

Ciaran White and Frank Costello: Allowing Northern Ireland residents to vote in future EU Parliamentary Elections: An ‘itsy-bitsy-teeny-weeny-yellow-polka-dot’ proposal



The UK-EU negotiations on the final shape of the future relationship between them are reaching a crescendo as the deadline of 31 December 2020, which the s33 of the EU Withdrawal Act 2020 does not permit to be extended, approaches. However, whatever outcome those negotiations reach, Northern Ireland’s relationship with the EU will continue to be governed by the ‘backstop’ that is the Protocol on Ireland/Northern Ireland. The Protocol fixes Northern Ireland with the task of continuing to observe elements of EU law in the areas of, for example, equality, state aid, the single electricity market (on the island of Ireland), customs rules and regulations, food, agriculture, aquaculture and related areas, with the intention of, inter alia, delivering on the UK’s commitment of “avoiding a hard border, including any physical infrastructure or related checks and controls.” The Protocol will, it states, “maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.” (Art 1)

The implementation of the Protocol will be in the hands of the UK government and its officials and officials of the EU acting through the ‘Specialised Committee’, set up by Article 165, of the Withdrawal Agreement, and supported by the ‘Joint consultative working group’ (Art 15), a forum for the exchange of information and mutual consultation.

The Protocol’s continued, future, application is subject to the consent of the Northern Ireland Assembly, voting every four years after the end of the transition period, on a straight majority basis (Art 18(5)). (If a majority of the MLAs vote for the continuation of the Protocol then it will continue for another four years, to be voted on again. If the majority has ‘cross-community support’ of nationalist and unionists then the period until the next vote is extended to 8 years) (Art 18(6)). The securing of the Assembly’s consent is designed to provide ‘democratic legitimacy’ according to the Preamble (for a discussion of the implications of requiring cross community support on all votes on the continuation of the Protocol see [O’Connell](#)).

The democratic legitimacy of the Protocol and its effects can be enhanced further, we suggest, by allowing NI residents the opportunity to vote in EU parliamentary elections. This might seem to be a suggestion whose ‘sell-by date’ has come and gone, now that the UK has departed the EU and its seats in the EU Parliament distributed amongst other member states, with two of Northern Ireland’s seats having been allocated to the Republic of Ireland. However, other examples, from across the EU, demonstrate that it is possible for a Member State to provide EU

voting opportunities to non-EU residents, or to its own nationals resident outside that Member State's territory.

Since 2014 Turkish Cypriots have been allowed to vote in EU Parliamentary elections owing to a new law adopted by the government of the Republic of Cyprus which governs the southern part of the island and is mainly Greek. It allows Turkish Cypriots, resident in the north of the island, with Republic of Cyprus identity documents to cross into southern Cyprus, to vote in the EU Parliament election. Cyprus has six seats in the European Parliament, of which two, we understand, are notionally set aside for Turkish Cypriots. The 2019 EU elections saw a Turkish Cypriot elected to public office for the first time since 1963. Whilst the electoral process in operation in EU Parliamentary elections in Cyprus generates complaints from the Turkish minority, one can immediately appreciate that it is a model to stimulate discussion on the island of Ireland.

There are also examples from France. Prior to the 2019 EU Parliament elections there were two examples relevant to the proposal made here. One of these involved Nouvelle Calédonie, the French Pacific island collective, which, along with other French overseas territories, was represented in the EU Parliament as part of France's Overseas Territories constituency. This was the case even though Nouvelle Calédonie, and some of the other French overseas territories, are not in the EU. The second example was found closer to home: France also allowed its citizens who live outside France and who were not registered to vote in other EU states, to vote in EU Parliamentary elections for its 'Ile de France' constituency. Since 2019, France has elected representatives to the EU Parliament on the basis of a single constituency composed of the entire country and its overseas territories and departments, rather than on the basis of multiple constituencies. However, France continues to allow those residing in Nouvelle Calédonie, for example, the right to vote in EU Parliamentary elections and did so in 2019 (In Nouvelle Calédonie the participation rate in the 2019 EU election was 19.22%, compared to 27.05 % in 2014). French nationals living outside of France also retain the right to vote in EU elections.

The authors first put this proposal to the previous Irish Minister for Foreign Affairs in March 2018 and to the Taoiseach, Leo Varadkar, in November 2018. The latter left the matter with the Department of Housing and Local Government, which has responsibility for the conduct of elections in Ireland and the development of electoral law and policy, where the proposal currently resides. We have, however, recently renewed our suggestion with the present Taoiseach, Micheál Martin, suggesting that it fits neatly within the 'Shared Island' concept contained in the new Programme for Government of the incoming Coalition Government.

Rules regarding eligibility to vote in EU Parliamentary elections are a matter for Member States, and so it is within Ireland's gift to create a mechanism by which NI residents can continue to vote in those elections. Coincidental to our own correspondence with Irish government figures, in March 2018, the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, also recommended that "all the people of Northern Ireland retain the right to stand and vote in European Parliament elections." ('Policy statement on the United Kingdom withdrawal from the European Union', March 2018).

It is important to stress that the extension of voting rights to Northern Ireland residents need not be focussed solely on Irish passport holders. Good stewardship of the Good Friday Agreement should mean that the Irish Government would ensure that those who opt for British passports in Northern Ireland – as they are entitled to do by virtue of that Agreement – are not disadvantaged by making that choice.

As things sit at the present, the Protocol will create something of a democratic deficit. Certain EU laws will continue to apply to Northern Ireland in circumstances where there will no longer be any Northern Ireland representation in the EU Parliament. The Protocol appears to anticipate that those EU laws that continue to have effect in Northern Ireland after transition will apply for quite some considerable period of time, even in fact embracing amendments or replacements to them. Article 13(3) provides that, notwithstanding the Withdrawal Agreement, a reference to EU law is to include those legal enactments that amend or replace that law. A new legislative act that neither amends nor replaces an existing one is to be the subject of an iterative process within the Joint Committee which may lead to that new legislative act being added to the Protocol Art13(4). Further, as noted above, the only manner in which the Protocol would no longer apply is if the Assembly votes for that effect, and that is an unlikely event given the Northern Ireland vote in the 2016 Brexit referendum and the breakdown of seats in the subsequent 2019 Assembly election. Based on the current MLA party affiliations, ('Anti-Brexit' parties, namely Sinn Fein, SDLP, Alliance, and Green Party, have 48 of the 90 seats between them.) the Assembly will not vote, in 2024, to have the Protocol disapplied and therefore it cannot happen until at least 2030, being two years after the next opportunity that the Assembly will have to vote on the matter, that is in 2028 (Art 14(4).)

Ireland has never recognised the right of persons who are not resident within the state to vote in Irish elections, whether those are municipal, general, Presidential or European elections. (It does, however, recognise the right of non-Irish EU nationals living in Ireland to vote in EU elections, provided they agree not to cast a vote in their country of origin.) However, as clichéd as it may sound, we are in unprecedented times, and the Protocol is likely to remain part of Northern Ireland's constitutional legal architecture for some decades to come. Enhancing its democratic legitimacy by creating a mechanism to allow Northern Ireland residents to vote in Irish-allocated EU Parliament seats will not deal with all the issues that may arise from the implementation of the Protocol. It is a 'small ask' in the greater scheme of things, though a justified one, we suggest. It is only a 'itsy-bitsy-teeny-weeny-yellow-polka-dot' request, when you think of it really.

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