

## **From Internal Market to European Democracy**

### *Essay on the incompatibility of the 1976 Electoral Act with the 2007 Lisbon Treaty*

One year before the 2024 elections for the European Parliament, the EU faces an electoral dilemma. Will the voters be asked to go to the polls in their capacity of citizens of the Member States as the 1976 Electoral Act prescribes or will they cast their ballot in line with the 2007 Treaty of Lisbon as citizens of the Union? This essay posits that the provisions of the 1976 Electoral Act are incompatible with those of the 2007 Lisbon Treaty.

### **The importance of paradigm change**

Practical politicians tend to overlook the importance of paradigm changes. Yet, the transformation of the Communities into the EU implies the metamorphosis from an internal market to a transnational democracy. In conceptual terms, the Communities formed an association of states, whereas the EU has been constructed a democratic union of democratic states.<sup>1</sup> The relevance of these observations for the human beings inhabiting the EU polity is that they used to be regarded as nationals of the member states under the vigour of the Community regulations, whereas they are perceived as citizens of the Union by the Maastricht Treaty and the subsequent Treaties on European Union. In the utilitarian approach of the Communities, the natural persons living in the member states were treated as 'market people', i.e. as persons entitled and willing to use the economic freedoms of the internal market. The paradigm change, which the Treaties of Amsterdam and Lisbon have brought about, is that they substitute the Aristotelian vision on men and women as political beings for the utilitarian approach of the Communities. In concrete terms, the market people of the Communities had to cross an internal border in order to activate their European rights, whereas the fundamental rights of the EU citizens are protected in all situations, wherein the law of the Union is applicable.

From the political perspective, the treaties on European Union embody the emancipation of the citizens in the context of the Union. The citizens of the member states have not been asked or forced by the EU to give up their national status in exchange for the nationality of a new federal European state as many politicians and theorists of the federal school used to predict. Instead, the nationals of the member

states have received an additional status, which enables them to function as full-fledged citizens in the European Union alongside their original state. From the outset, the EU Court of Justice has made clear that the status of EU citizen is their primary status in their functioning in the Union.<sup>2</sup> More specifically, the Treaty of Lisbon 'precludes national measures, which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.<sup>3</sup> Therefore, the conclusion is warranted that the executive, administrative and judicial authorities of the EU and its Member States must sharply distinguish between the status of EU citizens and nationals of the Member States in their dealings with individual persons. In the context of the construction of the EU as a democratic Union of democratic States, it is perfectly clear that the electorate in parliamentary elections of a particular Member State consists of nationals of that Member State, whereas the European Parliament has to be chosen by the citizens of the Union.

### **Provisions on Democratic Principles**

The claim concerning the consequences of paradigm change will be substantiated at the start of this treatise with an analysis of the primary and the secondary legislation concerning the electoral system of the EU. At first sight, the provisions on democratic principles and the architecture of the 2007 Treaty of Lisbon are clear and unambiguous. Article 10, para 2, TEU proclaims in a straightforward way that the citizens shall be represented at Union level in the European Parliament. As this provision deviates from the previous treaties, which stipulated that the European Parliament consisted of 'representatives of the peoples of the States, brought together in the Community, article 223 of the Treaty on the Functioning of the European Union instructs the European Parliament and the Council to lay down the provisions necessary for the election of the Members of the European Parliament by direct universal suffrage. Fifteen years after the entry into force of the Lisbon Treaty, however, article 223 TFEU has yet to be implemented.<sup>4</sup>

In this connection, it may be recalled that the EU consists of states and citizens and that it is based on values. As article 1 TEU prescribes that the dual aim of the EU is to create and ever closer union among the peoples of Europe and to

ensure that decisions are taken as closely as possible to the citizens, the construction of the polity presupposes democratic governance at all levels. This conceptual presumption is explicitly confirmed by article 49 TEU, which makes accession of new member states conditional on their respect for the EU's values.<sup>5</sup> The value of democracy, which article 2 TEU contains alongside the values of human dignity, freedom, equality, the rule of law and respect for human rights, is elaborated in Title II TEU, which precedes the provisions on the institutions of the Union. As these values apply to both the member states and the Union, it may be concluded that the EU has been constructed as 'a democratic union of democratic states'.

Title II TEU consists of articles 9 to 12.<sup>6</sup> Article 9 TEU accentuates the equality of the citizens, stipulates that the citizens of the member states shall also be citizens of the Union and explicates that EU citizenship does not replace national citizenship. Instead, EU citizenship is additional to the national status of the citizens. It follows that the subsequent articles of Title II TEU are exclusively addressing the citizens of the Union. They shall be represented at Union level in the European Parliament and they shall have the right to participate in the political life of the Union. In its fourth paragraph, article 10 ordains moreover that political parties at European level contribute to forming European political awareness and to expressing the will of the citizens of the Union.

### **Conflicting secondary legislation**

Commendable as these provisions on the democratic principles of the Union may be, the non-implementation of article 223 TFEU implies that they have remained a dead letter so far. This inertia is most regrettable as the Electoral Act has been conceived in the context of the internal market-template. In line with the overall approach of that period, it addresses the voters as citizens of the States brought together in the Communities. So, the constitutional contradiction resulting from the failure to adapt the 1976 Electoral Act to the Treaty on European Union is that the voters will not be asked to cast their ballot as 'citizens of the Union' but rather as 'citizens of the Member States brought together in the Union'.<sup>7</sup> As article 9 TEU explicitly states that EU citizenship shall be additional to national citizenship, the conclusion that the Council will make itself guilty of electoral negligence if it fails to act in time, can hardly

be avoided. The essence of dual democratic citizenship is that the citizens are entitled to contribute to the political life of their different polities in their corresponding capacities. The last thing the electoral authorities should do in the EU as a democratic union of democratic states is to confuse the two statuses by inviting national citizens to participate in European elections and the other way around.

### **The counterargument of article 14 (2) TEU**

The argument brought forward by the advocates of the current practice is that article 14, para 2, TEU prescribes not only that the European Parliament shall be composed of representatives of the Union's citizens but also that representation of the citizens shall be degressively proportional, with a minimum threshold of six member per Member State. This provision is regarded as the basis or *passarelle* for the application of the 1976 Electoral Act in the elections for the European Parliament, held after the entry into force of the Treaty of Lisbon in December 2009. While the advocates of the current practice realise that article 223 TFEU instructs the Council to lay down the provisions necessary for the election of the Members of the European Parliament by direct universal suffrage, they prefer to leave the procedure as it is. Despite persistent efforts from the side of the European Parliament to break the deadlock by submitting detailed proposals for the adaptation of the 1976 Electoral Act to the 2007 Lisbon Treaty, the Council has so far refrained from fulfilling its constitutional obligation.<sup>8</sup> It seems to argue that, in the absence of a new arrangement, the 1976 Electoral Act can be applied again in the 2024 elections.<sup>9</sup>

This line of thought cannot be maintained. It entirely negates the paradigm change brought about by the transformation of the European polity from internal market to transnational democracy. The ECJ's jurisprudence concerning the status of EU citizens may serve to illustrate the profound if not revolutionary character of the change over. Moreover, it disregards the structure of the treaties, violates the provision of article 9 TEU concerning the differentiation between Union citizens and nationals of the Member States and fails to account for the functioning of political parties at European level. In short, it prolongs the paradoxical situation in which the EP considers the EU as a European democracy, while the Council acts on the presumption that the EU continues to be a confederal association of states.

## **The structure of the Treaties**

As each treaty represents a new stage in the process of creating an ever closer union between the peoples of Europe, the EU should be studied neither without reference to its historical development nor without regard to the structure of the treaties. At the start of this essay, it has already been pointed out that article 1 TEU has been written in such a manner that it presupposes the EU to function as a European democracy, that is as a democratic union of democratic states. The intention of article 1, para 2, TEU to take decisions as openly as possible and as closely as possible to the citizens can only be realised if both the union and the participating states work as democracies. This assumption is confirmed by the inclusion by virtue of article 12 TEU of the national parliaments of the Member States in the legislative process of the Union.

Seen in this perspective, it is self-evident that respect for democracy and for the rule of law have been included in the values of article 2 TEU. In consequence, the subsequent provisions of the treaties must be interpreted in line with the democratic and constitutional principles preceding them. The citizens are no longer contributing to the functioning of an internal market but to the well-being of a democratic polity. The ECJ has highlighted the far-reaching consequences of this fundamental alteration in its case-law on the freedom of movement and residence by lifting the so-called cross-border requirement.<sup>10</sup> The conclusion is therefore warranted that, although the natural persons concerned remain the same, the nationals of the Member States brought together in the Communities function in another capacity than the citizens of the Union. As the Court established already in 2001, EU citizenship is the primary status of the natural persons involved in the functioning of the Union.<sup>11</sup> It follows that participation in the elections for the European Parliament is a right of the citizens of the Union rather than a prerogative of the nationals of the Member States as the current interpretation of article 14, para 2, TEU holds.

## **European Citizens' Initiative**

The argumentation that the Lisbon Treaty constructs the EU as a transnational democracy, finds support in the provision concerning the European Citizens Initiative of article 11, para 4, TEU. The article grants the citizens of the Union the right 'to take the initiative of inviting the European Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'. Article 11 TEU sets the condition that the initiative must be supported by at least one million citizens who are nationals of a significant number of Member States and leaves further details to secondary legislation to be adopted in line with article 24 TFEU by the Parliament and the Council.<sup>12</sup> The relevance of this provision for the debate about the electoral system of the EU is that Title II TEU does not address the citizens in their capacity of nationals of the Member States -as the 1976 Electoral Law continues to do- but grants them the right of initiative as citizens of the Union. As the provisions on the democratic principles of Title II TEU do not differentiate between two categories of EU citizens, it will be unconstitutional for the secondary laws of the Union to do so.

### **Pan-European political parties & Spitzenkandidaten**

The third reason why the 2024 EP elections should not be held under the vigour of the 1976 Election Act stems from the same institutional incapacity or -worse- unwillingness to account for the transition of the Communities as an internal market to the Union as a democratic polity. In contrast to the provisions of the Community-treaties, the TEU expresses in article 3, para 2, the determination 'to offer its citizens an area of freedom, security and justice without internal borders'. In the context of the Lisbon Treaty, the provision of article 10, para 4, concerning political parties at European level relates specifically to the area of freedom. If there is no common territory, there is also no need for transnational political parties. On the other hand, if there is an area of freedom in which the peoples are to live together in a democratic way, there should be political parties at the level of that area. As the 1976 Electoral Act has been drafted in the context of the internal market, it does not contain provisions on the functioning of political parties at European level. In current reality, it prevents political parties aiming to express the will of the citizens of the Union to do so. Consequently, political parties presenting themselves as pan-European parties like Volt are entitled to address the court on the ground that regulations blocking their

participation in the elections for the European Parliament contravene article 10, para 4, TEU and must therefore be adjusted.

In addition, it does not require much imagination to see that, if parties at European level should be able to compete in European elections, political parties should also be entitled to organise themselves at Union level and to nominate their electoral frontwomen and men. In post Lisbon Treaty-elections, transnational lists and *Spitzenkandidaten* should be the norm rather than the exception. The overall conclusion of these reflections on the EU's electoral system is that article 14, para 2, TEU cannot be interpreted in such a way that it should make the provision on the democratic principles of Title II illusory. It may be underlined in this connection that article 11, para 4, TEU on the citizens initiative offers an example of how the concepts of EU citizenship and the status of nationals of Member States can be reconciled for the purposes of the electoral system of the EU. The current interpretation of article 14 TEU forms a stumbling block on the EU's long and winding road from internal market to European democracy, the impact of which is comparable to that of the problems concerning the rule of law, which have been addressed by the EU Court of Justice in its verdicts on the conditionality mechanism of 16 February 2022.<sup>13</sup> Politicians and political parties affected by the confederal interpretation as well as the European Parliament should use all legal means at their disposal in order to bring the secondary legislation concerning the electoral system of the EU in line with the provisions on the democratic principles of Title II TEU before the next elections.

### **A democratic Union of democratic States**

In line with tradition, the Lisbon Treaty describes itself in article 1 as a new stage in the process of creating an ever closer union among the peoples of Europe. The present investigation perceives it more specifically as a further stage in the evolution of the EU from an internal market to a European democracy. This approach makes it possible to establish the diagnosis that the EU is constructed as a democratic union of democratic states but functions with respect to its electoral system as a confederal association of states. In a vibrant democracy with articulate citizens like the European Union, it seems but a matter of time, if the institutions continue to fail to comply with

their constitutional obligations, before the courts of the polity will be addressed by citizens and their political parties with the request to provide clarity with respect to such quintessential matters as its electoral system.

---

<sup>1</sup> J. Hoeksma, *The Democratisation of the European Union*, Eleven The Hague 2023

<sup>2</sup> ECJ (2001), *Case Grzelczyk versus Centre publique d'aide social d'Ottignies-Louvain-la-Neuve* of 20 September 2001, ECLI:EU:C:2001:458

<sup>3</sup> ECJ (2011), *Case Ruiz Zambrano versus Office national de l'emploi (ONEm)* of 8 March 2011, ECLI:EU:C:2011:124

<sup>4</sup> R. Hrbek, *The Arduous Way Towards a Uniform Electoral System for the European Parliament*, in: O. Costa, *The European Parliament in times of EU crisis: Dynamics and Transformations*, Springer 2019

<sup>5</sup> Since 1993 known as the Copenhagen Criteria.

<sup>6</sup> A. von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organisations*, *The European Journal of International Law*, Vol 23, no 2

<sup>7</sup> W. van Gerven, *The European Union: a Polity of States and Peoples*, Stanford 2005

<sup>8</sup> Proposal for a Council Regulation on the election of the Members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC,EEC,Euratom) and the European Electoral Act, Rapporteur Ruiz Devesa, Legislative Train 05.2023, 18 Constitutional Affairs/AFCO

<sup>9</sup> O. Costa and S. van Hecke (eds), *The EU's Political System After the 2019 European Elections*, Palgrave McMillan 2023

<sup>10</sup> K. Lenaerts, 'Civis Europaeus Sum': From the Cross-border Link to the Status of Citizen of the Union, in: Cardonnel, Rosas & Wahl, *Constitutionalising the EU judicial system*, Oxford 2012

<sup>11</sup> Supra note 3

<sup>12</sup> Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 (OJ L 130 17.5.2019)

<sup>13</sup> ECJ (2022). *Cases Poland and Hungary versus Parliament and Council* of 16 February 2022, ECLI:EU:C:2022:98 and ECLI:EU:C:2022:97 Jurisprudence confirmed in case C 204/21, *Commission versus Poland* of 5 June 2023