EXPLANATORY MEMORANDUM TO

THE EUROPEAN PARLIAMENTARY ELECTIONS ACT 2002 (AMENDMENT) REGULATIONS 2017

2017 No. [XXXX]

AND

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2017 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The European Parliamentary Elections Act 2002 (Amendment) Regulations 2017 ("the 2002 Act Regulations") and the European Parliamentary Elections (Amendment) Regulations 2017 ("the Elections Regulations") amend the existing procedure for filling MEP vacancies in Great Britain and Gibraltar in order to reduce the likelihood that a European Parliamentary by-election would be required in the period up to the United Kingdom leaving the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of these instruments includes Scotland.

4. Legislative Context

4.1 The 2002 Act Regulations amend the regulation making powers in section 5 of the European Parliamentary Elections Act 2002 concerning the procedure for filling vacant MEP seats. The amendments will permit regulations to provide for vacant seats in Great Britain and Gibraltar to be filled by the sitting party's nomination or, in the case of independent candidates, substitution.

4.2 Using these new powers, the Elections Regulations amend the European Parliamentary Elections Regulations 2004 (S.I. 2004/293), which set out provisions governing the conduct of European Parliamentary elections in Great Britain and Gibraltar.

5. Extent and Territorial Application

5.1 Both instruments extend throughout the United Kingdom.

5.2 These instruments apply to Great Britain and Gibraltar.

6. European Convention on Human Rights

6.1 Chris Skidmore MP, the Minister for the Constitution, Cabinet Office, has made the following statement regarding Human Rights:

"In my view the provisions of the European Parliamentary Elections Act 2002 (Amendment) Regulations 2017 and the European Parliamentary Elections (Amendment) Regulations 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Following the EU Referendum, the UK will be leaving the EU and it is not expected that the UK will be participating in the next elections to the European Parliament in 2019 (the date of the poll has not been confirmed as yet though the election is expected to be held in May/June 2019). While the UK remains a member of the EU, we are obliged to return Members to the European Parliament and to make arrangements to fill any MEP vacancies that may arise, for example, due to the resignation of a sitting MEP. It is proposed to amend the procedure for filling MEP vacancies in Great Britain and Gibraltar in order to reduce the likelihood that a European Parliamentary by-election would be required before the UK leaves the EU. The proposed amendments would provide that where a MEP vacancy arises and it is not possible to fill the vacancy under the existing procedure, ie with reference to the list of unelected candidates for the party of the outgoing MEP from the previous European Parliamentary general election, the party that holds the seat may instead nominate a person to be the new MEP, rather than a by-election being required to fill the vacancy.

7.2 There would be significant financial costs in holding a by-election and the turnout at such a poll could be low as electors may query the necessity of holding the poll given that the UK will be leaving the EU. The Government considers that in the circumstances there is strong justification for taking action to reduce the likelihood of a by-election occurring before the UK leaves the EU. Under the proposed changes, the party would nominate a person to be the new MEP as a last resort, in the event that the party's list of candidates from the last round of European Parliamentary elections is exhausted. The proposed approach in Great Britain and Gibraltar is modelled on the position already in place in Northern Ireland for filling MEP vacancies.

Current arrangements

7.3 At European Parliamentary general elections, there are nine electoral regions in England, and Scotland, Wales and Northern Ireland each forms an electoral region for the purposes of the poll. In Great Britain and Gibraltar, these elections are held under the closed list system, under which electors have one vote which they may cast for a party or for an independent candidate. The seats in each region are allocated to parties in proportion to the number of votes they receive using a specified formula (the D'Hondt formula). The seats are assigned to party candidates according to the order

in which the candidates are displayed on the ballot paper. This order is determined by the party before the election.

7.4 Under the European Parliamentary Elections Regulations 2004, in the event of a MEP vacancy in Great Britain and Gibraltar, essentially, the vacant seat will stay with the party of the previous MEP and is filled with reference to the results at the previous European Parliamentary general election in the region where the vacancy arises, with the seat being filled by the next (unelected) candidate to appear on the party's list. Where there is a vacancy, the Regional Returning Officer (RRO) in the region where the vacancy arises will contact the next (unelected) candidate on the party's list of candidates at the previous EP election to ascertain if they meet the requirements to fill the seat. That person, in order to be returned as an MEP, must state in writing that he or she is willing and able to be returned as a MEP, and must deliver a certificate signed by or on behalf of the nominating officer of the registered party concerned confirming that he or she can be returned as that party's MEP. In the event that this is not successful, the procedure must be repeated with each of the unelected candidates in turn according to their position on the ballot paper until either: one of the candidates meets these requirements; or the list of candidates is exhausted without any success. If it is not possible to fill a vacant seat from the party list then a by-election is held to fill the vacancy.

7.5 UK law currently provides that if a MEP vacancy occurs less than 6 months before the next general election for the European Parliament the seat remains vacant until that poll, and therefore no action is required to fill a vacant seat in this period. We intend to maintain this position.

Detail of proposed changes

7.6 At present, all current UK MEPs in Great Britain and Gibraltar stood on behalf of a single registered political party at the last election of MEPs. The proposed changes to the European Parliamentary Elections Regulations 2004 address the position where it would not possible for the RRO to identify a candidate to fill a vacant MEP seat from the relevant party list in the region where the vacancy has arisen.

7.7 Under the proposed changes, in the event that there is a MEP vacancy, where the outgoing (or previous) MEP stood for a registered party, the RRO will still initially seek to fill the vacancy through approaching (in turn) the unelected candidates on the party's list of candidates in the relevant region.

7.8 If the RRO is unable to fill the vacancy from the party list because it is exhausted (i.e. the remaining candidates on the list are unable or unwilling to fill the vacancy or no longer have the support of their party), this will no longer trigger a by-election.

7.9 Instead, the RRO must "as soon as practicable" after determining that it is not possible to fill the vacancy from the party list, ask the nominating officer of the party that held the seat to nominate a person to fill the vacant seat and be returned as an MEP for that party. Under the proposed changes, the nominating officer must respond to the RRO giving the name of the person who is to fill the vacant seat, and include a declaration signed by that person, within 28 days of the request being made by the RRO. This replicates the equivalent deadline that currently applies in Northern Ireland.

7.10 If the nominating officer responds to the RRO with the required details within the specified period, the RRO must declare in writing that that person is returned as an MEP, give public notice of that declaration, and send a copy to the Secretary of State.

The RRO's declaration will note that it was not possible to fill the vacancy from the relevant party list and instead the party has nominated the new MEP.

7.11 In the event that the nominating officer of the party was not able to nominate a person to be the new MEP within 28 days, the RRO will notify the Secretary of State of this, and this will cause a by-election to be held to fill the vacancy. We think it would be extremely unlikely that a party would not be able to nominate a person to fill the vacancy within the specified 28 days period, and so cause a by-election.

7.12 We have included a number of provisions to ensure that the changes work effectively which draw on those that apply in the existing provisions for Northern Ireland.

7.13 The proposed changes address the situation when the party that the previous MEP stood for when elected is no longer registered. This will make it necessary for the vacancy to be filled by way of a by-election.

7.14 We have made provision in relation to EU citizens. EU citizens living in another State are able to stand at EP elections in their State of residence, and so an EU citizen living in the UK could be nominated as a new MEP. The proposed changes provide that if an EU citizen is nominated by a party as an MEP they must provide the same information as is required of EU citizens when nominated to stand as a candidate at an EP election. There is also provision for the Secretary of State to obtain confirmation of the candidate's eligibility to stand as a candidate from their home State, in line with the procedure at EP elections. As with the approach in Northern Ireland, in the (unlikely) event that a party nominates an EU citizen to be the new MEP and the person's home State advises that the person is disqualified from standing in their home State, the person cannot fill the vacant seat and it will be necessary to hold a by-election to fill the vacancy. It is proposed that the existing offence, at regulation 28(1) of the European Parliamentary Elections Regulations 2004, of an EU citizen making a false statement in a declaration when nominated to stand as a candidate at a European Parliamentary election, is extended to the making of a false statement in the declaration that an EU citizen will be required to make when nominated to be a new MEP.

Other provisions

7.15 The key objective of the proposed changes is to prevent it being necessary to hold a by-election to fill an MEP vacancy, and we think it unlikely that a by-election will occur. However, the proposed changes provide for a by-election to be held to fill the vacancy, as a back-stop, in certain circumstances, for example, in the event that a party fails to nominate a new MEP within the specified deadline of 28 days. This has made it necessary to cater for potential scenarios that could arise if a by-election is held and a vacancy subsequently arises in respect of an MEP elected at that by-election. In particular, the proposed changes make provision in relation to the standing and election as an MEP of an "independent" candidate or a candidate who stood on behalf of a registered party, or two or more registered parties, at a by-election. These provisions ensure that the instruments take a comprehensive approach in order to ensure that the possibility of a by-election is avoided.

7.16 More specifically, where the previous MEP stood on behalf of two (or more) parties when elected at a by-election, the procedure described above will apply but the parties will be asked to jointly nominate a person to fill the vacant seat.

7.17 Also, an independent MEP who is elected after the Elections Regulations come into force will be able to give a notice of substitutes. This is a written notice which sets out the names and contact details of a number of people who may fill the MEP's seat should he or she vacate it. It is only if a vacant seat cannot be filled by reference to a notice of substitutes that a by-election will be called.

Consolidation

7.18 The Law Commission is currently conducting a review into the desirability and feasibility of consolidating electoral law. In the meantime there are no plans at this time to consolidate amendments that have been made to the 2002 Act or the European Parliamentary Elections Regulations 2004.

8. Consultation outcome

8.1 The Electoral Commission has been consulted on both instruments. In addition, the Cabinet Office have shared the draft instruments with representatives of the Association of Electoral Administrators (AEA), the Electoral Management Board for Scotland, the Society of Local Authority Chief Executives, and the Government of Gibraltar.

8.2 The Electoral Commission agrees with the Government's approach in the two instruments and believes that the proposed approach is sensible, given the issues that would be posed by any by-election.

8.3 The Government of Gibraltar has also given its agreement to the proposed changes. The AEA supports the proposed instruments and commented that in light of the UK leaving the EU, the AEA is fully supportive of the proposed measures that will avoid unnecessary elections.

8.4 There is general agreement among those whose views were sought on the instruments that it would be desirable to avoid a European Parliamentary by-election across a region just before the UK leaves the EU, and they are supportive of the proposed measures.

9. Guidance

9.1 The Electoral Commission issues guidance to electoral administrators relating to the administration and conduct of European Parliamentary elections and will update its guidance as necessary to cover the changes set out in these instruments.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Electoral Commission will produce reports on the administration and conduct of European Parliamentary elections and related matters, and the Cabinet Office will

consider any findings or recommendations made by the Commission about the provisions introduced by these instruments. The Cabinet Office will continue to keep all electoral legislation under review to ensure it continues to support electors' participation in elections and effective electoral administration.

13. Contact

13.1 Peter Richardson at the Cabinet Office, Telephone: 020 7271 6433 or email: peter.richardson@cabinetoffice.gov.uk can answer any queries regarding the instrument.