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Making the Most of Transnational Lists

Electoral Equality at EU Level Through Proportional Compensation

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INTRODUCTION

The introduction of transnational lists is one of the most prominent approaches for a reform of the European electoral law (see Verger 2018, Diaz Crego 2021, with many other examples). The proposal goes back to the 1990s and was discussed several times in the European Parliament (EP), in particular in the debate on the so-called Duff Report (Duff 2012). In the context of the United Kingdom's exit from the EU, the idea was raised again by French President Emmanuel Macron (2017) and supported by several other member states' governments. Various options are being discussed for certain design aspects – for example regarding the size of the transnational seat contingent, the use of preferential votes, etc. (Müller 2020, Diaz Crego 2021: 23–31). Although the proposal has so far failed to achieve the necessary majority in the EP and unanimity in the Council, the political debate around it remains lively. Currently, transnational lists are one of the ideas that have received most endorsements on the digital platform of the Conference on the Future of Europe (Kantar Public 2021: 62) and play a central role in the Draft Report on electoral reform that is currently discussed in the EP (Ruiz Devesa 2021).

A variety of advantages are expected from transnational lists (Müller 2021, Diaz Crego 2021: 4–5 with more references). In the first place, they would strengthen the European political parties, increasing their political power and relevance through the right to draw up electoral lists. This increased role of the European political parties in the electoral campaign would also give visibility to their transnational platforms and foster transna-

tional opinion-formation in the public sphere. Finally, transnational lists would strengthen the leading-candidates (*Spitzenkandidaten*) procedure and thus increase the influence of European voters on the appointment of the EU Commission.

There is, however, an even more fundamental benefit of transnational lists concerning the formal legitimacy of the EP – more specifically, the question of transnational electoral equality. Under the current system, the EP is elected in national constituencies with separate seat contingents, whose size is »degressively proportional« to the number of inhabitants. As a consequence, larger member states elect fewer MEPs per inhabitant than smaller member states. While there are good reasons for this degressive proportionality – in particular, to guarantee an adequate representation of the party systems of the smaller member states in the EP –, the fact that votes cast in large member states have a lower success value is a serious breach of the principle of electoral equality and impairs the legitimacy of the EP as a democratic representative body. As will be shown in more detail below, this is not only a political, but also a constitutional problem and a legal obstacle to a further institutional deepening of the EU.

With the introduction of transnational lists, the principle of »one person, one vote« would be applied for the first time at a transnational level. However, the scope of its effect on electoral equality would strongly depend on how transnational lists are designed and implemented. The currently discussed models usually envisage the introduction of an additional EU-wide constituency that would be entirely separate from the national seat contingents. With such a model, the ef-

fect on transnational electoral equality would be limited to the relatively small EU-wide seat contingent. There would still be no electoral equality for the composition of the EP as a whole.

This policy paper presents a possibility to go one step further and **use transnational lists to achieve EU-wide proportionality among the political groups in the EP. To this end, it is necessary that the seats from the EU-wide constituency are not allocated separately from the national seat contingents but used for proportional compensation at the European level.** Thus, the number of seats that an individual transnational lists obtains from the EU-wide seat contingent would not correspond directly to the percentage of votes that this list has achieved. Rather, the seats from the EU-wide contingent would be allocated in such a way that, **taking into account the national seat contingents, the seat share of each European party family in the EP would correspond to its share of the EU-wide (transnational) vote.**

This system of proportional compensation would allow to keep the degressive proportionality of the national seat contingents, so that the smaller states would continue to be adequately represented in the EP. At the same time, however, it would also ensure that the balance of power between the political groups in the EP reflects the democratic will of the European population as a whole, giving each vote an equal weight. It thus offers an outstanding opportunity to live up to the potential of transnational lists to strengthen the formal legitimacy of the EU.

This Policy Paper will first give a short analysis of the problem of degressive proportionality and the lack of transnational electoral equality. It will then present the model of a multi-tier electoral system with proportional compensation, illustrating it with calculation examples. Finally, the paper deals with an important side condition for the implementation of such a model, namely the avoidance of »overhanging« national seats.

ELECTORAL EQUALITY AND DEGRESSIVE PROPORTIONALITY

Electoral equality is the fundamental principle that every voter must have an a priori equal chance of influencing the overall outcome of the election. In the intuitive understanding of most people, this principle belongs to the core of what constitutes a democracy. **In the case of EP elections, however, electoral equality only exists within the single national constituencies, not at the EU level.** Due to the seat allocation rules, some votes possess a higher success value than others, i.e., they have greater impact on the composition of the EP. This inequality in the EP is higher than in other democratic parliaments within and beyond Europe (Tailor/Véron 2014).

DEGRESSIVE-PROPORTIONAL REPRESENTATION OF THE MEMBER STATES

The most important cause of these distortions is the so-called degressive proportionality in the size of the national seat contingents. EP elections are currently taking place in the form of 27 simultaneous national elections, in which citizens elect a

fixed number of MEPs in each member state. Although seat contingents of larger states are bigger than those of smaller ones, the number of seats does not increase at the same rate as the population of the states. Therefore, **smaller states have more MEPs per inhabitant than larger ones**; votes cast in smaller countries have a greater impact on the composition of the Parliament than votes cast in larger countries. The two extremes are Germany with 96 MEPs for around 65 million eligible voters and Malta with 6 MEPs for less than 0.4 million eligible voters – a distortion factor of more than 10.

Another cause of distortions are differences in national voter turnout, which are not compensated by the electoral system. Because of the fixed national seat contingents, **votes cast in a country with low turnout have relatively more impact than votes cast in a country with high turnout.** For the last two EP elections, the two extremes were represented by Belgium and Slovakia, with a turnout of 89.6 % and 13.1 % in 2014 and 88.5 % and 22.7 % in 2019 – a distortion factor of 6.8 and 3.9, respectively.

The distortions caused by differences in turnout are an inevitable consequence of fixed seat contingents. The principle of degressive proportionality, on the other hand, has been a political choice that can be explained by the enormous differences in size between the member states. If the national seat contingents in EP elections faithfully reflected the population figures, Germany would have to elect around 200 times as many MEPs as Malta, Luxembourg, or Estonia. Consequently, even if the smallest states were only allowed to elect a single MEP, the EP would grow to over a thousand members.

The principle of degressive proportionality is therefore an attempt to find a middle ground: On the one hand, it should enable even the smallest member states to hold meaningful EP elections and to have their national party system reflected within the EP. On the other hand, it is intended to prevent the EP as a whole from growing to a size that is no longer manageable. According to a widespread view, **European electoral law is therefore a compromise between the principles of »equality of citizens« and »equality of states«** (Habermas 2014, Duff 2014, von Achenbach 2014: 425–430).

DISTORTIONS IN THE SEAT SHARE OF POLITICAL GROUPS

Indeed, **the fact that MEPs from smaller member states are over-represented in the EP is not necessarily a democratic problem** per se. In general, voting patterns in the EP do not primarily follow national lines, but parliamentary groups. Within the groups, politically influential positions are often assigned to MEPs from larger states.¹ Overall, there is no indication that the interests of either smaller or larger states are dominating in EP policymaking.

¹ For example, 8 of the 11 current group presidents and 17 of the 27 committee chairs have been elected to the EP in one of the four largest member states (cf. <https://www.europarl.europa.eu/meps/en/search/advanced?bodyType=OTH&bodyCode=BCPR>, <https://www.europarl.europa.eu/meps/en/search/advanced?bodyType=OTH&bodyCode=PRCO>).

Table 1
Vote and seat share in past EP elections

Election 2014 (751 seats)						
Group	Votes	Vote share	Seats (ideal)	Seats (real)	Seat share (without NI)	Votes per seat
GUE/NGL	12,931,666	8.83 %	62	52	7.44 %	248,686
G/EFA	12,367,883	8.45 %	59	50	7.15 %	247,305
S&D	41,139,131	28.10 %	196	191	27.32 %	215,388
ALDE	13,966,066	9.54 %	67	67	9.59 %	207,471
EPP	40,375,501	27.58 %	193	221	31.62 %	182,695
ECR	13,916,852	9.51 %	66	70	10.01 %	184,469
EFDD	11,688,459	7.98 %	56	48	6.87 %	243,510
NI and other parties	(18,611,211)		(52)	52		
Election 2019 (without UK, 705 seats)						
Group	Votes	Vote share	Seats (ideal)	Seats (real)	Seat share (without NI)	Votes per seat
GUE/NGL	11,893,812	7.27 %	49	40	5.90 %	292,715
G/EFA	19,339,119	11.82 %	80	68	10.03 %	282,916
S&D	34,467,330	21.06 %	143	148	21.83 %	232,887
ALDE	22,443,746	13.72 %	93	97	14.31 %	230,753
EPP	40,225,832	24.58 %	167	187	27.58 %	215,111
ECR	14,098,205	8.62 %	58	62	9.14 %	227,390
ID	21,157,867	12.93 %	88	76	11.21 %	278,393
NI and other parties	(17,365,645)		(27)	27		

Methodological notes: *Number of votes:* The votes of each parliamentary group include the votes for national parties, lists, or candidates who (a) were group members in the constituent session of the EP after the election, (b) did not enter the EP, but were members of the group before the election, or (c) were not represented in the EP either before or after the election but belonged to a European political party attached to the group. The »NI and other parties« category includes parties, lists, or candidates who (a) were non-attached in the constituent session of the EP after the election, (b) did not enter the EP but were non-attached before the election, (c) were not represented in the EP before or after the election and did not belong to any European political party. If MEPs elected on the same national list split up into different parliamentary groups, the votes for this list were divided among the respective groups in the same proportion as the MEPs on that list. *Vote share:* Share of the votes of a parliamentary group in relation to the total number of votes cast across the EU, without considering the votes for »NI and other parties«. *Ideal seats:* Number of seats that the parliamentary group would be entitled to according to its vote share following the largest-remainder allocation method (Hare quota), without considering votes and seats for NI and other parties. Example (S&D, 2014): $28.10\% \times (751 - 52) = 196.44$, rounded to 196. *Real seats:* number of seats of the parliamentary group in the constituent session of the EP (in the last example including the posterior seat changes due to Brexit). *Seat share:* Share of the group's real seats in relation to the EP as a whole. *Votes per seat:* quotient of the group's votes and real seats, rounded.

However, the electoral distortions caused by degressive proportionality and differences in national turnout do not only affect the representation of member states' populations, but also the relative strength of the political groups in the EP. Since member states show different voting behaviour, any European party is usually stronger in some member states than in others. Without transnational electoral equality, this means that the **share of seats held by the political groups in the EP does not necessarily match the share of votes that the corresponding parties received in the EP elections.**

The calculation examples in table 1, based on the EP elections of 2014 and 2019, indicate the extent of these distortions. Political groups with relatively strong results in large countries with a high turnout – especially Germany (G/EFA in 2014 and 2019) and Italy (S&D in 2014, ID in 2019) – were disadvantaged by the electoral system.

From a political point of view, the most relevant and momentous effect of these distortions concerns the 2014 European elections. Although the S&D group obtained slightly more votes than the European People's Party, the EPP achieved significantly more seats and became the largest group in the EP. In connection with the successful leading-candidates procedure of that year, this also had an important impact on the election of the European Commission: Since the European Socialists accepted the EPP's leadership as the strongest political group, it was Jean-Claude Juncker, and not Martin Schulz, who became Commission President.

CONSTITUTIONAL IMPLICATIONS

This lack of transnational electoral equality has repeatedly been criticized in the political debate. Especially in Germany (which, as the largest member state, is particularly affected by the degressive proportionality), even pro-European authors have denounced it as a serious legitimization problem (e.g. Guérot 2017, Winkler 2019). The EP itself identified a need of »reinforcing the concept of citizenship of the Union and electoral equality« in its 2015 resolution on the reform of the electoral law (European Parliament 2015, cf. also Kalczik/Wolff 2017: 2–3).

The issue is not limited to the political arena, however, but also has concrete implications in constitutional law. In its *Lisbon* judgment of 2009, **the German Federal Constitutional Court (FCC) cited the lack of electoral equality as the main formal reason for the EU's deficit of democratic legitimacy** (Federal Constitutional Court 2009: paras. 276–297). Due to the principle of degressive proportionality, »the European Union lacks a political decision-making body created in equal elections by all citizens of the Union and with the ability to uniformly represent the will of the people. [...] If a narrow decision between opposing political groupings is taken in the European Parliament, there is no guarantee of [sic] the majority of votes cast also represents a majority of Union citizens«. Therefore, according to the judges, »the European Parliament is not a representative body of a sovereign European people«, but only »a representation of the peoples of the Member States«.

From this, the FCC drew the conclusion that the EU can only be an »association of sovereign states« and cannot develop into a supranational parliamentary democracy. In particular, »the formation, from within [the European] Parliament, of an independent government vested with the competences that are usual in states would meet with fundamental objections« by the FCC. Moreover, the *Lisbon* judgment prescribes that Germany must always retain a national right of veto on key European policies, such as defence, fiscal, or social policy decisions.

Regardless of the argumentative value of this reasoning, the FCC is a de facto veto player in every substantial EU reform. The restrictive jurisprudence based on the *Lisbon* judgment has therefore significantly limited the capacity of the German government to agree to majority voting at the EU level.² Thus, **the lack of transnational electoral equality is not only a central obstacle for the parliamentarisation of the EU's political system, but also for its capability to act in important policy areas.**

With a view to the institutional development of the EU, it is therefore highly desirable that the FCC amends its restrictive line in the future and grants the EP a greater role in legitimising European policy decisions. To make this possible, it is necessary for the EP to meet the criterion formulated in the *Lisbon* judgment that »the majority of votes cast also represents a majority of Union citizens«. The decisive factor for this is that **the seat share of the political groups in the EP should correspond to their respective EU-wide share of the votes.**

A MULTI-TIER SYSTEM WITH PROPORTIONAL COMPENSATION

The reform of the European electoral law therefore faces the challenge of combining two goals. On the one hand, it should **preserve the principle of degressive proportionality for the national seat contingents**, so that the national party systems of smaller member states continue to be adequately represented in the EP. On the other hand, however, there should be an **approximation to direct proportionality for the vote and seat shares of the political groups** in order to achieve electoral equality. At first glance, these two goals seem contradictory. However, they can be combined by a model of proportional compensation through transnational lists.³

² The European Stability Mechanism, for example, was only accepted by the Court because Germany maintained a veto (technically a blocking minority of the capital shares) over all decisions on financial assistance – while most other member states accepted the possibility of being outvoted in the emergency voting procedure (cf. Müller 2014).

³ As an alternative approach to combine both goals, it has been suggested to apply a variant of the so-called »double proportionality« system that is used in some Swiss cantons to EP elections (Pukelsheim 2017:266–272). According to this system, specific divisors could be applied both to each political group and each member state, in such way that the seat share of each party would be proportional to its EU-wide vote share while maintaining the existing national contingents. However, since the overall seat share would be determined mostly by the vote share in the larger member states, such a system could lead to a situation in which the composition of the smallest member states' seat contingents is very different from their national vote share. This would contradict the primary reason of degressive proportionality, i.e. the adequate

Table 2
Calculation example for a simplified EP model

Scenario 1 (parallel voting without compensation)					
	Party A	Party B	Party C	Party D	NI
Vote share (EU-wide lists)	35 %	33 %	17 %	15 %	–
Seats from national contingents (180)	57	58	27	23	15
Seats from EU-wide contingent (20)	7	7	3	3	–
Overall seats (200)	64	65	30	26	15
Overall seat share	32 %	32.5 %	15 %	13 %	7.5 %
Overall seat share (without NI)	35 %	35 %	16 %	14 %	–

EU-wide vote share corresponds to seat share from EU-wide contingent

Scenario 2 (proportional compensation)					
	Party A	Party B	Party C	Party D	NI
Vote share (EU-wide lists)	35 %	33 %	17 %	15 %	–
Seats from national contingents (180)	57	58	27	23	15
Seats from EU-wide contingent (20)	8	3	4	5	–
Overall seats (200)	65	61	31	28	15
Overall seat share	32.5 %	30.5 %	15.5 %	14 %	7.5 %
Overall seat share (without NI)	35 %	33 %	17 %	15 %	–

EU-wide vote share corresponds to overall seat share (without NI)

The core idea of transnational lists consists in the establishment of an EU-wide constituency with its own seat contingent. In most proposals, this is modelled according to a »parallel voting« system, i.e., a system that completely separates the allocation of seats for the EU-wide seat contingent from the national contingents. With this approach, each voter would have two votes. The first would go to a national party list and determine the composition of the national seat contingent; the second would go to a transnational list and determine the composition of the EU-wide contingent.

With the model of proportional compensation presented here, by contrast, the allocation of seats for the national and European contingents would be connected. The nation-wide share of the first votes would still determine the composition of the respective national contingent. The EU-wide share of second votes, however, would not only determine the composition of the EU-wide contingent, but the composition of the EP as a whole. The allocation of the European seat contingent would therefore not take place separately from the national contingents, but in such a way that, **taking into account the national seat contingents, the seat share of each European party family in the EP would correspond to the share of its EU-wide (second) votes.** National parties that enter the EP without belonging to a European party family and running on a transnational list – such as the non-attached (»non-inscrits«, NI) parties –, would not be considered for the proportional compensation.

representation of the national party systems of smaller member states. The calculation example in Pukelsheim 2017:268–272 avoids this problem by using a fictional EP with only 72 seats, in which 16 member states have only one seat, which is automatically allocated to the strongest party. This would not be possible in the real EP, where seat contingents comprise at least 6 seats.

The calculation example in table 2 can illustrate the procedure. For this purpose, we assume a simplified model with four European parties and an EP with 200 seats, 20 of which are allocated via transnational lists. In the example, party A obtained slightly more votes than party B, but party B won more seats from the national contingents (somewhat similar to the result of the real 2014 EP elections). 15 seats from the national contingents go to »NI« parties that are not affiliated to any European party family and do not run on a transnational list.

In **scenario 1** – a parallel voting system **without compensation** – the number of seats each party wins from the EU-wide contingent is proportional to their pan-European share of the vote. The parties with a higher vote share (A and B) receive more additional seats than the parties with a smaller vote share (C and D). However, party B can maintain its seat lead from the national contingents and remains over-represented in the overall result.

In **scenario 2**, by contrast, the seats in the EU-wide contingent are used for **proportional compensation**. Party B, which is over-represented in terms of its seat share from national contingents, receives correspondingly fewer seats from the EU-wide contingent. As a result, the overall seat share of each party coincides with its EU-wide share of the vote.⁴

Given that this model would not bring about any change for the size or composition of the national seat contingents, the principle of degressive proportionality would remain in force with regard to the representation of the member states. At the same time, however, it would **ensure transnational electoral equality in the sense that the balance of power among the European party families in the EP would reflect their share of the EU-wide vote**.

THE PROBLEM OF OVERHANGING SEATS

For the implementation of such a system of proportional compensation, however, it is necessary to take into account the problem of overhanging seats. **Overhanging seats can arise if the number of seats won by a European party from the national contingents is already greater than the overall number of seats that would correspond to its EU-wide vote share.** In this case, it is not possible to have full proportional compensation. Even if the party is not allocated a single seat from the EU-wide contingent, it will remain over-represented in the EP.

⁴ In detail, the number of seats from the EU-wide contingent is calculated as follows: 1. The number of NI seats is subtracted from the number of overall seats (200 – 15 = 185). 2. The remaining seats are proportionally allocated to the parties to their EU-wide vote share (e.g. party A: $185 \times 35\% = 64.75$, rounded to 65). This is the total number of seats of the party. 3. From this total number, the number of seats the party has received from the national contingents is subtracted (party A: $65 - 57 = 8$). This is the number of seats the party receives from the EU-wide seat contingent. – Please note that for the sake of simplicity, the Hare method is used for proportional allocation in all calculation examples in this paper. In practice, any other proportional allocation method, such as d'Hondt or Sainte-Laguë, might equally be used.

Since the number of seats in the EP is fixed at 751, the risk of such overhanging seats cannot be avoided entirely. However, there are two factors that have a strong influence on how great this risk is: the size of the EU-wide seat contingent and the correct attribution of national parties to European party families. It is therefore important to pay particular attention to these aspects during implementation.

SIZE OF THE EU-WIDE SEAT CONTINGENT

The possibility that full proportional compensation can be ensured through transnational lists increases with the relative size of the EU-wide seat contingent. **If there are only few EU-wide seats, the probability of overhanging seats is higher.**

The following calculation examples illustrate this based on the real results of the 2014 and 2019 EP elections, in each case excluding the United Kingdom. For the sake of simplicity, the example assumes that the transnational lists would not be drawn up by the European parties, but by the political groups in the EP.⁵ In addition, the example assumes that every voter would have voted for the transnational list of the political group to which the national party they voted for belongs.

The first scenario (table 3) assumes today's national seat contingents (705 seats in total), to which 46 EU-wide seats would be added. The total number of seats would thus be 751, the maximum foreseen in the EU Treaty. Of these, the EU-wide contingent would amount to slightly less than one-sixteenth.

As can be seen, the EPP in 2014 and 2019 as well as the ALDE in 2014 would have obtained overhanging seats. Moreover, the RE in 2019 and the ECR in 2014 and 2019 would not have won any seat from the transnational lists, as they had already exhausted their overall seat share from the national seat contingents. Therefore, the leading candidates of these parties' transnational lists would not have entered the EP (unless they had also run on a national list).

If the total size of the EP is to remain fixed at 751 seats, the only way to increase the number of EU-wide seats is to reduce the national seat contingents. In the second scenario, each national seat contingent is therefore reduced by one twelfth (with standard rounding, so that the smallest contingents remain with six seats, the minimum number stipulated in the EU Treaty). This would reduce the total number of national seats to 646, while the EU-wide contingent could increase to 105 seats – a share of slightly less than one-seventh of the total size of the EP (table 4).

As can be seen in table 5, this increase of the number of EU-wide seats suffices to ensure full proportional compensation

⁵ This simplification is not only useful for reducing the complexity of the calculation example, but also because membership in European parties is currently not clearly defined. For example, some European parties differentiate between »full member parties« and »observer parties« or offer MEPs the possibility to be individual members without simultaneous membership of their national party. This makes it difficult to clearly attribute national party votes to European party families.

Table 3
Calculation examples for proportional compensation (705 national seats, 46 EU-wide seats)

Based on EP election results 2014								
	GUE/NGL	G/EFA	S&D	ALDE	EPP	ECR	EFDD	NI
Votes (EU-wide lists)	12,771,853	10,610,943	37,118,485	12,878,433	40,375,501	10,040,865	7,115,471	–
Vote share (EU-wide lists)	9.76 %	8.11 %	28.35 %	9.84 %	30.84 %	7.67 %	5.44 %	–
Ideal proportional seat allocation (751)	68	57	198	69	216	54	38	(51)
Seats from national contingents (705)	57	48	176	71	226	53	23	51
Seats from EU-wide contingent (46)	9	7	16	0	0	0	14	–
Overall seats (751)	66	55	192	71	226	53	37	51
Based on EP election results 2019								
	Left	G/EFA	S&D	RE	EPP	ECR	ID	NI
Votes (EU-wide lists)	11,893,812	19,339,119	34,467,330	22,443,746	40,225,832	14,098,205	21,157,867	–
Vote share (EU-wide lists)	7.27 %	11.82 %	21.06 %	13.72 %	24.58 %	8.62 %	12.93 %	–
Ideal proportional seat allocation (751)	53	86	152	99	178	62	94	(27)
Seats from national contingents (705)	40	68	148	97	187	62	76	27
Seats from EU-wide contingent (46)	12	16	2	0	0	0	16	–
Overall seats (751)	52	84	150	97	187	62	92	27

Methodological notes: The attribution of votes and seats from national parties to European political groups follows the same methodology as in table 1. *Ideal proportional seat allocation:* The number of NI seats always corresponds to the number of NI seats from national contingents. To calculate the ideal allocation for political groups, the number of NI seats is subtracted from the total number of EP seats (751) and the remaining seats are proportionally allocated among the groups. *Seats from national contingents:* Calculated according to the real national election results and the current national system for EP elections. *Overall seats:* The number of seats of NI parties and of »overhanging« groups always corresponds to their number of seats from national contingents. To calculate the overall seats of the remaining groups, the number of seats of NI parties and of »overhanging« groups is subtracted from the overall number of seats and the remaining seats are proportionally allocated among the remaining groups. *Seats from EU-wide contingent:* The EU-wide seats are calculated as the difference between a group's overall seats and its seats from national contingents.

Table 4
Seat contingents in the calculation examples

Total	751	751	751
EU-wide contingent	46	105	76
National contingents	705	646	675
DE	96	88	88
FR	79	72	72
IT	76	70	70
ES	59	54	54
PL	52	48	48
RO	33	30	33
NL	29	27	29
BE	21	19	21
EL	21	19	21
CZ	21	19	21
HU	21	19	21
PT	21	19	21
SE	21	19	21
AT	19	17	19
BG	17	16	17
DK	14	13	14
FI	14	13	14
SK	14	13	14
IE	13	12	13
HR	12	11	12
LT	11	10	11
LV	8	7	8
SI	8	7	8
EE	7	6	7
CY	6	6	6
LU	6	6	6
MT	6	6	6

both with the electoral results of 2014 and 2019. No political group would have had any overhanging seats from the national contingents. Consequently, all groups would have obtained at least some seats from their transnational lists, allowing all leading candidates to enter the EP.

However, such a large increase in the EU-wide contingent is not absolutely necessary. Even with a smaller number of transnational seats, a far-reaching – if not complete – proportional compensation could be achieved. In the third scenario, only the contingents of the five largest states (Germany, France, Italy, Spain, Poland) are reduced by one twelfth, while all other countries retain their current number of seats.⁶ This reduces the total number of seats from national contingents to 675, leaving 76 seats (a share of one tenth of the total size of the EP) available for the EU-wide contingent.

As table 6 shows, this scenario would not have avoided overhanging seats entirely: The ALDE in 2014 and the EPP in 2019 would have obtained a small number of seats more than in an ideal proportional allocation. However, the resulting distortions are only minor and would not have affected the overall balance of power in the EP.

In summary, it can be observed that the relative size of the EU-wide seat contingent has a strong effect on the risk of overhanging seats and, therefore, the feasibility of a full proportional compensation through transnational lists. While an EU-wide contingent of only one-sixteenth of the EP seats (46 of 751) would have led to a significant amount of overhanging seat in the elections of 2014 and 2019, a contingent of one-seventh (105 of 751) would have been sufficient for full proportional compensation. With an EU-wide contingent of one-tenth all EP seats (76 of 751), it would have been possible to avoid most, but not all overhanging seats.

ATTRIBUTION OF NATIONAL PARTIES TO EUROPEAN PARTY FAMILIES

All previous examples in this paper were based on the assumption that voters vote for the same party family with both their national and their European vote. However, in a two-vote system – as is usually discussed for transnational lists – it is to expect that some voters would split their votes, i.e., give their national and European votes to different party families.

In principle, this can lead to further overhanging seats. Comparable national systems (e.g. Germany until 2009) show that voters may use tactical vote splitting in order to create overhanging seats that give their political camp an advantage. However, this problem arises mainly in electoral systems in which the lower level consists of one-person constituencies, so

⁶ Laying the burden of reducing the total number of national seats primarily on the large member states could be politically justified given that small member states are the main beneficiaries of the current system of degressive proportionality and have so far been generally less eager for the introduction of EU-wide lists. However, the exact distribution of the national seat contingents is not a primary concern of this policy paper and would, in practice, obviously be a matter of political negotiations.

Table 5
Calculation examples for proportional compensation (646 national seats, 105 EU-wide seats)

Based on EP election results 2014								
	GUE/NGL	G/EFA	S&D	ALDE	EPP	ECR	EFDD	NI
Votes (EU-wide lists)	12,771,853	10,610,943	37,118,485	12,878,433	40,375,501	10,040,865	7,115,471	–
Vote share (EU-wide lists)	9.76 %	8.11 %	28.35 %	9.84 %	30.84 %	7.67 %	5.44 %	–
Ideal proportional seat allocation (751)	69	57	200	69	218	54	38	(46)
Seats from national contingents (646)	55	43	161	65	205	50	21	46
Seats from EU-wide contingent (105)	14	14	39	4	13	4	17	–
Overall seats (751)	69	57	200	69	218	54	38	46
Based on EP election results 2019								
	Left	G/EFA	S&D	RE	EPP	ECR	ID	NI
Votes (EU-wide lists)	11,893,812	19,339,119	34,467,330	22,443,746	40,225,832	14,098,205	21,157,867	–
Vote share (EU-wide lists)	7.27 %	11.82 %	21.06 %	13.72 %	24.58 %	8.62 %	12.93 %	–
Ideal proportional seat allocation (751)	53	86	153	100	179	63	94	(23)
Seats from national contingents (646)	38	62	138	90	171	54	70	23
Seats from EU-wide contingent (105)	15	24	15	10	8	9	24	–
Overall seats (751)	53	86	153	100	179	63	94	23

Methodological notes: The attribution of votes and seats from national parties to European political groups follows the same methodology as in table 1. *Ideal proportional seat allocation:* The number of NI seats always corresponds to the number of NI seats from national contingents. To calculate the ideal allocation for political groups, the number of NI seats is subtracted from the total number of EP seats (751) and the remaining seats are proportionally allocated among the groups. *Seats from national contingents:* Calculated according to the real national election results and the current national system for EP elections. *Overall seats:* The number of seats of NI parties and of »overhanging« groups always corresponds to their number of seats from national contingents. To calculate the overall seats of the remaining groups, the number of seats of NI parties and of »overhanging« groups is subtracted from the overall number of seats and the remaining seats are proportionally allocated among the remaining groups. *Seats from EU-wide contingent:* The EU-wide seats are calculated as the difference between a group's overall seats and its seats from national contingents.

Table 6
Calculation examples for proportional compensation (675 national seats, 76 EU-wide seats)

Based on EP election results 2014								
	GUE/NGL	G/EFA	S&D	ALDE	EPP	ECR	EFDD	NI
Votes (EU-wide lists)	12,771,853	10,610,943	37,118,485	12,878,433	40,375,501	10,040,865	7,115,471	–
Vote share (EU-wide lists)	9.76 %	8.11 %	28.35 %	9.84 %	30.84 %	7.67 %	5.44 %	–
Ideal proportional seat allocation (751)	69	57	199	69	216	54	38	(49)
Seats from national contingents (675)	55	45	168	71	214	51	22	49
Seats from EU-wide contingent (76)	13	12	30	0	2	3	16	–
Overall seats (751)	68	57	198	71	216	54	38	49
Based on EP election results 2019								
	Left	G/EFA	S&D	RE	EPP	ECR	ID	NI
Votes (EU-wide lists)	11,893,812	19,339,119	34,467,330	22,443,746	40,225,832	14,098,205	21,157,867	–
Vote share (EU-wide lists)	7.27 %	11.82 %	21.06 %	13.72 %	24.58 %	8.62 %	12.93 %	–
Ideal proportional seat allocation (751)	53	86	153	100	178	62	94	(25)
Seats from national contingents (675)	39	65	142	94	181	58	71	25
Seats from EU-wide contingent (76)	14	20	10	5	0	4	23	–
Overall seats (751)	53	85	152	99	181	62	94	25

Methodological notes: The attribution of votes and seats from national parties to European political groups follows the same methodology as in table 1. *Ideal proportional seat allocation:* The number of NI seats always corresponds to the number of NI seats from national contingents. To calculate the ideal allocation for political groups, the number of NI seats is subtracted from the total number of EP seats (751) and the remaining seats are proportionally allocated among the groups. *Seats from national contingents:* Calculated according to the real national election results and the current national system for EP elections. *Overall seats:* The number of seats of NI parties and of »overhanging« groups always corresponds to their number of seats from national contingents. To calculate the overall seats of the remaining groups, the number of seats of NI parties and of »overhanging« groups is subtracted from the overall number of seats and the remaining seats are proportionally allocated among the remaining groups. *Seats from EU-wide contingent:* The EU-wide seats are calculated as the difference between a group's overall seats and its seats from national contingents.

that even a relatively small number of tactical voters can be decisive for the allocation of a constituency seat. For the EP elections, the lower (national) level would already consist of rather large multi-person constituencies. Therefore, **there is only a minor risk of additional overhanging seats arising from tactical vote splitting.**

There is, however, another problem related to vote splitting that could be more relevant at the EU level: the correct attribution of national parties to European party families. To be able to offset the national and European seat contingents of a European party, it must be determined *before* the election which national list belongs to which European list. If a national party runs as a formally non-attached list, its seats are not included in the proportional compensation. If after the election the party then joins a political group, this group will be over-represented. Therefore, **European party families would have an unwanted incentive to have their national and European lists formally run separately from each other**, in order to avoid that the national seats are counted towards their overall contingent.

In principle, this kind of distortion through a tactical separation of lists is also possible in comparable national electoral systems with proportional compensation.⁷ However, this problem does not play a significant role at national elections since parties that use such a stratagem would risk a reputational loss. In the EP, by contrast, it is common already now that some national parties do not declare which political group they will join until after the elections. In view of the low level of public awareness for the European parties, it would hardly entail any reputational costs for them to use this ambiguity tactically. To make a system of transnational proportional compensation work at the EU level, **it is therefore necessary to ensure the correct attribution of national parties to transnational lists by institutional means.** This can be achieved in several ways.

One option would be to generally impede vote splitting by giving voters only one single vote, which they use to vote for a national list and its affiliated European list at the same time. There are examples for this model in some EU member states. In both the elections to the Polish Sejm up to 2001 and the elections to the Austrian Nationalrat, voters vote for a regional and a federal list by the same vote, with the federal list being used for nation-wide proportional compensation.⁸

Such a one-vote system would solve the problem of attributing national to European parties in a simple manner. However, it might jeopardize another important aspect of transnational lists: with a one-vote system, parties could keep campaigning only for the national list, as a vote for the national list would automatically also be a vote for the EU-wide list. A one-vote system would therefore be well suited to ensure transnational electoral equality through proportional compensation, but it

might undermine the goal of increasing the public visibility of European parties.

Another option is to have a two-vote system, but to create additional incentives for national and European parties to correctly declare their mutual affiliation. Such incentives could be provided, for example, through the regulations on electoral admission and electoral thresholds. For example, it would be possible to oblige all national parties to declare their affiliation to some EU-wide list, eliminating the category of non-attached national lists. Since this could be a major obstacle for newly founded parties, such a regulation would have to handle the right to draw up EU-wide lists in a liberal way. However, it would also be necessary to prevent national parties from putting up a transnational »pseudo-list« that would be supposed not to win any votes (since the party is only aiming for overhanging national seats). This could be achieved with **a transnational electoral threshold**, according to which national parties would only enter the EP if their affiliated transnational list achieves at certain percentage (e.g., 2 %) of the EU-wide vote. As a consequence, national parties would have an incentive to correctly declare their affiliation to a European party and to campaign for their EU-wide list in order to obtain seats in the EP.

The specific details of such a transnational threshold clause go beyond the scope of this paper. Since it would make the allocation of the national seat contingents dependent on the EU-wide results, it would be an additional, significant change of the existing electoral system. At the same time, the threshold clause would also have positive effects in itself. Most importantly, **it would further strengthen the European party system by giving national parties an additional incentive to cooperate with European partners and by minimizing the number of MEPs without a political group.**

In any case, it can be noted that the question of the correct attribution of national to European parties is solvable with a one-vote as well as a two-vote model. While it is necessary to take this aspect into account during implementation, it is not a fundamental impediment to a system of transnational proportional compensation.

CONCLUSION

The current system of fixed national seat contingents with degressive proportionality leads to a deficit of electoral equality in EP elections. This is not only in itself a problem for the formal democratic legitimacy of the European Union. Based on the *Lisbon* jurisprudence of the German Federal Constitutional Court, the lack of guarantee that »the majority of votes cast also represents a majority of Union citizens« is also a constitutional obstacle to a substantive deepening of European integration in important areas and to the further parliamentarisation of the EU's political system.

However, there are also good reasons for degressive proportionality. In particular, small member states should have the opportunity to be adequately represented in the EP with their respective national party systems. **A reform of the European**

⁷ See Fehndrich 2012, where a corresponding plan of the German SPD for Bundestag elections was »leaked« as an April Fool's joke.

⁸ In fact, the Austrian electoral system is slightly more complicated, as lists are drawn up not only on two but on three levels, i.e., regional, *Land*, and federal level (Müller 2005).

electoral law should therefore achieve the double goal of preserving the current system of degressive proportionality of the national seat contingents, while also achieving direct proportionality between the EU-wide vote share and the seat share of the political groups in the EP.

As outlined in this Policy Paper, this dual objective is best accomplished through a multi-tier electoral system with proportional compensation. In this system, a number of EP seats would be allocated through EU-wide transnational lists, with each party receiving so many seats from the EU-wide contingent that its overall seat share in the EP corresponds to its EU-wide share of the vote.

When implementing such a model, various aspects must be taken into account in order to minimize the risk of »overhanging« seats from the national contingents that impede full proportional compensation between the political groups. In the first place, this requires that the EU-wide seat contingent is large enough. Based on the results of the 2014 and 2019 European elections, it would not be enough to dedicate only the 46 currently vacant seats to transnational lists. However, an EU-wide contingent of 76 seats (around one-tenth of the EP's total size) would suffice to allow for an almost complete proportional compensation. Secondly, it is necessary to ensure the correct attribution of national to European parties in order to prevent parties from deliberately creating overhanging seats. This can be achieved in different ways – for example through a one-vote system as in the Austrian electoral law or through a two-vote system with a transnational electoral threshold.

With the Conference on the Future of Europe and the EP's current legislative initiative for an electoral law reform, the political debate about transnational lists is gaining momentum once again. To make the most of them, we should not treat them only as a nice-to-have supplement to the current system, but use them to **overcome the lack of transnational electoral equality that is still staining the democratic legitimacy of the European Parliament.**

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