest amongst them;

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<sup>1</sup> OJ L 79, 21.3.2013, p. 29.

<sup>2</sup> PE 558.775  
([http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/558775/EPRS\\_IDA\(2015\)558775\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/558775/EPRS_IDA(2015)558775_EN.pdf))

<sup>3</sup> OJ L 304, 20.11.2010, p. 47.

<sup>4</sup> OJ L 329, 30.12.1993, p. 34.

<sup>5</sup> OJ L 317, 4.11.2014, p. 1.

- C. whereas the reform of the electoral procedure must respect the principles of subsidiarity and proportionality and should not seek to impose uniformity for its own sake;
- D. whereas the possibility of developing a uniform electoral procedure based on direct universal suffrage has been enshrined in the Treaties since 1957;
- E. whereas the steadily decreasing turnout in European elections, in particular among the youngest voters, and voters' lack of interest in European issues is posing a threat to the future of Europe, and whereas there is therefore a need for ideas that will help to revive European democracy;
- F. whereas a genuine harmonisation of the procedure for elections to the European Parliament in all the Member States could better promote the right of all Union citizens to participate, on an equal basis, in the democratic life of the Union, while strengthening the political dimension of European integration;
- G. whereas the European Parliament's competencies have been gradually increasing since the first direct elections in 1979, and whereas the European Parliament now has equal status as co-legislator with the Council in most of the Union's policy areas, most notably as a result of the entry into force of the Treaty of Lisbon;
- H. whereas the Treaty of Lisbon changed the mandate of Members of the European Parliament, making them direct representatives of the Union's citizens<sup>1</sup> instead of "representatives of the peoples of the States brought together in the Community"<sup>2</sup>;
- I. whereas the only reform of the Electoral Act itself took place in 2002 as a result of the adoption of Council Decision 2002/772/EC, Euratom<sup>3</sup>, which requires the Member States to conduct the elections on the basis of proportional representation using a list system or a single transferable vote system and which abolished the dual mandate for Members of the European Parliament; whereas, furthermore, Member States were expressly granted the right to establish constituencies at national level and to introduce a national threshold not exceeding 5 % of the votes cast;
- J. whereas a comprehensive agreement on a truly uniform electoral procedure has not yet been achieved, though some convergence of electoral systems has taken place gradually, inter alia as a result of the adoption of secondary legislation, such as Council Directive 93/109/EC;
- K. whereas the concept of citizenship of the Union, formally introduced into the constitutional order by the Treaty of Maastricht in 1993, includes the right of Union citizens to participate in European and municipal elections in their Member States, and in their State of residence under the same conditions as nationals of that State<sup>4</sup>; whereas the Charter, to which the Treaty of Lisbon gave binding legal force, has reinforced that right;

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<sup>1</sup> Articles 10(2) and 14(2) TEU.

<sup>2</sup> Article 189(1) of the Treaty establishing the European Community.

<sup>3</sup> Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom (OJ L 283, 21.10.2002, p. 1).

<sup>4</sup> Article 20(2) TFEU.



- L. whereas despite these reforms, European elections are still governed for the most part by national laws, electoral campaigning remains national, and European political parties cannot sufficiently fulfil their constitutional mandate and “contribute to forming European political awareness and to expressing the will of citizens of the Union” as required by Article 10(4) TEU;
- M. whereas European political parties are best placed to "contribute to forming European political awareness" and should therefore play a stronger role in the campaigns for Parliament elections in order to improve their visibility and to show the link between a vote for a particular national party and the impact it has on the size of a European political group in the European Parliament;
- N. whereas the procedure for nominating candidates for elections to the European Parliament varies considerably from Member State to Member State and from party to party, in particular as regards transparency and democratic standards, while open, transparent and democratic procedures for the selection of candidates are essential for building trust in the political system;
- O. whereas the deadlines for finalising electoral lists ahead of European elections vary greatly among Member States, currently ranging from 17 days to 83 days, and this puts candidates and voters across the Union in an unequal position when it comes to the time they have to campaign or to reflect on their voting choice;
- P. whereas the deadlines for finalising the electoral roll ahead of European elections vary greatly among Member States and may render the exchange of information between Member States on voters (which is aimed at the avoidance of double voting) difficult, if not impossible;
- Q. whereas the establishment of a joint constituency in which lists are headed by each political family's candidate for the post of President of the Commission would greatly strengthen European democracy and legitimise further the election of the President of the Commission;
- R. whereas the existing European electoral rules allow for a non-obligatory threshold of up to 5 % of votes cast to be set for European elections, and whereas 15 Member States have availed themselves of this opportunity and have introduced a threshold of between 3 % and 5 %; whereas in smaller Member States, and in Member States that have subdivided their electoral area into constituencies, the de facto threshold nevertheless lies above 3 %, even though no legal thresholds exist; whereas introducing obligatory thresholds is recognised by constitutional tradition as a legitimate means of guaranteeing that parliaments are able to function;
- S. whereas, although Article 10(2) of the Electoral Act expressly prohibits the early publication of the results of elections, such results have been made public in the past; whereas a harmonised time for the close of polling in all Member States would contribute strongly to the common European character of the European elections and would reduce the possibility of their outcome being influenced if election results in some Member States are made public before the close of polling in all Member States;
- T. whereas first official projections of the electoral results should be announced simultaneously in all Member States on the last day of the election period at 21:00 hours CET;

- U. whereas establishing a common European voting day would better reflect common participation by citizens across the Union, reinforce participatory democracy and help create a more coherent pan-European election,
- V. whereas the Lisbon Treaty established a new constitutional order by granting the European Parliament the right to elect the President of the European Commission<sup>1</sup> instead of merely giving its consent; whereas the 2014 European elections set an important precedent in this respect and have shown that nominating lead candidates increases the interest of citizens in European elections;
- W. whereas the nomination of lead candidates for the office of President of the European Commission provides a link between votes cast at national level and the European context and enables Union citizens to make informed choices between alternative political programmes; whereas the designation of lead candidates by open and transparent procedures reinforces democratic legitimacy and strengthens accountability;
- X. whereas the procedure for the nomination and selection of lead candidates for that office is a strong expression of European democracy; whereas, furthermore, it should be an integral part of the election campaigns;
- Y. whereas the deadline for the nomination of candidates by European political parties should be codified in the Electoral Act and whereas the lead candidates for the office of President of the Commission should be candidates in the elections to the European Parliament;
- Z. whereas not all Member States afford their citizens the possibility of voting from abroad, and among those that do, the conditions for deprivation of the right to vote vary greatly; whereas granting all Union citizens residing outside the Union the right to participate in elections would contribute to electoral equality; whereas, however, Member States need to coordinate their administrative systems better in order to prevent voters from voting twice in two different Member States;
- AA. whereas at least 13 Member States do not have in place adequate internal rules precluding citizens of the Union who have dual nationality of Member States from voting twice, in breach of Article 9 of the Electoral Act;
- AB. whereas an electoral authority, acting as a network of Member States' single contact authorities, should be set up at Union level, as it would facilitate access to information on the rules governing the European elections as well as streamlining the process and enhancing the European character of those elections; whereas, therefore, the Commission is called upon to explore the practical arrangements necessary to establish such an authority at Union level;
- AC. whereas the minimum age for eligibility to stand as a candidate across the 28 Member States varies between 18 and 25, and the minimum age for eligibility to vote ranges from 16 to 18, due to the divergent constitutional and electoral traditions in the Member States; whereas harmonisation of the voting age, and of the minimum age for candidates, would be highly desirable as a means of providing Union citizens with real voting equality, and would enable discrimination to be avoided in the most fundamental area of citizenship, namely the right to participate in the democratic process;

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<sup>1</sup> Article 17(7) TEU.

- AD. whereas the official establishment and consolidation of political parties at Union level are fostering the development of European political awareness and giving expression to the wishes of Union citizens, and whereas this has also facilitated the process of gradually bringing electoral systems closer together;
- AE. whereas postal, electronic and internet voting could make the conduct of European elections more efficient and more appealing for voters, provided that the highest possible standards of data protection are ensured;
- AF. whereas in most Member States, members of the executive can seek election to the national parliament without having to discontinue their institutional activity;
- AG. whereas despite continuous progress since 1979 in terms of balance between women and men in the distribution of seats, there remain considerable divergences in this regard between Member States, with 10 of them having a level lower than 33 % accounted for by the less represented gender; whereas the current composition of the European Parliament, comprising as it does only 36,62 % women, falls short of the values and objectives of gender equality championed in the Charter;
- AH. whereas equality between women and men must be achieved, as one of the founding values of the Union, while only very few Member States have incorporated this principle in their national electoral laws; whereas gender quotas in political decision-making and zipped lists have proved to be highly effective tools in addressing discrimination and gender power imbalances and improving democratic representation on political decision-making bodies;
- AI. whereas the principle of degressive proportionality enshrined in the TEU has contributed significantly to the common ownership of the European project between all Member States,
1. Decides to reform its electoral procedure in good time before the 2019 elections, with the aim of enhancing the democratic and transnational dimension of the European elections and the democratic legitimacy of the EU decision-making process, reinforcing the concept of citizenship of the Union and electoral equality, promoting the principle of representative democracy and the direct representation of Union citizens in the European Parliament, in accordance with Article 10 TFEU, improving the functioning of the European Parliament and the governance of the Union, making the work of the European Parliament more legitimate and efficient, enhancing the effectiveness of the system for conducting European elections, fostering common ownership among citizens from all Member States, enhancing the balanced composition of the European Parliament, and providing for the greatest possible degree of electoral equality and participation for Union citizens;
  2. Proposes that the visibility of European political parties be enhanced by placing their names and logos on the ballot papers, and recommends that the same should also appear on television and radio campaign broadcasts, posters and other material used in European election campaigns, especially the manifestos of national parties, since those measures would render European elections more transparent and improve the democratic manner in which they are conducted, as citizens will be able to link their vote clearly with the impact it has on the political influence of European political parties and their ability to form political groups in the European Parliament;

3. Considers at the same time, in the light of the Union's commitment to subsidiarity, that regional political parties competing in European elections should follow the same practice and that regional authorities should be encouraged to use officially recognised regional languages in that context;
4. Encourages Member States to facilitate the participation of European political parties, as well as their lead candidates, in electoral campaigns, particularly on television and in other media;
5. Determines to set a common minimum deadline of 12 weeks before election day for the establishment of electoral lists, in order to enhance electoral equality by providing candidates and voters across the Union with the same period in which to prepare and reflect ahead of the vote; encourages Member States to reflect upon ways to ensure greater convergence between rules governing electoral campaigns regarding European elections;
6. Deems it essential that political parties at all levels adopt democratic and transparent procedures for the selection of candidates; recommends that national parties hold a democratic vote to select their candidates for European elections;
7. Suggests the introduction of an obligatory threshold, ranging between 3 % and 5 %, for the allocation of seats in single-constituency Member States and constituencies in which the list system is used and which comprise more than 26 seats; considers this measure to be important for safeguarding the functioning of the European Parliament, since it will avoid further fragmentation;
8. Proposes, despite the fact that Member States are free to determine the day(s) of the elections within the electoral period, that elections in all Member States end by 21:00 hours CET on the Sunday of the European elections, as this would ensure the correct application of Article 10(2) of the Electoral Act and thus reduce the possibility of the outcome of the elections being influenced if the election results in some Member States are made public before the close of polling in all Member States; advocates that the ban on early announcement of the election results should remain in force in all Member States;
9. Determines to set a common deadline for the nomination of lead candidates by European political parties 12 weeks in advance of European elections, so as to enable their electoral programmes to be presented, political debates between the candidates to be organised and Union-wide electoral campaigns to be mounted; considers that the process of nomination of lead candidates constitutes an important aspect of electoral campaigns due to the implicit link between the results of European elections and the selection of the Commission President as enshrined in the Treaty of Lisbon;
10. Determines to set a common deadline of eight weeks for finalisation of the electoral roll and six weeks for information concerning Union citizens with dual nationality and Union citizens living in another Member State to be exchanged with the national single authority in charge of the electoral roll;
11. Suggests that the integrity of elections should be bolstered by limiting campaign expenditure to a reasonable amount that allows adequate presentation of political parties, candidates and their election programmes;

12. Proposes that all Union citizens, including those living or working in a third country, be granted the right to cast their vote in elections to the European Parliament; considers that this would finally give all Union citizens the same right to vote in European elections under the same conditions, irrespective of their place of residence or citizenship;
13. Calls on Member States, however, to coordinate their administrative systems better in order to prevent voters from voting twice in two different Member States;
14. Encourages Member States to allow postal, electronic and internet voting in order to increase the participation of, and to make voting easier for, all citizens, and especially for people with reduced mobility and for people living or working in a Member State of which they are not a citizen or in a third country, provided that necessary measures are taken to prevent any possible fraud in the use of voting by those means;
15. As a future step, recommends to Member States that they should consider ways to harmonise the minimum age of voters at 16, in order to further enhance electoral equality among Union citizens;
16. Calls for a review of the Framework Agreement on relations between the European Parliament and the European Commission, with a view to adapting the rules on Commissioners seeking election to the European Parliament, in order not to impede the institutional efficiency of the Commission in times of elections, while avoiding the misuse of institutional resources;
17. Determines to give Parliament the right to fix the electoral period for elections to the European Parliament after consulting the Council;
18. Encourages Member States to adopt adequate legal frameworks that ensure the highest standards of informative, fair and objective media coverage during the election campaigns, particularly from public service broadcasters; considers this crucial in order to allow Union citizens to make an informed choice about competing political programmes; recognises the significance of self-regulatory instruments such as codes of conduct in achieving this goal;
19. Calls for the standards intended to ensure free and unfettered competition between political parties to be tightened up and, in particular, for media pluralism and the neutrality of all levels of public administration with regard to the electoral process to be enhanced;
20. Highlights the importance of an increased presence of women in political decision-making and a better representation of women in European elections; consequently, calls on Member States and the institutions of the Union to take all necessary measures to promote the principle of equality between men and women throughout the whole electoral process; emphasises in this connection the importance of gender-balanced electoral lists;
21. Encourages Member States to take measures to promote adequate representation of ethnic, linguistic and other minorities in European elections;
22. Deems it to be desirable to establish an European Electoral Authority that could be tasked with centralising information on the elections for the European Parliament,

overseeing the conduct of elections and facilitating the exchange of information between Member States;

23. Determines that the office of Member of the European Parliament should also be incompatible with that of member of a regional parliament or assembly vested with legislative powers;
24. Recalls that, despite recommendations by the Commission, Member States have repeatedly failed to agree on a common voting day; encourages Member States to work towards finding an agreement on this issue;
25. Submits to the Council the annexed proposal for amendment of the Act concerning the election of the Members of the European Parliament by direct universal suffrage<sup>1</sup>;
26. Instructs its President to forward this resolution to the European Council, the Council, the Commission and the parliaments and governments of the Member States.

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<sup>1</sup> The amendments in the annexed proposal are based on a consolidation produced by the Legal Service of the European Parliament on the basis of the Act concerning the election of the representatives of the Assembly by direct universal suffrage (OJ L 278, 8.10.1976, p. 5), as amended by Decision 93/81/Euratom, ECSC, EEC amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 33, 9.2.1993, p. 15), and Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 (OJ L 283, 21.10.2002, p. 1). It differs from the consolidated version produced by the Publications Office of the European Union (CONSLEG. 1976X1008-23/09/2002) on two points: it incorporates an indent to Article 7(1) '– member of the Committee of the Regions' resulting from Article 5 of the Treaty of Amsterdam (OJ C 340, 10.11.1997) and is renumbered in accordance with Article 2(1) of Council Decision 2002/772/EC, Euratom.

Proposal for a

**COUNCIL DECISION**

**adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 223(1) thereof,

Having regard to the proposal from the European Parliament,

After transmission of the draft legislative act to the national parliaments,

Having regard to the consent of the European Parliament,

Acting in accordance with a special legislative procedure,

Whereas the Treaty provisions concerning the electoral procedure should be implemented,

HAS ADOPTED the following provisions and recommends that they be approved by the Member States in accordance with their respective constitutional requirements.

*Article 1*

The Act concerning the election of the Members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom<sup>1</sup>, is amended as follows:

(1) In Article 1, paragraph 1 is replaced by the following:

"1. In each Member State, members of the European Parliament shall be elected as representatives of the citizens of the Union on the basis of proportional representation, using the list system or the single transferable vote."

(2) The following article is inserted:

"Article 2a

The Council decides by unanimity on a joint constituency in which lists are headed by each political family's candidate for the post of President of the Commission."

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<sup>1</sup> Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 278, 8.10.1976, p. 1).

- (3) Article 3 is replaced by the following:

"Article 3

For constituencies, and for single-constituency Member States, in which the list system is used and which comprise more than 26 seats, Member States shall set a threshold for the allocation of seats which shall not be lower than 3 per cent, and shall not exceed 5 per cent, of the votes cast in the constituency, or the single-constituency Member State, concerned."

- (4) The following articles are inserted:

"Article 3a

Each Member State shall set a deadline for the establishment of lists of candidates for election to the European Parliament. That deadline shall be at least 12 weeks before the start of the electoral period referred to in Article 10(1).

Article 3b

The deadline for the establishment and finalisation of the electoral roll shall be eight weeks before the first election day.

Article 3c

Political parties participating in elections to the European Parliament shall observe democratic procedures and transparency in selecting their candidates for those elections.

Article 3d

The list of candidates for election to the European Parliament shall ensure gender equality.

Article 3e

The ballot papers used in elections to the European Parliament shall give equal visibility to the names and logos of national parties and to those of the European political parties.

Member States shall encourage and facilitate the provision of those affiliations in television and radio campaign broadcasts and on electoral campaign materials. Electoral campaign materials shall include a reference to the manifesto of the European political party, if any, to which the national party is affiliated.

The rules concerning the posting of electoral materials to voters in elections to the European Parliament shall be the same as those applied for national, regional and local elections in the Member State concerned.

Article 3f

European political parties shall nominate their candidates for the position of President



of the Commission at least 12 weeks before the start of the electoral period referred to in Article 10(1).".

- (5) The following articles are inserted:

"Article 4a

Member States may introduce electronic and internet voting for elections to the European Parliament and, where they do so, shall adopt measures sufficient to ensure the reliability of the result, the secrecy of the vote and data protection.

Article 4b

Member States may afford their citizens the possibility of casting their vote by post in elections to the European Parliament.".

- (6) In Article 5(1), the second subparagraph is deleted.

- (7) Article 6 is replaced by the following:

"Article 6

1. Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate. They shall represent all Union citizens.

2. Members of the European Parliament shall enjoy the privileges and immunities applicable to them by virtue of Protocol No 7 on the privileges and immunities of the European Union, annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community.".

- (8) Article 7 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. The office of member of the European Parliament shall be incompatible with that of:

- member of the government of a Member State,
- member of a national or regional parliament or assembly vested with legislative powers,
- member of the Commission,
- Judge, Advocate-General or Registrar of the Court of Justice of the European Union,
- member of the Executive Board of the European Central Bank,
- member of the Court of Auditors,

- European Ombudsman,
- member of the Economic and Social Committee,
- member of the Committee of the Regions,
- member of committees or other bodies set up pursuant to the Treaty on the Functioning of the European Union or the Treaty establishing the European Atomic Energy Community for the purposes of managing the Union's funds or carrying out a permanent direct administrative task,
- member of the Board of Directors, Management Committee or staff of the European Investment Bank,
- active official or servant of the institutions of the European Union or of the specialised bodies attached to them or of the European Central Bank.";

(b) paragraph 2 is deleted;

(c) paragraph 4 is replaced by the following:

"4. Members of the European Parliament to whom paragraphs 1 and 3 become applicable in the course of the five-year period referred to in Article 5 shall be replaced in accordance with Article 13."

(9) The following articles are inserted:

"Article 9a

All Union citizens, including those living or working in a third country, shall have the right to vote in elections to the European Parliament. Member States shall take the necessary measures to ensure the exercise of this right.

Article 9b

Each Member State shall designate the contact authority responsible for exchanging data on voters with its counterparts in the other Member States. That authority shall transmit to those counterparts, at the latest six weeks before the first day of the election and via uniform and secure electronic means of communication, data concerning Union citizens who are nationals of more than one Member State and Union citizens who are not nationals of the Member State in which they are residing.

The information transmitted shall include at least the surname and forename, age, city of residence, and date of arrival in the Member State concerned, of the citizen in question."

(10) Articles 10 and 11 are replaced by the following:

"Article 10

1. Elections to the European Parliament shall be held on the date or dates and at the times fixed by each Member State. For all Member States the date or dates shall fall within the same period starting on a Thursday morning and ending on the following Sunday. The election shall end in all Member States by 21:00 hours CET on that Sunday.

2. Member States shall not officially make public the results of their count until after the close of polling. First official projections of the results shall be communicated simultaneously in all Member States at the end of the electoral period specified in paragraph 1. Prior to this no exit poll-based forecasts may be published.

3. The counting of postal votes shall begin in all Member States once the polls have closed in the Member State whose voters vote last within the electoral period referred to in paragraph 1.

#### Article 11

1. The European Parliament, after consulting the Council, shall determine the electoral period for the elections at least one year before the end of the five-year term referred to in Article 5.

2. Without prejudice to Article 229 of the Treaty on the Functioning of the European Union, the European Parliament shall meet, without requiring to be convened, on the first Tuesday after expiry of an interval of one month from the end of the electoral period."

(11) Articles 14 and 15 are replaced by the following:

#### "Article 14

Measures to implement this Act shall be proposed by the European Parliament, acting by a majority of its component members, and adopted by the Council, acting by a qualified majority, after consulting the Commission and obtaining the consent of the European Parliament.

#### Article 15

This Act is drawn up in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all the texts being equally authentic.

Pursuant to Accession Treaties, the Bulgarian, Croatian, Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Romanian, Slovak and Slovenian versions of this Act shall also be authentic."

(12) Annexes I and II are deleted.

*Article 2*

1. The amendments laid down in Article 1 shall take effect on the first day of the month following the approval of the provisions of this Decision by the Member States, in accordance with their respective constitutional requirements.

2. The Member States shall notify the General Secretariat of the Council of the completion of their national procedures.

*Article 3*

This decision shall be published in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council*  
*The President*

## UNNUMBERED DOCUMENTS

### EXPLANATORY MEMORANDUM ON EUROPEAN UNION DOCUMENTS

#### **European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union**

#### **Proposal for a Council Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage**

Submitted by the Foreign and Commonwealth Office on 4 January 2016.

#### **SUBJECT MATTER**

1. The attached Resolution and associated proposal from the European Parliament set out a number of measures to reform the European Electoral Law of 1976, concerning the conduct of elections to the European Parliament (EP elections). Under Article 223(1) of the Treaty on the Functioning of the European Union, the European Parliament has the right to draw up a proposal to reform electoral law concerning election of its members. To take effect, the proposal would need to be endorsed unanimously by the Council, with the consent of the European Parliament, and then approved by all Member States in accordance with their constitutional requirements. There is therefore a power of national veto in respect of this measure.
2. The European Parliament states that the objectives of the proposed reforms are: to enhance the democratic and transnational dimension of the European elections and the democratic legitimacy of EU decision-making; to reinforce the concept of citizenship of the EU; to promote the principle of representative democracy and the direct representation of Union citizens in the EP; to improve the functioning of the EP and the governance of the Union; to make the work of the EP more legitimate and efficient; to enhance the effectiveness of the system for conducting European elections; and to provide for the greatest possible degree of electoral equality and participation for EU citizens.
3. The proposed reforms are wide-ranging. Most are directly concerned with the conduct of EP elections. These include the introduction of mandatory thresholds to win seats in the EP in those EU countries that have only one constituency or constituencies that have more than 26 seats; issues relating to affiliation between national political parties and the European political parties; gender balance in electoral lists; the simultaneous communication of election results in all Member States; as well as a number of measures aimed at standardising practices relating to establishing candidate lists, electoral periods and voting methods.

4. In addition to those proposals relating to the conduct of elections, there are four further proposals. Two of these are concerned with the method used for proposing the candidate for the President of the European Commission. The EP is proposing that EP elections should be contested with formal EU-wide lead candidates for the Commission Presidency; and that a transnational constituency be established for the selection of these candidates.
5. There is also a proposal to replace unanimity with qualified majority voting for some Council decisions relating to the Electoral Act. Finally, the proposal seeks to establish that the office of Member of the European Parliament be incompatible with other roles, including that of a member of a regional parliament or assembly vested with legislative powers.
6. It should be noted that a number of measures in the attached Resolution, such as the recommendation that Member States should consider ways to harmonise the minimum voting age at 16, and move towards a common voting day, are not the subject of legislative proposals in the draft Council Decision.

#### **SCRUTINY HISTORY**

7. These are new documents and have therefore not been subject to Parliamentary Scrutiny before.
8. An Explanatory Memorandum on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Preparing for the 2014 European elections: Further enhancing their democratic and efficient conduct - and the Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament was submitted for Parliamentary Scrutiny on 17 April 2013. The House of Commons European Scrutiny Committee cleared the documents as “legally and politically important” after a debate on the Floor of the House on 18 June 2013 (ESC 34797 & 34798, Session 2013/14). The House of Lords Select Committee on the European Union cleared the documents on 22 May 2013 after referral to Sub-Committee E.

#### **MINISTERIAL RESPONSIBILITY**

9. The Secretary of State for Foreign and Commonwealth Affairs is the Minister with overall responsibility for UK policy on the EU. The Cabinet Office has responsibility for electoral policy and legislation relating to elections in the UK.

#### **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

10. The UK’s Foreign Affairs policy is a reserved matter under the UK’s devolution settlements.

The devolved administrations have been consulted in the preparation of this EM, and will continue to be consulted on the proposals as the Government position on this develops.

## **LEGAL AND PROCEDURAL ISSUES**

11. Legal Basis: Article 223(1) of the Treaty on the Functioning of the European Union. However, the EP's proposals concerning election of the President of the Commission and on implementing measures do not appear to be in accordance with this competence.
12. Voting Procedures: 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.
13. Impact on UK Law: The proposals if adopted would be likely to require amendment to UK domestic legislation, the extent of which would depend on the precise nature of any agreed proposed changes.
14. Application to Gibraltar: Yes.
15. Fundamental rights analysis: No fundamental rights issues apply.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

16. None.

## **SUBSIDIARITY**

17. The Government considers that this proposal raises subsidiarity concerns. Member States have competence in how they administer their elections, including deciding procedures to administer European parliamentary elections at national level, provided they comply with the 1976 Act and do not affect the essentially proportional nature of the voting system. Such an approach permits, where appropriate, consistency with other elections, such as those to national or regional parliaments or assemblies. Some of the proposals seek to achieve uniformity of practice across Member States on matters that the Government considers should be decided at a national level.

## **POLICY IMPLICATIONS**

18. It is important to note that the proposals will require unanimity from Member States (in the Council) in order to progress. The Government will look at the proposals carefully. Consideration of them is at an early stage, though the Government's initial view is that it is not persuaded of the merits of many of the proposals and does not consider that they would achieve the European Parliament's stated objectives.

A number of the proposals lack clarity and the Government, will therefore, be seeking further clarification as to what is intended.

*Current arrangements for the election of UK Members of the European Parliament*

19. Elections to the European Parliament are currently held every 5 years. For European Parliamentary elections, the UK is divided into 12 electoral regions: 9 in England (one of which includes Gibraltar) and the 3 regions of Wales, Scotland and Northern Ireland. The UK's MEP seats (there are currently 73 seats) are allocated across the regions in accordance with criteria set out in the European Parliament (Representation) Act 2003 which provides that each region has at least 3 MEP seats and, subject to this, MEP seats are allocated in proportion to the number of electors in each region. Since 1999, elections to the European Parliament in Great Britain have been held using the Closed List proportional representation system, and in Northern Ireland using the Single Transferable Vote (STV) system.

*The introduction of an obligatory threshold ranging between 3% and 5% for candidates to be elected*

20. Article 2 of the current Act permits Member States to establish constituencies for elections to the European Parliament. As described above, the UK has 12 such constituencies (or "electoral regions"). The European Parliament has proposed that for constituencies (and also for single-constituency Member States), in which use the list system is used and which comprise more than 26 seats, Member States must set a threshold for the allocation of seats which may not be lower than 3 per cent nor exceed 5 per cent of the votes cast in the constituency (or the single-constituency Member State) concerned. This proposal may stem from concerns that it is currently possible for extreme parties to win EP seats on a small share of the vote.
21. The UK does not have provision for thresholds at any of its statutory elections, and in principle does not support them as they can be seen as undemocratic, though it is recognised that in reality a party or candidate will need to secure a certain level of support in order to be elected.
22. However, the UK would not fall within the scope of the proposal as drafted. This is because each of the UK's 12 electoral regions has fewer than 26 seats. Currently, the UK electoral region that returns the most MEPs is the South East region, which has 10 MEPs. It is unlikely that under the existing provisions for allocating UK MEPs seats any region will ever have more than 26 seats. This means that ultimately this proposal would not be relevant in the UK.
23. However, there is currently no provision for thresholds at statutory elections in the UK, and adopting the principle of a mandatory threshold for a statutory election would be a significant change for the UK. The Government will therefore wish to consider the proposal very carefully.



*Common deadline for establishment of lists of candidates*

24. The European Parliament has proposed that a common deadline is set across Member States for the establishment of the lists of candidates standing for election. It is proposed that this is at least 12 weeks prior to the beginning of the period (from Thursday to Sunday) that polling occurs in Member States. At present, the deadline for parties and candidates to submit their nomination papers (in order to stand at the election) may vary across Member States.
25. In the UK, parties and candidates wishing to stand at a European election may submit their nomination papers within a window starting from the publication of the notice of election (which must be done no later than 25 working days before polling day) and ending at 4pm on the 19th working day before polling day.
26. Clearly, the proposal would be a significant change to the nomination process. The UK Government would be concerned that having an earlier deadline for nominations could present potential difficulties for parties and individuals wishing to stand for election if they did not have the necessary nomination papers ready by the earlier date. Political parties in the UK may not favour having to submit their papers so far before polling day and it is not clear whether the proposal would have support among UK political parties.
27. The proposal if implemented for European elections would mean that the nomination process for these elections would differ from that at other polls (where we would not wish to make such a change). This could create issues; in particular, it could make it more complex to combine European elections with other polls, such as local elections, which has generally been considered to have had a positive impact on voter turnout at these polls. The Government has been seeking to align timings at elections generally and this proposal would be a departure from that policy.

*Common deadline for establishment of electoral register*

28. The European Parliament has proposed that a common deadline of 8 weeks before polling can first begin at the elections is set across Member States for the establishment of the lists of electors who will be eligible to vote at the elections.
29. The current deadline for registering to vote at UK elections, including European elections, is 12 working days before polling day. We would not favour moving the current registration deadline, as is proposed, as this would restrict participation at polls and may prevent eligible persons who, for example, may have recently moved, from registering to vote in the run up to the poll. There is also provision for late alterations to be made to the register in certain circumstances. It would appear that under the proposal such alterations would also be prevented given that it requires the finalisation of the register 8 weeks before polling can first begin.

30. A concern seems to be that political parties should be aware of the persons who will be able to vote at the upcoming poll. It is relevant that in the UK, political parties may be supplied with the electoral register, including monthly updates, at any time for electoral purposes and therefore in practice parties, if they wish, may have access to the register 12 weeks before polling day.
31. Again, the proposal if adopted for European elections could create complexities with the combination of European elections with other polls as well as disadvantage persons who wish to register to vote in the run up to the poll. Such a change for European elections could prove to be unhelpful to electors and levels of participation in elections to the European Parliament.

#### *Selection of candidates by political parties*

32. The European Parliament has proposed that political parties participating in European elections should ensure that their procedures for selecting their candidates for those elections are democratic and transparent. Also, that the list of candidates for European elections should ensure gender equality. The Government notes that these proposals are aimed at enhancing trust in European elections and improving democratic representation in the European Parliament. The Government believes that democratic institutions make the best decisions when they have a mix of people with different skills, backgrounds and experiences, from across the country and we must ensure that women are better represented across all walks of life.
33. The Government does not consider that legal quotas are the best way to affect change. The European Parliament's proposals may therefore not be the appropriate way to proceed on these matters though we will wish to consider them carefully.

#### *The affiliation between national parties and European political parties*

34. The European Parliament has proposed that the ballot papers used in European elections should give equal visibility to the names and logos of national parties and to those of European political parties. Also, national parties should refer in their campaign material to the manifesto of the European political party, if any, to which the national party is affiliated.
35. Political parties can already indicate their affiliation with European parties, should they wish to. At European elections, there is nothing within UK domestic law which would prevent a national political party from making known its affiliation with a European political party, during the course of its election campaign.

36. Political parties standing at UK elections may register with the Electoral Commission up to 12 descriptions and up to 3 emblems, which may be used on ballot papers at elections - a description and an emblem may appear alongside the name of the party on the ballot paper at a European election. A party could therefore register with the Electoral Commission a description and an emblem that show its affiliation with a European party (providing they met the requirements in electoral law) and these details could appear on the ballot paper at a European election.

*Posting of electoral materials to voters*

37. The European Parliament has proposed that the rules concerning the posting of electoral materials to voters in European elections should be the same as those applied for national, regional and local elections in the Member State concerned.
38. This would appear to concern the provision of information to voters about parties and candidates standing at European elections. The Government recognises the point being made, though there may be differences between the position at national, regional and local elections within Member States, and it would not be straightforward to mandate the position in the terms of the proposal.

*Use of electronic voting and postal voting*

39. The European Parliament has proposed that Member States adopt electronic and internet voting at European elections in order to make the conduct of the elections more efficient and more appealing to voters. Postal voting should also be available.
40. We recognise that the European Parliament is seeking to encourage participation at European elections. At UK elections, electors (including eligible UK citizens living abroad) are already able to vote by post. To make online voting available for elections sounds attractive in light of current advances in IT. However, there are concerns that electronic voting is not sufficiently transparent or secure. The selection of elected representatives is regarded as requiring the highest possible level of test and, at present, there are concerns that electronic voting, by any means, is not seen by many to be sufficiently rigorous and could potentially be vulnerable to attack or fraud.
41. In addition, the cost of introducing such a system would be substantial. Public support for such measures is still far from universal and traditional means of voting (such as polling stations and postal voting) remain popular with the electorate. Therefore, any means of electronic voting would have to be introduced as an additional voting channel. Even if proven to be sufficiently robust, such a move would require careful consideration given the current economic climate.

The experience of the referendum on Scottish independence shows that if people are engaged in the democratic process they will turn out to vote using the existing mechanisms. Because of continuing concerns about the integrity of electronic voting systems, the UK Government has no plans to introduce such a system for UK elections.

#### *Eligibility to be an MEP*

42. The European Parliament has proposed that the office of MEP should be incompatible with that of member of a regional parliament or assembly vested with legislative powers. EU law currently prevents members of national parliaments from holding the office of MEP. The UK Government would wish to consider the proposal further in light of the potential impact it may have on membership of the devolved bodies in the UK.
43. Given the different types of elected bodies that exist at a sub-national level across Member States and the range of powers that they have, it would be important to ensure that any change resulting from this proposal is clearly drafted to ensure there is certainty and clarity on the issue. This may be a matter that would be more appropriate for individual Member States to decide.

#### *EU citizens overseas*

44. The European Parliament proposes that all EU citizens, including those living or working in a third country should be able to vote in European Parliamentary elections. Member States would be required to take the necessary measures to ensure the exercise of this right.
45. This seems to concern the position of citizens of a Member State who do not reside in their 'home' State. Currently, UK law provides that British citizens living overseas (whether in another Member State or otherwise) may register to vote in European elections in the UK for a maximum of 15 years after they were last registered to vote in the UK. The same time limit also applies to voting in UK Parliamentary elections. British citizens living overseas who are entitled to vote in European elections in the UK may vote by post or appoint a proxy to vote on their behalf at these elections.
46. As set out in its manifesto, the Government is committed to scrapping the rule that bars British citizens who have lived abroad for more than 15 years from voting and will introduce standalone legislation to deliver this as a permanent change in due course. Citizens of other EU Member States who are resident in the UK can register to vote in European elections in the UK in the same way as British citizens.

### *Exchange of data on voters*

47. The European Parliament has made proposals relating to the exchange of data on voters under Directive 93/109/EC on the right to vote and stand as a candidate in elections to the EP for EU citizens residing in a Member State of which they are not nationals. In particular, it is proposed to set a common deadline for the exchange of data between Member States. The Government has concerns about the practicalities of the existing process which has not proved workable in practice. The Government will consider whether the European Parliament's proposals would improve the current system.

### *Voting and declaration of results*

48. The European Parliament proposes that voting at European elections will continue to take place across Member States within a period of four days (from Thursday to Sunday), with each Member State fixing the date (or dates) and times for voting in their poll within that period, though voting should end by 2100 hours CET on the Sunday.
49. It is also proposed that, as now, Member States shall not officially make public their results until polling has closed in all Member States. Also, first official projections of the results should be communicated simultaneously in all Member States following the close of voting. Prior to this, exit poll-based forecasts should not be published.
50. UK electoral law governing the conduct of European Parliamentary elections in effect provides, in accordance with existing EU law, that UK results cannot be published until polls have closed in all Member States. UK law also prohibits the publication of exit polls until voting has ended across the EU.
51. It is proposed that the counting of postal votes may only begin in all Member States once the polls have closed in all Member States. In the UK, the verification and counting of postal votes is organised so that these stages will commence before the close of polling in all Member States and are completed after that time. Should these processes finish at an earlier point, UK law prevents results from being published until polls have closed in all Member States.
52. We agree that no indication of the result, final or projected, should go out before voting has ended in all Member States.

### *Voting Day*

53. It is envisaged that European elections continue to be held across Member States every 5 years though it is proposed that in future the European Parliament, after consulting the Council will determine the electoral period for voting and will do so at least one year before the end of the existing 5 year term.

The UK has a long tradition of Thursday elections, and the UK Government welcomes that the European Parliament respects electoral diversity across Member States on this issue.

54. The period in which the elections are held is determined by EU law which provides that Council can move the date up to two months before or one month after the period fixed for voting, if all Member States agree, and after consulting the European Parliament. On the basis of this provision, the date of European elections has previously been changed; most recently the 2014 European election was moved to earlier in 2014 to avoid a clash with the Pentecost public holiday which could have affected electors' availability to vote. The UK Government would have concerns about changing the current arrangements were this to lead to elections being held in a period that might cause difficulty for some (or all) Member States.

#### *The Post of President of the European Commission*

55. There are two proposals that seek to reinforce the legitimacy of the "Spitzenkandidaten" process for the Commission Presidency. Firstly, that the EP elections should be contested with formal EU-wide lead candidates, and secondly, that a joint constituency is established in which lists are headed by each political family's candidate for the post of President of the European Commission. It is unclear what is intended by the second of these proposals.
56. The UK Government's view remains that, in accordance with the Treaties, it is for the European Council composed to propose the President of the European Commission. European political parties are free to nominate candidates for Commission President, and national political parties are free to declare support for those candidates, if they so choose.
57. However, the Prime Minister made clear in his statement to Parliament after the June 2014 European Council that the UK Government believed that it should not be for the European Parliament to dictate the choice of candidate for the role of the President of the European Commission. The Treaties clearly set out the role the European Parliament and the European Council respectively play in the process of selecting the next Commission President.

#### *Replacing unanimity by qualified majority voting for implementing measures*

58. Replacing unanimity with qualified majority voting for measures to implement this Act would remove an important tool that the UK and other member States have to block unwanted measures. In any event it does not appear to be in accordance with the Treaties for the European Parliament to propose a voting procedure that differs from that in Article 223(1) TFEU.

## **REGULATORY IMPACT ASSESSMENT**

59. Not applicable.

## **FINANCIAL IMPLICATIONS**

60. We have not carried out any detailed work on the financial implications of the proposals given that they are wide ranging and consideration of them is at an early stage. Should more refined proposals emerge following consideration of the EP's proposals by the Council and Member States we will consider in more detail their financial implications.

## **TIMETABLE**

61. The European Parliament adopted these proposals on 11 November 2015 and they were formally transmitted to the Council by EP President Schulz on 27 November.
62. The Dutch Presidency will start discussions at working group level in January 2016.

The Rt Hon David Lidington MP  
Minister for Europe  
Foreign and Commonwealth Office



House of Commons  
European Scrutiny Committee

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**Reform of the electoral  
law of the EU**

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**Nineteenth Report of Session 2015–16**

Documents considered by the Committee on 13 January 2016,  
and recommended for debate

*Report, together with formal minutes*

*Ordered by the House of Commons  
to be printed 13 January 2016*

**HC 342-xviii**

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## Notes

### Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

### Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	Treaty on European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

### Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

### Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": [www.parliament.uk/escom](http://www.parliament.uk/escom). The website also contains the Committee's Reports.

\*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: <http://europeanmemoranda.cabinetoffice.gov.uk/>.

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# 1 Reform of the electoral law of the EU

Committee's assessment	Legally and politically important
<a href="#">Committee's decision</a>	Not cleared from scrutiny; recommended for debate on the floor of the House on a Reasoned Opinion before 8 February; further information requested; drawn to the attention of the Public Administration and Constitutional Affairs Committee
Document details	(a) EP Resolution of 11 November 2015 on EU electoral law reform; (b) EP Proposal for a Council Decision to amend the 1976 Electoral Act
Legal base	Article 223(1) TFEU; EP consent; unanimity
Department	Foreign and Commonwealth Office
Document Numbers	(a) (37395), —; (b) (37431), —

## Summary and Committee's conclusions

1.1 On 11 November, the European Parliament (EP) adopted these documents, an EP Resolution (document (a)) and a proposal for a Council Decision (document (b)). These set out a number of measures to change the conduct of future EP elections but only those contained in the proposed legislative act, the Council Decision (b), can legally reform the European Electoral Law of 1976<sup>1</sup> (the 1976 Act). This Decision excludes those purely aspirational measures which are included only in the EP's Resolution (document (a)), the most prominent being the proposal for a universal minimum voting age of 17 and a common voting day. No explanatory memorandum or impact assessment accompanies the proposals nor has been sent to national parliaments. The Resolution does refer in its preamble to a "European Added Value" Assessment—equivalent to a Commission Impact Assessment— but this document provides little reference to impacts on Member States and their electoral administrations and negligible financial assessment.<sup>2</sup>

1.2 The measures in document (b) are detailed in the table at Annex 1 of this Report chapter. In short, the more significant measures include:

- common deadlines for establishing lists of candidates and for establishing electoral registers;
- making members of regional parliaments and assemblies ineligible to become MEPs;
- ensuring gender equality of candidates;

<sup>1</sup> Council Decision 76/787/ECSC, EEC, Euratom (OJ No. L 278, 8.10.1976, p.1) as amended by Council Decision 93/81/Euratom, ECSC, EEC (OJ No. L 33, 09.02.1993) and by Council Decision 2002/772/EC, Euratom (OJ No. L 283, 21.10.2002, p.1).

<sup>2</sup> See the reference in the preamble of the Resolution to the "[European Added Value Assessment on the Reform of the Electoral Law of the European Union](#)", dated September 2015, available in English, with German, French and Polish Translations. It is produced by European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament.

- proposals on voting methods, including electronic and postal voting;
- the introduction of mandatory 3-5% thresholds to win seats in the EP in those EU countries that have only one constituency or constituencies that have more than 26 seats;
- formalising the “Spitzenkandidaten” process for election of the Commission President, with the EP elections being contested with formal EU-wide lead candidates for the post and that the establishment of a transnational constituency for their selection; and
- amending the provisions in the 1976 Act to make detailed implementing rules.

1.3 The legal basis for the proposed Council Decision is Article 223(1) TFEU. This gives the EP the right to draw up a proposal to reform electoral law concerning election of its members “in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States”.<sup>3</sup> To take effect, the proposal would need to be agreed unanimously by the Council, with EP consent, and then approved by all Member States in accordance with their constitutional requirements. The UK therefore has a national veto. Additionally, section 7(2)(b) of the European Union Act 2011 requires approval of such a proposal by Act of Parliament.

1.4 In the last Parliament, our predecessors scrutinised various other documents relevant to the conduct of EP elections, most notably the Commission’s 2013 Recommendation<sup>4</sup> and the European Council decision in 2014 to nominate Jean-Claude Juncker as Commission President. An account of this previous scrutiny and the background to the current proposals is provided at paragraphs 1.22–1.25 of this chapter.

1.5 The Minister for Europe (Mr David Lidington) provides a comprehensive Explanatory Memorandum in terms of the policy implications of each of the proposals in document (b), but does not provide any assessment of its costs implications other than to say that the cost of electronic voting would be “substantial”. He also fails to provide an adequate subsidiarity assessment which should have addressed both limbs of the subsidiarity principle<sup>5</sup>: that the action at EU level should be taken “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States” (first limb) and only if they “can better be achieved at Union level” because of “the scale or effects” of what is proposed (second limb).

**1.6 We thank the Minister for his Explanatory Memorandum, particularly his comprehensive explanation of Government policy on each substantive measure proposed in document (b).**

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<sup>3</sup> Article 223(1) TFEU states in full:

“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”.

<sup>4</sup> Commission Recommendation [2013/142/EU](#) of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament, OJ L 79, 21.3.2013, p.29.

<sup>5</sup> See Article 5(3) TEU.

1.7 However, we are disappointed by the inadequate subsidiarity assessment that he provides, particularly given that he will be mindful of the tight eight week deadline that national parliaments have to meet in order to submit a reasoned opinion in time to the EU institutions. This deadline has been shortened by the recent Christmas/New Year holiday period. Despite concluding that the proposal “raises subsidiarity concerns”, the Minister’s subsidiarity assessment vaguely focuses on competence concerns, fails to address both limbs of the subsidiarity principle, does not address the lack of subsidiarity substantiation of its proposal by the European Parliament (EP), seems only to imply the need for “consistency” with “other elections” and simply asserts that the EP should not seek uniformity of practices on “matters” which “should be decided at national level”.

1.8 We are also dissatisfied with the lack of any assessment in the EM of the financial implications of the proposals, other than speculation that the cost of implementing electronic voting for EP elections would be “substantial”. Given that there is some similarity in the proposals being made with the Commission’s 2013 Recommendation, we would have thought that the previous Government might have carried out some preliminary cost assessments which could have been updated for present purposes. We therefore look forward to receiving an assessment of potential cost implications of the measures in document (b) as negotiations progress.

1.9 Despite the inadequacy of the Government information provided, we consider that the European Parliament itself has failed to provide detailed information about the subsidiarity and the proportionality of its proposal. We have particular concerns about measures on eligibility to become MEPs, gender inequality, electoral registration, electronic voting and a mandatory threshold of 3-5% for gaining a seat in the European Parliament. Details of those concerns are set out in the draft Reasoned Opinion at Annex 2 of this chapter.

1.10 We recommend that the House issue a Reasoned Opinion to be submitted to the EP and the other EU institutions by 8 February 2016. In doing so, we recognise, in principle, that it is consistent with subsidiarity for the EP to propose measures at EU level to determine its own membership and the manner of its election, rather than leave such matters to Member States. However, we consider that the procedural and substantive objections to the proposal justify a Reasoned Opinion.

1.11 We would be grateful if the Minister could, as soon as possible, provide us with the following information, to assist our further scrutiny.

- a) His reaction to the proposal to give the Council power under Article 11 of the 1976 Electoral Act to determine the precise electoral period for voting to the EP instead;<sup>6</sup>
- b) A better explanation of why, legally-speaking, the Government considers that it is contrary to the Treaties for the EP to propose the voting procedure for implementing legislation set out in the proposed amendments to Article 11 and 14 of the 1976 Electoral Act;

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<sup>6</sup> It is proposed that in future the EP, after consulting the Council, will determine the electoral period for voting and will do so at least one year before the end of the existing 5 year term. At present, Article 11 of the Act gives this power to the Council acting unanimously, after consulting the EP.

- c) An evaluation of the “European Added Value” Assessment referred to the EP’s Resolution;<sup>7</sup>
- d) An indication of whether he has consulted the Electoral Commission, and if not, whether and at what stage he intends to do so; and
- e) Information about progress achieved on the European Council’s review of the process for the nomination of a candidate for the post of Commission President (we refer to the European Council Conclusions of 27 June 2014<sup>8</sup> and the repeated requests for information on this question made by both us and our predecessors<sup>9</sup>). We also look forward to clarification of the proposals in document (b) on formalising the “Spitzenkandidaten” process as part of the EP elections, which the Minister says he will be seeking.

1.12 We retain the current documents under scrutiny and draw them to the attention of the Public Administration and Constitutional Affairs Committee, taking account of the work of its predecessors on voting by EU mobile citizens.<sup>10</sup>

**Full details of the documents:** (a) European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union: (37395), —; (b) Proposal for a Council Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage: (37431), —.

## The current documents

### *Objectives and justifications for the proposals*

1.13 In its Resolution (document (a)), the EP sets out the objectives and justifications for the proposed reforms in document (b). The Resolution also refers in its Preamble to “having regard” to a having regard to “the European Added Value Assessment on the Reform of the Electoral Law of the European Union”. As this document does not accompany the proposals and was not provided directly to national parliaments, we have not included a detailed assessment of it in this Report but we provide a link to it [here](#) and have commented on its inadequacy on paragraph 1 of this Report.

1.14 Some of the EP’s substantiation is specific to particular measures and it is set out accordingly in the table at Annex 1 to this Report chapter.

1.15 In addition to recognising the EP’s power pursuant to Article 223(1) TFEU to propose the reform of its own electoral procedure, more general substantiation for the reform proposals includes the following justifications:

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<sup>7</sup> See footnote 2.

<sup>8</sup> European Council Conclusions, [27 June 2014](#)

<sup>9</sup> See (36170),—: Sixth Report HC 342-vi (2015–16), [chapter 10](#) (21 October 2015); First Report HC 342-i (2015-16), [chapter 10](#) (21 July 2015); Eighth Report HC 219-viii (2014–15), [chapter 7](#) (16 July 2014).

<sup>10</sup> We refer to the recommendations of the Political and Constitutional Reform Committee on “Voter Engagement in the UK” to simplify the registration system and to run a corresponding publicity campaign. See the Fourth Report of the Political and Constitutional Reform Committee, Voter engagement in the UK, [HC 232](#) (2014-15), (14 November 2014).

- enhancing the democratic and transnational dimension of the European elections and the democratic legitimacy of EU decision-making;
- reinforcing the concept of citizenship of the EU; to promote the principle of representative democracy and the direct representation of Union citizens in the EP, including achieving a balanced composition of the EP;
- improving the functioning of the EP and the governance of the EU;
- making the work of the EP more legitimate and efficient;
- enhancing the effectiveness of the system for conducting EP elections;
- providing for the greatest possible degree of electoral equality and participation for EU citizens, helping to revive European democracy in the face of steadily decreasing turnout;
- recognising that the harmonisation of procedure for EP elections in all Member States could better achieve the objectives listed above and also strengthen European integration;
- noting the reforms reflect the steady increase in EP competences since the first direct election in 1979 and its equal co-legislator status in most EU policy areas, particularly in the wake of the Lisbon Treaty; and
- concluding that despite incremental reforms, no truly uniform electoral procedure has been achieved and EP elections are still governed for the most part by national laws, campaigning remains national and European political parties are not managing to raise European political awareness or to establish a mandate from EU citizens.

### ***Measures proposed in document (b)***

1.16 A summary of the measures proposed in document (b) is also set in the table at Annex 1 to this Report chapter.

### **The Government's view**

1.17 In his Explanatory Memorandum of 4 January 2016, the Minister for Europe assesses the policy implications of each proposal in commendable detail. He firstly notes the unanimity requirement and then adds that consideration of the proposals is at an early stage “though the Government’s initial view is that it is not persuaded of the merits of many of the proposals and does not consider that they would achieve the EP’s stated objectives”. He considers that the proposals lack clarity and that the Government would be seeking further clarification in due course.

### ***Current arrangements for EP elections in the UK***

1.18 He then summarises current UK arrangements for the five-yearly election of MEPs:

- The current 73 seats are allocated across 12 electoral regions in accordance with the European Parliament (Representation) Act 2003 (EPRA);
- The EPRA provides that each region should have at least three MEP seats and then allocated in proportion to the size of each regional electorate; and
- Since 1999, elections to the EP in Great Britain have been held using the Closed List proportional representation system, and in Northern Ireland using the Single Transferable Vote (STV) system.

### ***New measures proposed by the EP in document (b)***

1.19 The Minister then addresses each of the measures in turn proposed by the EP in the draft Council Decision. The Minister’s views and explanations are set out in the column headed “The Government’s view” to the table at Annex 1 to this Report.

### ***Subsidiarity***

1.20 On the question of subsidiarity, the Minister says:

“The Government considers that this proposal raises subsidiarity concerns. Member States have competence in how they administer their elections, including deciding procedures to administer European parliamentary elections at national level, provided they comply with the 1976 Act and do not affect the essentially proportional nature of the voting system. Such an approach permits, where appropriate, consistency with other elections, such as those to national or regional parliaments or assemblies. Some of the proposals seek to achieve uniformity of practice across Member States on matters that the Government considers should be decided at a national level.”

### ***Next steps***

1.21 Finally, the Minister adds that the Dutch Presidency will start discussions at working group level in January 2016 on the proposals.

### ***Background and previous scrutiny***

1.22 In 2013 the Commission issued:

- a Communication on “Preparing for the 2014 European elections: Further enhancing their democratic and efficient conduct”;<sup>11</sup> and
- a Recommendation of 12 March on enhancing the democratic and efficient conduct of the elections to the European Parliament.<sup>12</sup>

1.23 To some extent, the Commission’s (non-legally binding) Recommendation overlaps with current document (b)) proposing that: national political parties, facilitated by

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<sup>11</sup> (34979), 7648/13: First Report HC 83-i (2013–14), [chapter 3](#) (8 May 2013).

<sup>12</sup> (34798), 7650/13: First Report HC 83-i (2013–14), [chapter 3](#) (8 May 2013).



Member States, should publicise their affiliation with European political parties; that European political parties should nominate and publicise their candidate for the Commission President; national political parties should inform voters about the candidate they support for Commission President; that there should be a single contact authority in charge of the exchange of data on voters; that Member States should exchange such data taking into account their respective electoral calendars, using a single electronic mechanism. However, the Recommendation also included the proposal that Member States should agree on a common day for the elections of the EP, with polling stations closing at the same time (the former now being proposed in document (a), the latter in document (b)). The previous Government rejected most aspects of these suggested measures and the documents were eventually cleared after a debate recommended by our predecessors on the Floor of the House in June 2013.

1.24 Our predecessors also scrutinised the European Council Decision<sup>13</sup> to nominate a candidate for the position of Commission President which we then cleared from scrutiny on 21 October 2015. The 2014 EP elections were the first since the Lisbon Treaty to establish a direct link between the outcome of the elections and the appointment of the Commission President. As part of that process, the European political parties nominated Presidential candidates, the European Council then nominated the candidate of the majority party following the elections (Jean-Claude Juncker as lead candidate of the European Peoples’ Party) and that candidate was then elected by the EP. The Decision was adopted in June 2014, by a qualified majority of EU Heads of State and Government and only the UK and Hungary opposed the nomination. The view of the previous Government was that this amounted to the EP determining the choice of candidate, when Article 17(7) TEU assigns that role to the European Council. As a concession to UK opposition to Mr Juncker’s nomination, the European Council gave the following commitment in corresponding Council Conclusions:

“Once the new European Commission is effectively in place, the European Council will consider the process for the appointment of the President of the European Commission for the future, respecting the Treaties.”<sup>14</sup>

1.25 We recently scrutinised the Commission’s Report on the European Elections of 22–26 May 2014. This reviewed the conduct of those elections and the effectiveness of measures taken to enhance the transparency, democratic conduct and European dimension of the elections. Despite a minimal decrease in turnout (0.36%) which varied significantly across Member States, the Commission’s conclusions were mainly positive. It considered that voter engagement and understanding increased due to the linkage of the elections and the Presidential appointment, the promotion by European (and some national political parties) of a particular Presidential candidate and increased use of interactive social media and EU-wide web dialogues and debates. It also considered building on these initiatives for the 2019 process. We highlighted in our Report of 21 October,<sup>15</sup> that the Minister for Constitutional Reform at the Cabinet Office (John Penrose) said that he was “not aware of any current

<sup>13</sup> European Council Decision proposing to the European Parliament a candidate for the President of the European Commission (36170),—: Sixth Report HC 342-vi (2015–16), [chapter 10](#) (21 October 2015); First Report HC 342-i (2015–16), [chapter 10](#) (21 July 2015); Eighth Report HC 219-viii (2014–15), [chapter 7](#) (16 July 2014).

<sup>14</sup> European Council Conclusions, [27 June 2014](#).

<sup>15</sup> Sixth Report HC 342-vi (2015–16), [chapter 10](#) (21 October 2015).

plans to progress” the Commission’s initiatives referred to in the Report (and set out in the Recommendation) “further into legislation”.

## Previous Committee Reports

None, but see (34797), 7648/13 and (34798), 7650/13: First Report HC 83-i (2013–14), [chapter 3](#) (8 May 2013); (34523), 17469/12: Twenty-seventh Report HC 86-xxvii (2012–13), [chapter 1](#) (16 January 2013); (34259), 13842/12: Nineteenth Report HC 86-xix (2012–13), [chapter 2](#) (7 November 2012); (36803), —: Sixth Report HC 342-vi (2015–16), [chapter 10](#) (21 October 2015); First Report HC 342-i (2015–16), [chapter 10](#) (21 July 2015); (36170), —: Sixth Report HC 342-vi (2015–16), [chapter 10](#) (21 October 2015); First Report HC 342-i (2015–16), [chapter 10](#) (21 July 2015); Eighth Report HC 219-viii (2014–15), [chapter 7](#) (16 July 2014).

## Annex 1: Table of Measures in the proposed Council Decision

Measures in the proposed Council Decision (CD) <sup>16</sup> and EP substantiation <sup>17</sup>	The Government’s view
<p><b>An obligatory threshold of between 3%–5% for candidates to be elected</b></p> <p>For constituencies (and also for single-constituency Member States), in which the list system is used and which comprise more than 26 seats, Member States must set a threshold for the allocation of seats of 3–5% of votes cast.</p> <p><b>Substantiation provided by EP:</b></p> <p><u>Preamble R:</u> whereas the existing European electoral rules allow for a non-obligatory threshold of up to 5% of votes cast to be set for European elections, and whereas 15 Member States have availed themselves of this opportunity and have introduced a threshold of between 3% and 5%; whereas in smaller Member States, and in Member States that have subdivided their electoral area into constituencies, the de facto threshold nevertheless lies above 3%, even though no legal thresholds exist; whereas introducing obligatory thresholds is recognised by constitutional tradition as a legitimate means of guaranteeing that parliaments are able to function.</p> <p><u>Para 7:</u> EP “considers this measure to be important for safeguarding the functioning of the European Parliament, since it will avoid further fragmentation”.</p>	<p>The UK:</p> <ul style="list-style-type: none"> <li>• considers that the proposal aims to prevent extreme parties winning EP seats on a small share of the vote;</li> <li>• does not use or support election thresholds, as in principle they can be perceived as undemocratic and adopting a mandatory threshold would be a significant change; and</li> <li>• currently, would not be affected as each of its 12 electoral regions have fewer than 26 seats nor is this likely to change (South East region has biggest allocation of 10 MEPs).</li> </ul>
<p><b>Measure: Common deadline for establishment</b></p>	<p>The Government considers that:</p>

<sup>16</sup> The legislative act.

<sup>17</sup> In the Resolution: there are no relevant Recitals in the proposed Council Decision. “Preamble” refers to the alphabetical paragraphs which precede the actual “paragraphs” of the Resolution. The Resolution itself does include a reference to a “[European Added Value Assessment on the Reform of the Electoral Law of the European Union](#)”, dated September 2015, available in English, with German, French and Polish Translations. It is produced by European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament.

<b>Measures in the proposed Council Decision (CD)<sup>16</sup> and EP substantiation<sup>17</sup></b>	<b>The Government's view</b>
<p><b>of lists of candidates</b> A common deadline of at least 12 weeks prior to the beginning of the polling period (already established as Thursday to Sunday) should be introduced for the establishment of the lists of candidates.</p> <p><b>Substantiation provided by the EP:</b> <u>Preamble O:</u> whereas the deadlines for finalising electoral lists ahead of European elections vary greatly among Member States, currently ranging from 17 days to 83 days, and this puts candidates and voters across the Union in an unequal position when it comes to the time they have to campaign or to reflect on their voting choice. <u>Para 5:</u> This deadline will “enhance electoral equality by providing candidates and voters across the Union with the same period in which to prepare and reflect ahead of the vote; encourages Member States to reflect upon ways to ensure greater convergence between rules governing electoral campaigns regarding European elections”.</p>	<ul style="list-style-type: none"> <li>• the proposal would be a significant change to the current UK nomination process – papers are submitted between the publication of the notice of election (which must be done no later than 25 working days before polling day) and ending at 4pm on the 19th working day before polling day;</li> <li>• an earlier deadline for nominations could present potential difficulties for parties and individuals wishing to stand for election if they did not have the necessary nomination papers ready by the earlier date;</li> <li>• political parties in the UK may not support the proposal as they may not favour having to submit their papers so far before polling day; and</li> <li>• if implemented for EP elections, this process would differ from that at other polls. This “could create issues; in particular, it could make it more complex to combine European elections with other polls, such as local elections, which has generally been considered to have had a positive impact on voter turnout at these polls. The Government has been seeking to align timings at elections generally and this proposal would be a departure from that policy”.</li> </ul>
<p><b>Measure: Common deadline for establishment of electoral register</b> A common deadline of eight weeks prior to the beginning of the polling period should be introduced for the establishment of the lists of eligible voters.</p> <p><b>Substantiation provided by the EP:</b> <u>Preamble P:</u> Whereas the deadlines for finalising the electoral roll ahead of EP elections vary greatly among Member States and may render the exchange of information between Member States on voters (which is aimed at the avoidance of double voting) difficult, if not impossible.</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• would not want to move the current deadline of 12 working days before polling day for registering to vote at UK elections, including EP elections — this would restrict participation at polls and may prevent eligible persons who, for example, may have recently moved, from registering to vote in the run up to the poll;</li> <li>• is concerned that provision late alterations would also be prevented given that the proposal requires the finalisation of the register eight weeks before polling can first begin;</li> <li>• considers that the concern that political parties should be aware of eligible voters is already addressed in the UK as political parties may be supplied with the electoral register, including monthly updates, at any time for electoral purposes and therefore may have access to the register 12 weeks before polling day;</li> <li>• believes that if the deadline was adopted for EP elections, it could make it complex to combine those elections with other polls as well as</li> </ul>

<b>Measures in the proposed Council Decision (CD)<sup>16</sup> and EP substantiation<sup>17</sup></b>	<b>The Government's view</b>
	<p>disadvantage persons who wish to register to vote nearer to the time of the elections and that “such a change for European elections could prove to be unhelpful to electors and levels of participation” in the EP elections.</p>
<p><b>Selection of candidates by political parties</b> Political parties participating in the EP elections should ensure that their procedures for their selection of candidates are democratic, transparent and ensure gender equality.</p> <p><b>Substantiation by the EP:</b> <u>Preamble N:</u> whereas the procedure for nominating candidates for elections to the European Parliament varies considerably from Member State to Member State and from party to party, in particular as regards transparency and democratic standards, while open, transparent and democratic procedures for the selection of candidates are essential for building trust in the political system. <u>Preamble AG:</u> whereas despite continuous progress since 1979 in terms of balance between women and men in the distribution of seats, there remain considerable divergences in this regard between Member States, with 10 of them having a level lower than 33 % accounted for by the less represented gender; whereas the current composition of the European Parliament, comprising as it does only 36.62 % women, falls short of the values and objectives of gender equality championed in the Charter. <u>Preamble AH:</u> whereas equality between women and men must be achieved, as one of the founding values of the Union, while only very few Member States have incorporated this principle in their national electoral laws; whereas gender quotas in political decision-making and zipped lists have proved to be highly effective tools in addressing discrimination and gender power imbalances and improving democratic representation on political decision-making bodies. <u>Para 20:</u> Highlights the importance of an increased presence of women in political decision-making and a better representation of women in European elections; consequently, calls on Member States and the institutions of the Union to take all necessary measures to promote the principle of equality between men and women throughout the whole electoral process; emphasises in this connection the importance of gender-balanced electoral lists.</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• notes that these proposals are aimed at enhancing trust in EP elections and improving democratic representation in the EP;</li> <li>• believes that democratic institutions make the best decisions when they have a mix of people with different skills, backgrounds and experiences;</li> <li>• wants to ensure that women are better represented across all walks of life; but</li> <li>• does not consider that “legal quotas are the best way to affect change” nor that the EP’s proposals, which it will consider carefully, are the “appropriate way to proceed on these matters”.</li> </ul>
<p><b>The affiliation between national parties and European political parties</b> Ballot papers used should give equal visibility to the names and logos of national parties and to those of European political parties. Also, national parties should refer in their campaign material to the manifesto of the European political party, if any, to which the national party is affiliated.</p>	<p>In the UK:</p> <ul style="list-style-type: none"> <li>• domestic law does not prevent political parties from indicating their affiliation with European parties during their campaigns for the EP elections – they are free to do so; and</li> <li>• political parties standing at EP elections could register with the</li> </ul>

<b>Measures in the proposed Council Decision (CD)<sup>16</sup> and EP substantiation<sup>17</sup></b>	<b>The Government's view</b>
<p><b>Substantiation by the EP:</b>  <u>Preamble AD:</u> whereas the official establishment and consolidation of political parties at Union level are fostering the development of European political awareness and giving expression to the wishes of Union citizens, and whereas this has also facilitated the process of gradually bringing electoral systems closer together.</p> <p><u>Para 2:</u> Measures would render European elections more transparent and improve the democratic manner in which they are conducted, as citizens will be able to link their vote clearly with the impact it has on the political influence of European political parties and their ability to form political groups in the EP".</p> <p><u>Preamble M:</u>whereas European political parties are best placed to "contribute to forming European political awareness" and should therefore play a stronger role in the campaigns for Parliament elections in order to improve their visibility and to show the link between a vote for a particular national party and the impact it has on the size of a European political group in the EP.</p>	<p>Electoral Commission an emblem showing its affiliation with a European Party as part of its quota of up to 12 descriptions and up to 3 emblems which may be used on ballot papers at UK elections.</p>
<p><b>Posting of electoral materials to voters</b>  Rules concerning the posting of electoral materials to voters in the EP elections should be the same as those applied by each Member State for national, regional and local elections.</p> <p><b>Substantiation by the EP:</b> None specifically provided.</p>	<p>The Government understands the aim of providing information to voters about parties and candidates standing at EP elections, but considers that it was not be straightforward to align differences between the position at national, regional and local elections within Member States on a mandatory basis.</p>
<p><b>Use of electronic voting and postal voting</b>  Member States MAY adopt electronic and postal voting in order to make the conduct of EP elections more efficient and more appealing to voters, but if they do they have to ensure its security and reliability.</p> <p><b>Substantiation by the EP:</b>  <u>Preamble AE</u> whereas postal, electronic and internet voting could make the conduct of European elections more efficient and more appealing for voters, provided that the highest possible standards of data protection are ensured.  <u>Para 14:</u>  in order to increase the participation of, and to make voting easier for, all citizens, and especially for people with reduced mobility and for people living or working in a Member State of which they are not a citizen or in a third country, provided that necessary measures are taken to prevent any possible fraud in the use of voting by those means.</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• recognises that the EP is seeking to encourage participation at EP elections;</li> <li>• confirms that at UK elections, electors (including eligible UK citizens living abroad) are already able to vote by post;</li> <li>• understands that it might be attractive to make electronic voting (EV) available for elections given advance in IT but highlights concerns that electronic voting is not sufficiently transparent or secure;</li> <li>• considers that the selection of elected representatives requires "the highest possible level of test and, at present, there are concerns that electronic voting, by any means, is not seen by many to be sufficiently rigorous and could potentially be vulnerable to attack or fraud";</li> <li>• estimates that the cost of introducing EV would be "substantial";</li> <li>• notes that public support for EV is</li> </ul>

Measures in the proposed Council Decision (CD) <sup>16</sup> and EP substantiation <sup>17</sup>	The Government's view
	<p>"still far from universal" and traditional means of voting (such as polling stations and postal voting) remain popular and so EV would have to be introduced as an additional option;</p> <ul style="list-style-type: none"> <li>• refers to experience of the Scottish independence referendum as proof that if people are sufficiently engaged in democratic process, they will use the existing voting mechanisms; and</li> <li>• concludes that "Even if proven to be sufficiently robust, such a move would require careful consideration given the current economic climate" and that given concerns about its integrity the UK has no current plans to introduce EV for UK elections.</li> </ul>
<p><b>Eligibility to be an MEP</b> Members of regional parliaments or legislative assemblies shall be ineligible to be MEPs, in line with the existing ineligibility of members of national Parliaments set out in the 1976 Electoral Act.</p> <p><b>Substantiation by the EP:</b> None specifically provided.</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• wants to consider further the impact it may have on membership of the devolved bodies in the UK;</li> <li>• believes this may a matter for appropriate for individual Member States to decide given the different types of elected bodies that exist at a sub-national level across Member States and the range of powers that they have;</li> <li>• in view of this diversity, considers it important to ensure that any change is clearly drafted to ensure certainty and clarity.</li> </ul>
<p><b>EU citizens overseas</b> Member States must ensure that all EU citizens, including those living or working in a third country, should be able to exercise their right to vote in the EP elections.</p> <p><b>Substantiation by the EP:</b> <u>Preamble Z:</u> whereas not all Member States afford their citizens the possibility of voting from abroad, and among those that do, the conditions for deprivation of the right to vote vary greatly; whereas granting all Union citizens residing outside the Union the right to participate in elections would contribute to electoral equality; whereas, however, Member States need to coordinate their administrative systems better in order to prevent voters from voting twice in two different Member States. <u>Para 12:</u> "this would finally give all Union citizens the same right to vote in European elections under the same conditions, irrespective of their place of residence or citizenship".</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• notes that UK law provides that British citizens living overseas (whether in another Member State or otherwise) may register to vote in European elections in the UK for a maximum of 15 years after they were last registered to vote in the UK – they may use a postal or proxy vote;</li> <li>• will be introducing legislation, in line with its manifesto, to enable British citizens living abroad for more than 15 years from voting; and</li> <li>• confirms that citizens of other EU Member States, resident in the UK, can register to vote in EP elections in the UK in the same way as British citizens.</li> </ul>
<p><b>Exchange of data on voters</b> A common deadline should be introduced for the</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• has concerns about the practicalities</li> </ul>

<b>Measures in the proposed Council Decision (CD)<sup>16</sup> and EP substantiation<sup>17</sup></b>	<b>The Government's view</b>
<p>exchange of voter data. Data is already exchanged between Member States under Directive 93/109/EC on the right of EU citizens to vote and stand as a candidate in EP elections in Member States of which they are not nationals.</p> <p><b>Substantiation by EP:</b>  <u>Preamble P:</u> whereas the deadlines for finalising the electoral roll ahead of European elections vary greatly among Member States and may render the exchange of information between Member States on voters (which is aimed at the avoidance of double voting) difficult, if not impossible.  <u>Preamble AA:</u> whereas at least 13 Member States do not have in place adequate internal rules precluding citizens of the Union who have dual nationality of Member States from voting twice, in breach of Article 9 of the Electoral Act.</p>	<p>of the existing process for exchange of voter information which has not proved workable in practice; and</p> <ul style="list-style-type: none"> <li>• will consider whether the proposals would improve the current system.</li> </ul>
<p><b>Voting period</b>  Voting at EP elections will continue to take place across Member States within a period of four days (from Thursday to Sunday), with each Member State fixing the date (or dates) and times for voting in their poll within that period, though voting should end by 2100 hours CET on the Sunday.</p> <p>It is envisaged that EP elections continue to be held across Member States every 5 years.</p> <p>However it is also proposed that in future the EP, after consulting the Council, will determine the electoral period for voting and will do so at least one year before the end of the existing 5 year term. At present, Article 11 of the Act gives this power to the Council acting unanimously, after consulting the EP.</p> <p><b>Substantiation by the EP:</b> None provided beyond the assertion that the EP “Determines to give Parliament the right to fix the electoral period for elections to the European Parliament after consulting the Council”.</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• welcomes the EP's respect for electoral diversity on this issue as it has a long tradition of Thursday elections;</li> <li>• notes that the period in which the elections are held is determined by EU law which provides that Council can move the date up to two months before or one month after the period fixed for voting, if all Member States agree, and after consulting the EP;</li> <li>• informs us that on the basis of that provision, the date of EP elections has previously been changed; most recently the 2014 European election was moved to earlier in 2014 to avoid a clash with the Pentecost public holiday which could have affected turnout; and</li> <li>• would be concerned about changing the current arrangements were this to lead to elections being held in a period that might cause difficulty for some (or all) Member States.</li> </ul>
<p><b>Voting and Declaration of results</b>  It is proposed that, as now, Member States shall not officially make public their results until polling has closed in all Member States. Also, first official projections of the results should be communicated simultaneously in all Member States following the close of voting. Prior to this, exit poll-based forecasts should not be published. The counting of postal votes may only begin in all Member States once the polls have closed in all Member States.</p> <p><b>Substantiation by the EP:</b>  <u>Para 8:</u> this would ensure the correct application of Article 10(2) of the Electoral Act and thus reduce the possibility of the outcome of the elections being influenced if the election results in some Member States are made public before the close of</p>	<p>In the UK:</p> <ul style="list-style-type: none"> <li>• electoral law governing the conduct of EP elections complies with EU law by providing that UK results cannot be published until polls have closed in all Member States. It prohibits the publication of exit polls until voting has ended across the EU; and</li> <li>• the counting of postal votes is organised so that these stages will commence before the close of polling in all Member States but completed after that time and in any case UK law prevents results from being published before the last poll closes.</li> </ul> <p>The Government agrees that no indication of</p>

<b>Measures in the proposed Council Decision (CD)<sup>16</sup> and EP substantiation<sup>17</sup></b>	<b>The Government's view</b>
<p>polling in all Member States; advocates that the ban on early announcement of the election results should remain in force in all Member States.</p> <p><u>Preamble S</u>: whereas, although Article 10(2) of the Electoral Act expressly prohibits the early publication of the results of elections, such results have been made public in the past; whereas a harmonised time for the close of polling in all Member States would contribute strongly to the common European character of the European elections and would reduce the possibility of their outcome being influenced if election results in some Member States are made public before the close of polling in all Member States.</p>	<p>the result, final or projected, should go out before voting has ended in all Member States.</p>
<p><b>Post of President of the European Commission</b></p> <p>There are two proposals that seek to reinforce the legitimacy of the “Spitzenkandidaten” process for the Commission Presidency. Firstly, that the EP elections should be contested with formal EU-wide lead candidates, and secondly, that a joint constituency is established in which lists are headed by each political family’s candidate for the post of President of the European Commission.</p> <p><b>Substantiation by the EP:</b></p> <p><u>Preamble Q</u>: whereas the establishment of a joint constituency in which lists are headed by each political family’s candidate for the post of President of the Commission would greatly strengthen European democracy and legitimise further the election of the President of the Commission.</p> <p><u>Preamble V</u>: whereas the Lisbon Treaty established a new constitutional order by granting the European Parliament the right to elect the President of the European Commission instead of merely giving its consent; whereas the 2014 European elections set an important precedent in this respect and have shown that nominating lead candidates increases the interest of citizens in European elections.</p> <p><u>Preamble W</u>: whereas the nomination of lead candidates for the office of President of the European Commission provides a link between votes cast at national level and the European context and enables Union citizens to make informed choices between alternative political programmes; whereas the designation of lead candidates by open and transparent procedures reinforces democratic legitimacy and strengthens accountability.</p> <p><u>Preamble X</u>: whereas the procedure for the nomination and selection of lead candidates for that office is a strong expression of European democracy; whereas, furthermore, it should be an integral part of the election campaigns.</p>	<p>The Government:</p> <ul style="list-style-type: none"> <li>• considers that it is unclear what is intended by the second of these proposals;</li> <li>• remains of the view that the Treaties clearly set out the respective roles of the European Council and the EP and that it is for the European Council to propose the Commission President and not for the EP to dictate the choice of candidate;</li> <li>• the Prime Minister made clear this in his statement to Parliament after the June 2014 European Council; but that</li> <li>• European political parties are free to nominate candidates for Commission President, and national political parties are free to declare support for those candidates, if they so choose.</li> </ul>



<b>Measures in the proposed Council Decision (CD)<sup>16</sup> and EP substantiation<sup>17</sup></b>	<b>The Government's view</b>
<p><u>Para 9:</u> a common deadline for the nomination of lead candidates by European political parties 12 weeks in advance of European elections, so as to enable their electoral programmes to be presented, political debates between the candidates to be organised and Union-wide electoral campaigns to be mounted; considers that the process of nomination of lead candidates constitutes an important aspect of electoral campaigns due to the implicit link between the results of European elections and the selection of the Commission President as enshrined in the Treaty of Lisbon.</p>	
<p><b>Replacing unanimity by qualified majority voting for implementing measures</b></p> <p><b>Substantiation by the EP:</b> None specifically provided.</p>	<p>The Government believes that:</p> <ul style="list-style-type: none"> <li>• replacing unanimity with QMV for measures to implement this Act would remove an important tool that the UK and other Member States have to block unwanted measures; and</li> <li>• it is contrary to the Treaties of the EP to propose a voting procedure that differs from that in Article 223(1) TFEU.</li> </ul>

## Annex 2: Draft Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

### concerning

### **a Proposed Council Decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage (“the proposal”)<sup>18</sup>**

1. The UK House of Commons firstly notes that Protocol No 2 on the application of the principles of subsidiarity and proportionality (the Protocol) applies to the proposal since it is an “initiative from the European Parliament”<sup>19</sup> and a “draft legislative act”.<sup>20</sup> The European Parliament is therefore subject to the obligations set out in Articles 1, 4, 5 and 7 of the Protocol.

2. The House of Commons considers that the proposal fails to meet the requirements of Article 5(3) TEU<sup>21</sup> and the Protocol for the following reasons:

a) It fails to comply with essential procedural requirements set out in Article 5 of the Protocol. This states that:

*“any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact, and in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative, and whenever possible, quantitative indicators. Draft legislative acts shall 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.”*

The European Parliament fails to provide this detailed statement within the draft legislative act itself as this does not contain any substantive recitals.

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<sup>18</sup> Council document: Unnumbered; European Parliament document: 2015/0907/APP.

<sup>19</sup> Article 3.

<sup>20</sup> This proposal is based on Article 223 (1) TFEU, which specifies a “special legislative procedure” and does not fall within the exclusive competence of the Union.

<sup>21</sup> Article 5(3) TEU provides that “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 or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

- b) As the Resolution<sup>22</sup> of the European Parliament and the “European Added Value Assessment on the Reform of the Electoral Law of the European Union”<sup>23</sup> are not included in the draft legislative act, the House of Commons does not consider that they meet the requirements of Article 5 of the Protocol. In any event, the substantiation they provide is insufficient to enable national Parliaments to assess compliance of the proposal with subsidiarity principle. This is because:
- i) The Resolution is mostly of a general and theoretical nature and not all of the individual proposals made in the draft legislative act have been specifically justified, either on a quantitative or qualitative basis (for example, ineligibility of members of regional parliaments and assemblies with legislative powers to become MEPs, replacing unanimity by QMV for implementing measures and posting of election materials to voters); and
  - ii) The “European Added Value Assessment does not provide sufficient substantiation. For example, apart from some very broad consideration of cost implications for Member States to implement electronic voting, the document does not contain other “*assessment of the proposal’s financial impact*”. Page 13 of the Assessment makes clear that such assessment of “feasibility” that is provided, is focussed on assessing how proposals will meet the unanimity and ratification requirement of Member States and the diversity of national electoral law on EP elections, despite the recognition that the measures could have “to varying degrees, have impacts on Member States, national political parties as well as citizens”. So there is little assessment of the burdens that will be placed on national electoral bodies as a result of measures proposed.<sup>24</sup> Furthermore, the document does not address all the measures in the proposal (in particular, those on a common deadline for the electoral roll– Article 1(4) of the Proposal and ineligibility of members of regional parliaments and assemblies to be MEPs – Article 1(8) of the Proposal.). Yet it does address measures that are not included in the proposal (common voting day and minimum voting age of 16). In any case, it is not linguistically accessible to all national parliaments<sup>25</sup> nor it is integrated into the more linguistically accessible Resolution. The House sets out further examples of deficiencies in the European Added Value Assessment in the substantive subsidiarity objections which follow.

3. The House of Commons recognises as the objective of both Article 223(1) TFEU and this proposal of creating a uniform procedure for direct universal suffrage to the European Parliament in order to enhance its democratic legitimacy through electoral equality. However, it does not consider that the objective requires harmonisation at a level of detail that in fact detracts from that legitimacy by divorcing the European Parliament’s electoral procedure from that which is well-established and recognised in Member States.

<sup>22</sup> This accompanies, but is not part of the proposal i.e. the draft legislative act.

<sup>23</sup> This is only referenced by the Resolution: “The Reform of the Electoral Law of the European Union: a European Added Value Assessment” produced by the EU Added Value Unit of the European Parliamentary Research Service, [September 2015](#).

<sup>24</sup> There is some recognition in relation to the common minimum deadline for establishing candidate lists at national level that having a different deadline to the domestic electoral deadlines could “put pressure on domestic electoral bureaucracies and parties, especially the smaller ones” (P.16).

<sup>25</sup> It has not been translated into all the official languages of the EU and it only available in English, French, German and Polish).

4. With this in mind, the House raises the following specific objections to EU level action on the grounds that the measures in question do not comply with the principle of subsidiarity<sup>26</sup>:

- a) Given the wide diversity of types of elected bodies that exist at sub-national level across Member States and their range of powers, we consider it more appropriate to leave to Member States the question of whether to make members of regional parliaments and assemblies “vested with legislative powers” ineligible to become MEPs (Article 1(8) of the proposal). There is also no assessment of the impacts of such a prohibition and no identification of any expected benefits in either the Resolution or the European Added Value Assessment;
- b) As the “European Added Value Assessment” itself recognises, the question of gender equality of candidates (Article 1(4) of the proposal) is a matter which is politically sensitive for Member States and that a “softer, non-binding approach” would be “wiser”<sup>27</sup>. A simple requirement to ensure the gender equality of candidates implies the need for legal quotas which would, in our view, require further consideration and assessment.
- c) There is potential for a decreased voter turnout in the UK for EP elections if certain administrative inconsistencies created between EU and national arrangements by the proposal meant that the UK could no longer combine them with local elections. Such inconsistencies might arise in relation to common deadlines for both lists of candidates and electoral rolls (Article 1(4) of the Proposal). This would undermine the EP’s objective of increasing voter participation in the elections (Preamble B and E of the Resolution). The House notes that it is only in relation to common deadlines for candidate lists that the potential burden of different electoral practices required by the proposal on national electoral bureaucracies is recognised by the European Added Value Assessment (Page 16). Even then, it is dismissed on the grounds that this would only be a five-yearly burden and that differences would mark out the EP elections as being distinct from other elections, without any attempt to quantify the burdens to be imposed or demonstrates why this distinction promotes the objective;
- d) The European Parliament would like Member States to use electronic voting at EP elections (Article 1(5) of the proposal). The fact that this is on a non-mandatory basis<sup>28</sup> does not exempt the European Parliament from the obligation to provide sufficient subsidiarity justification of the measure for those Member States who may adopt the measure as a result of the proposal. The House considers that the consideration of costs implications in the European Added Value Assessment on this measure is limited and unclear: the Assessment acknowledges the lack of empirical evidence linking voter turnout and electronic voting and, in default, the sole example of one Member State, Estonia, having used the system in the EP elections of 2009 and 2014 is used to justify the recommendation for all. This is despite the fact that although in 2009 turnout in that country increased by 16% compared with 2004, there was then a 7% decrease in

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<sup>26</sup> Article 5(3) TEU.

<sup>27</sup> See footnote 6, p.29.

<sup>28</sup> Though the consequential requirement to ensure the reliability of the result, secrecy of the vote and data protection is itself mandatory.

2014. The recommendation is also made despite the adverse experience of the Netherlands in piloting a system which was insecure, the German Constitutional Court having declared it unconstitutional and a generalised conclusion based on a study by one Member State<sup>29</sup> that electronic voting if used as a substitute for paper voting, could be more cost-effective (Pages 26, 27 and 28 of the Assessment). However, the House notes that the UK Government considers that the costs of implementing electronic voting in the UK could be “substantial”<sup>30</sup> and is also concerned that the uncertain integrity of electronic voting systems and the attendant risk of electoral fraud could undermine the EP’s objective of increasing its own democratic legitimacy (Preamble B of the Resolution); and

- e) The European Value Assessment provides unclear substantiation of the need for a mandatory 3-5% mandatory threshold for gaining a seat in the European Parliament (Article 1(3) of the Proposal). It describes the legal practice of mandatory electoral thresholds as “widespread” in Member States but the evidence it provides indicates that only 15 Member States have already introduced the required threshold (Page 17 of the Assessment). But the remaining 13 Member States not adopting that practice represent a sizeable number of non-practising Member States. The evident varied practice of Member States and their differing political and electoral circumstances suggests that this is a matter best decided at national level. The House also considers that such a requirement could undermine the European Parliament’s objective of enhancing its democratic legitimacy (Preamble B and E of the Resolution) and broadening its composition if, as a consequence, it excludes minority and independent candidates.

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<sup>29</sup> A study by published by the French Senate but which is not accessible from the link provided.

<sup>30</sup> See para 41 of the Explanatory Memorandum of the Minister for Europe of the UK Government (Mr David Lidington) of [4 January 2016](#).

# Formal Minutes

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**Wednesday 13 January 2016**

Members present:

Sir William Cash, in the Chair

Geraint Davies  
Richard Drax  
Damian Green  
Kelvin Hopkins  
Calum Kerr

Stephen Kinnock  
Mr Jacob Rees-Mogg  
Alec Shelbrooke  
Mr Andrew Turner  
Heather Wheeler

Draft Report, proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.25 read and agreed to.

Annexes read and agreed to.

*Resolved*, That the Report be the Nineteenth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

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[Adjourned till Wednesday 20 January at 1.45pm.]

## Standing Order and membership

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The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at [www.parliament.uk](http://www.parliament.uk).

### Current membership

- [Sir William Cash MP](#) (Conservative, Stone) (Chair)
- [Geraint Davies MP](#) (Labour/Cooperative, Swansea West)
- [Richard Drax MP](#) (Conservative, South Dorset)
- [Peter Grant MP](#) (Scottish National Party, Glenrothes)
- [Damian Green MP](#) (Conservative, Ashford)
- [Kate Hoey MP](#) (Labour, Vauxhall)
- [Kelvin Hopkins MP](#) (Labour, Luton North)
- [Calum Kerr MP](#) (Scottish National Party, Berwickshire, Roxburgh and Selkirk)
- [Stephen Kinnock MP](#) (Labour, Aberavon)
- [Craig Mackinlay MP](#) (Conservative, South Thanet)
- [Mr Jacob Rees-Mogg MP](#) (Conservative, North East Somerset)
- [Alec Shelbrooke MP](#) (Conservative, Elmet and Rothwell)
- [Graham Stringer MP](#) (Labour, Blackley and Broughton)
- [Kelly Tolhurst MP](#) (Conservative, Rochester and Strood)
- [Mr Andrew Turner MP](#) (Conservative, Isle of Wight)
- [Heather Wheeler MP](#) (Conservative, South Derbyshire)

The following member was also member of the Committee during the parliament:  
Nia Griffith MP (Labour, Llanelli)

Mae cyfyngiadau ar y ddogfen hon



Yn rhinwedd paragraff(au) ix o Reol Sefydlog 17.42

Mae cyfyngiadau ar y ddogfen hon

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