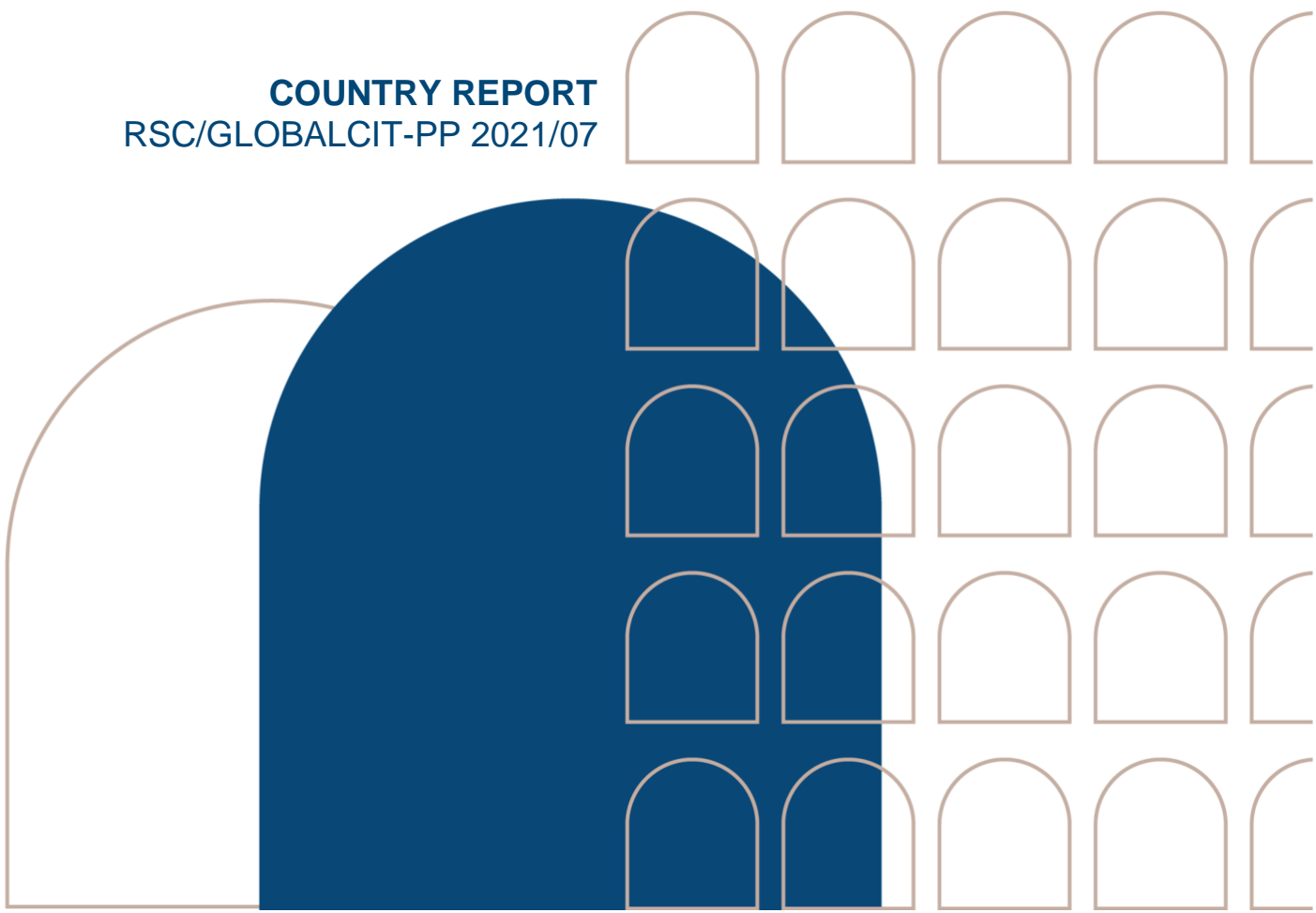


Report on Political Participation of Mobile EU Citizens: Poland

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COUNTRY REPORT
RSC/GLOBALCIT-PP 2021/07



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Global Citizenship Observatory (GLOBALCIT)
Robert Schuman Centre for Advanced Studies
in collaboration with Edinburgh University Law School

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Report on Political Participation of Mobile EU Citizens

Poland

*Piotr Korzec * and Dorota Pudzianowska **

Abstract:

In Poland non-citizen residents from EU Member States have the right to vote and stand as candidates in European Parliament elections. They are also entitled to vote and stand as candidates for the lowest-level of local government but only Polish citizen can be candidates in communal executive (mayoral) elections. Registration is not automatic. EU citizens have the choice either to register actively on the general Register of Voters, or to register on the List of Voters generated for each specific election. A challenge for their electoral participation is the ban on non-citizens joining political parties or funding electoral campaigns. Their rights are facilitated by the possibility of registering to vote in a place other than the municipality of registered residence. To facilitate the electoral participation of non-citizen residents, the report recommends: connecting electoral registration to registration of residence; directly targeting non-citizens residents by mail with information in English, and changing the law to allow for participation in political parties.

Non-resident citizens resident in the EU have the right to vote and stand as candidates in national legislative elections. They also have the right to vote and stand as candidates in EP elections. There is no Register of Voters abroad and voters need to register on the List of Voters prepared for the relevant elections. A challenge for the electoral participation of non-resident citizens is the recent abolition of postal voting. To facilitate the participation of non-resident citizens the report recommends: a Register of Non-resident Voters to structure the administration of voting abroad; a Senator to represent the constituency of mobile citizens, and the re-introduction of postal voting and consideration of e-voting.

Abstrakt:

Cudzoziemcy - obywatele państw Unii Europejskiej mają czynne i bierne prawo wyborcze w wyborach do Parlamentu Europejskiego. Mają również prawo głosować i kandydować w wyborach samorządowych na szczeblu gminy z wyłączeniem możliwości kandydowania na stanowisko wójta (burmistrza lub prezydenta miasta). Ich rejestracja nie jest automatyczna. Cudzoziemcy będący obywatelami UE mają wybór, czy chcą dopisać się do rejestru wyborców czy do spisu wyborców, który jest

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tworzony na potrzeby konkretnych wyborów. Utrudnieniem ich udziału w wyborach jest brak możliwości bycia członkiem partii politycznych oraz finansowania kampanii wyborczej. Z kolei realizacja ich praw wyborczych jest ułatwiona dzięki możliwości dopisania się do rejestru wyborców w gminie stałego pobytu mimo nie posiadania w niej miejsca zameldowania. W celu ułatwienia udziału w wyborach cudzoziemców unijnych raport zaleca: połączyć rejestrację na wybory z rejestracją miejsca pobytu; bezpośrednie kierowanie informacji w języku angielskim drogą e-mailową do cudzoziemców niebędących obywatelami i zmianę prawa w celu zezwolenia na ich udział w partiach politycznych.

Obywatele mieszkający za granicą na terytorium Unii Europejskiej mają czynne i bierne prawo wyborcze w wyborach na szczeblu krajowym. Mają także prawo głosować i kandydować w wyborach do Parlamentu Europejskiego. Nie ma rejestru wyborców zagranicznych i głosujący muszą dopisywać się do spisu wyborców przygotowywaną na konkretne wybory. Utrudnieniem dla udziału w wyborach dla obywateli mieszkających za granicą jest niedawno zniesione głosowanie korespondencyjne. W celu ułatwienia udziału w wyborach obywateli polskich mieszkających za granicą raport zaleca: wprowadzenie rejestru wyborców - obywateli polskich mieszkających za granicą, senatora reprezentującego wyborców polskich mieszkających za granicą, przywrócenie głosowania korespondencyjnego i rozważenie wprowadzenia głosowania elektronicznego.

1. Introduction

Non-resident Polish citizens are provided with the right to vote in national elections from abroad. Their right to vote in local elections is circumscribed by the condition of residence within Poland. The legal provision governing the right to vote in European Parliament elections is subject to ambiguity. However, in practice the administrative means have been put in place to allow non-resident citizens to vote in these elections. Registration is not automatic and non-resident citizens must actively register on the List of Voters for each election. Voting is possible at consular authorities or by returning to Poland but postal voting is no longer available even though COVID-related arrangements have been made for resident citizens who can claim postal voting when disabled, senior (60+) or subject to quarantine.

Non-citizen residents from the EU have the right to vote and to stand as candidates in European Parliament elections. They are also entitled to vote and stand as candidates for the lowest level of local government. Registration is not automatic; EU citizens have the choice either to register actively on the general Register of Voters, or to register on the List of Voters generated for each specific election.

Table 1. Conditions for electoral rights of non-resident citizens and non-citizen residents

Type of voter	Election type	Right Voting	Right Candidacy	Automatic registration	Remote voting
Non-resident citizens	National Legislative	YES	YES	NO	YES ¹
Non-resident citizens	European Parliament	YES	NO ²	NO	YES ³
Non-citizen residents	Local Legislative	YES ⁴	YES ⁵	NO	NA
Non-citizen residents	Local Mayoral	YES	NO	NO	NA
Non-citizen residents	European Parliament	YES	YES	NO	YES ⁶

* We want to thank Anna Górska of Institute of Public Affairs for her input on statistics and Dr Tomasz Gąsior for his input on electoral law.

¹ Only through voting at consular authorities or returning to country. Postal voting was available from 2011-2014 and 2014-2018.

² Except those with 5 years of residence in the country or in another EU member state in the 5 years immediately preceding the election.

³ Only through voting at consular authorities or returning to country. Postal voting was available from 2011-2014 and 2014-2018.

⁴ EU citizens who are resident in Poland have the right to vote in local legislative elections.

⁵ EU citizens can stand as candidates for the lowest level local assembly (the Communal Council) as well as to the second level Communal Council in cases where the lowest level commune takes the hybrid form of first and second level of local self-government.

⁶ Through consular services only for non-citizens residents who are registered as voters, cf. n. 56 *infra*.

1.1. Demographic characteristics of mobile EU citizens in the country

In Poland, there are over 330,000 foreign residents with lawful (or registered) stay within the territory in 2018 and 480,000 in 2021 (first quarter).⁷ For 2018 there are 71 978 EU citizens with registered stay in the Poland and 8017 EU citizens with permanent residence right⁸; long-term resident EU citizens count at 8,094 and migrant registered EU citizens count at 73,673 for 2019⁹. In 2020, the population amounted to 81,461 (73,197 and 8,264 registered EU citizens, short-term and long-term residents respectively).¹⁰ However, statistics differ and according to Eurostat in 2017 the total number of foreigners in Poland and the number of non-citizen EU nationals was lower (210,328 and 29,447, respectively). EU citizens in Poland are mostly male and between 20-39 years old (migracje.gov.pl). The highest is the number of EU citizens between 35-39 years old (Eurostat). The majority of mobile EU citizens in the country concentrate in Mazowieckie voivodship (Warsaw city region), Dolnośląskie voivodship (Wrocław city region), and Małopolskie voivodship (Kraków city region). Most EU citizens in Poland are from Germany, Italy, Spain, France and Great Britain (migracje.gov.pl). Relevant data will be available as migracje.gov.pl is updated later in the summer 2021 and the data resultant from the decennial national census of 2021 are made available.

1.2. Brief Summary of Electoral Rights (voting and candidacy) of Non-Citizen Residents and Non-Resident Citizens.

Non-citizen Residents

Non-citizen residents do not enjoy voting rights except for EU citizens in European Parliament and local communal elections. The latter concerns the lowest level of self-government as well as the second level Communal Council in cases where the lowest level commune takes the hybrid form of first and second level of local self-government.¹¹ In these elections, EU citizens enjoy the same rights as Polish citizens.

⁷ Office for Foreigners, <https://udsc.prowly.com/137257-prawie-480-tys-obcokrajowcow-z-zezwolezeniami-na-pobyt> [accessed 30.06.2021]

⁸ <https://migracje.gov.pl/en/>

⁹ Office for Foreigners [Urząd do Spraw Cudzoziemców], <https://migracje.gov.pl/statystyki/zakres/polska/typ/dokumenty/widok/tabele/rok/2019/> [accessed 15.05.2021], the data concerning regularised residence of EU citizens in Poland.

¹⁰ Office for Foreigners, annual reports, https://udsc.gov.pl/wp-content/uploads/2021/03/2020-roczny_319.xlsx, Table 26, column E&F [accessed 01.07.2021]. The statistical method excludes registrations older than ten years, where it is assumed the subject would have changed status (moved, acquired citizenship, or died); the attestations of the permanent right of residence expire after ten years (cf. Article 55 of the EU citizen-specific *The Act of 14 July 2006 on the entry into the territory of the Republic of Poland, residence and departure from this territory of citizens of the Member States of the European Union and their family members*, Journal of Laws 2006, no 144, item 1043, as amended [Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin], the 2021 consolidated version available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20061441043/U/D20061043Lj.pdf> [accessed 30.06.2021]).

¹¹ The hybrid form of a commune [Polish *gmina* denotes the first level of local self-government] exercises the competences of the *powiat* [i.e. the second-level self-government]; this hybrid system applies in certain towns. Both levels of self-government are thus exercised by one set of self-government authorities under Article 92.2 of the Act on the *Powiat-Level Local Self-Government* of 5 June 1998, as amended ('A town with the rights of a *powiat* [second-level local self-government unit] is a commune [first-level local self-government unit] exercising the tasks of a *powiat* according to this Act'), <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19980910578>.

Voting rights criteria are connected to age and the enjoyment of public rights:

- The age threshold for suffrage is generally set at eighteen years on the day of the elections (Article 10 EIC).¹² The age requirement for running as a candidate varies according to the office sought. The age limit has been set at 18 years of age for running in elections to councils of local self-government (Article 11.1 (5) EIC) and at 21 years of age for running in elections to the European Parliament (Article 11.1 (1) EIC and Article 11.1 (4) EIC, respectively).
- The legal incapacitation results in disenfranchisement with the decision of legal incapacity (Article 10.2 (3) EIC) under the Code of Civil Procedure. There is a specific constitutional provision disenfranchising the legally incapacitated (Article 62.2 of the Constitution of 1997¹³).
- Disenfranchisement can also be made by a specific decision of a criminal court (Article 10.2 (1) EIC) as a specific means of punishment. Article 39 of the Criminal Code extended potential criminal penalties to include the deprivation of public rights. Similar provisions apply to the electoral rights of persons tried by the Tribunal of the State as part of the responsibility of public officials for violations of the Constitution or the law (Article 10.2 (2) EIC).¹⁴ This is warranted by Article 62.2 of the Constitution.

As far as running in elections is concerned, the Electoral Code provides for additional limitations. First, anyone sentenced to prison (including a conditionally suspended prison term) for an intentional crime prosecuted *ex officio* (thus excluding the crimes of defamation, insult, offence to the dignity of a person, and causing bodily harm with a sentence lasting less than seven days) or for an intentional tax crime (Article 11.2(1) EIC) is excluded from running in elections. This effect lasts until the punishment is completed and has been cleared in the Criminal Register.¹⁵ Secondly, a court decision which cites the person's condemnable involvement in the country's socialist past can preclude eligibility as a political candidate (Article 11.2 (2) EIC).¹⁶ However, the provision specifically addresses Polish citizens. Third, the Polish Electoral Code extends disenfranchisement of foreign nationals by their home countries to preclude running for office in similar circumstances as regulated by the law of the EU Member State in respect of the state's citizens (Article 11.2 (3) EIC & Article 426.3 EIC).

As to voter registration, the EIC provides for a mixed system of a general Register of Voters and a List of Voters for particular elections. The Register of Voters is the basis for the production of the List of Voters in preparation for particular elections. As opposed to Polish

¹² The Act of 5 January 2011 – the Electoral Code [*Ustawa z dnia 5 stycznia 2011 r. – Kodeks wyborczy, Dz. U. z dnia 31 stycznia 2011 r.*].

¹³ Article 62.2 EIC: 'Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote.'

¹⁴ Article 10.2 EIC ('There is no right to vote by a person: 1) deprived of public rights by a legally valid court decision; 2) deprived of electoral rights by a valid decision of the State Tribunal; 3) incapacitated by a valid court decision.').

¹⁵ Such disenfranchisement can never be shorter than the time-span of other special punishments (Article 107.6 Criminal Code). In the case of a conditionally suspended prison term, the term of clearance is six months after the end of the term of probation (Article 76.1 CC). Otherwise, the term is ten years after the punishment was executed, after it was subject to clemency or after it stopped being executable (Article 107.1 Criminal Code). Where the prison sentence does not exceed three years, the term can be shortened upon request to five years by a court decision in specific cases. An executable prison sentence for a sexual crime against a minor under fifteen years of age never goes off the register.

¹⁶ Based on Article 21a of the *Act of 18 October 2006 on Revealing Information on Documents of the Organs of State Security from the years 1944-1990 and the Contents of such documents* [*Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów, Dz. U. z 2007 r. Nr 63, poz. 425, z późn. zm.*].

citizens, EU citizens are not automatically enrolled on the Register of Voters. On the one hand, **the fact that mobile EU citizens are not registered with the Register of Voters automatically could be viewed as an obstacle to electoral participation.** On the other hand, registering with the Register of Voters or the List of Voters for particular elections does not seem a daunting task (as will be outlined in point 2 below). Registering on the Register of Voters is a one-time procedure and translates into automatic inclusion in the list of voters in relevant elections.

Proxy voting and voting by correspondence is provided for persons with disabilities (Article 54.1 EIC and Article 53a.1 EIC, respectively); the elderly (60+, formerly 75+) (Article 54.3 & 53a.1a (2) EIC). Voting by correspondence was generally available to voters in the years 2014¹⁷-2018¹⁸ and available to voters voting abroad also in the years 2011-2014.¹⁹ It is not clear why postal voting has been removed from the EIC. The problem of the personal quality of the act of casting the vote was vaguely discussed and the issue of possible fraud was raised.

Non-Resident Citizens

Having regard to the fact that the Polish Constitution stipulates the right to vote in national elections as the right of every citizen, non-resident citizens enjoy the right to vote in national elections and local elections.²⁰ Voting rights in local elections are circumscribed by a constitutional definition of local government²¹ in that only residents (inhabitants) can participate. The Constitution does not preclude the right of vote of the non-resident citizens in European Parliament elections.

Non-resident citizens do not have their own representatives. The votes cast by non-resident citizen voters are for representatives who run in the Warsaw area. Their votes are subject to dilution due to the fact that they are assimilated into the Warsaw-Central voting district (Article 358 EIC). Whilst the principle of proportional representation²² does provide for a national sway of non-resident citizens in elections to the *Sejm*, presidential elections and EP elections (despite voting for candidates in the Warsaw region), elections to the Senate are devoid of any general effect : all out-of-country votes are only relevant for the election of the Senator for the constituency comprising Central Warsaw.²³

Polling stations abroad are the responsibility of consular services. There is nothing by the way of a Register of Voters and voters can only enlist in particular elections which is an obstacle in two respects. First, Polish citizens need to register for individual elections. Secondly, the Minister for Foreign Affairs can only guess how many polling stations to provide abroad.²⁴

¹⁷ *Act amending the Electoral Code and Some Other Statutes* [Ustawa o zmianie ustawy – Kodeks wyborczy oraz niektórych innych ustaw], Dz.U.2014.1072.

¹⁸ Amendment of Some Statutes with the Intention of Increasing the Direct Participation in the Proces of Electing, Functioning and Supervising some Public Authorities [Zmiana niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych]. Dz.U.2018.130 of 2018.01.16.

¹⁹ Cf. nn. 25 & 26 *infra*.

²⁰ The Constitution states in Article 62.1: 'If, no later than on the day of voting, he has attained eighteen years of age, Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the *Sejm* and Senate and organs of local government.'

²¹ Article 16 of the Constitution states that 'The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.'

²² Global election result is broken down by the D'Hondt method and particular mandates are distributed according to candidate lists according to the Hare-Niemeyer Method (Article 358 EIC).

²³ Cf. n. text at and n. 109 *infra*.

²⁴ Cf. text at n. 121-123 *infra*.

The system of registration as a voter is flexible and can be made in person, in writing (mail, teletext, e-mail, etc.), as well as through the electronic form available on the ephemeral website www.ewybory.msz.gov.pl.²⁵

In respect of methods of voting from abroad, voting by correspondence was available in the years 2011-2014²⁶ and 2014-2018.²⁷

2. Non-National EU Citizens' Franchise in EP and Local Elections

The Electoral Code regulates all matters in respect of elections.

2.1. Overview of Relevant Administrative Regulations (decrees, circulars, etc.)

EU Directives on voting-rights were implemented in Poland before the country joined the EU (1 May 2004).

EP Elections

Elections to the European Parliament are regulated by the Act of 23 January 2004 – Electoral ordinance to the European Parliament (European Parliament Ordinance – EPO). Voting rights remain largely unaffected by the 2011 Electoral Code as amended.

As with Polish citizens, the right to vote for EU mobile citizens is contingent on age (18 years old), enjoyment of voting rights as well as – additionally – permanent residence within the Republic of Poland (Article 10.1 (2) EIC). As to the condition of residence, some legal commentators maintain that the term ‘permanently resident within the Republic of Poland’ means that at least five years of residence are required prior to acquisition of voting rights.²⁸ This seems implausible, because the EIC speaks the language of actual residence²⁹ and, by contrast, specifically provides for five years of residence within the EU only in respect of *being a candidate* in EP elections³⁰. On the other hand, the five-year period as a test of ‘permanent residence’ seems arbitrarily derived from the statute regulating the administrative law’s

²⁵ Cf. text at n. 121 *infra*.

²⁶ Chapter 8 EIC regulated correspondence voting abroad; Chapter 8 EIC was abrogated when Chapter 6a EIC came to provide a general right to vote by correspondence in 2014 (amendment of 11 July 2014, Journal of Laws of 2014, item 1072).

²⁷ The general right to vote by correspondence was limited to persons with a qualified disability by the amendment of 11 January 2018 coming into force on 31 January 2018 (Journal of Laws of 2018, item 130), and has since been extended onto seniors 75+ and extended onto seniors (60+) and persons under quarantine in 2020, cf. text at n.68 *infra*.

²⁸ ‘In the elections to the EP, the EIC formulates the requirement of permanent residence on the territory of the Republic of Poland. Its meaning can also be reconstructed on the basis of Article 5 (see commentary Article 5). This corresponds with the current understanding of this concept in the jurisprudence of the Constitutional Tribunal, meaning staying for at least 5 years "with the intention of permanent residence in any place located on the territory of the Republic of Poland" (resolution of the Constitutional Tribunal of 21.8.1991, W 7/91, OTK 1991, item 24).’, Bogusław Banaszak, Kodeks wyborczy. Komentarz, [Electoral Code. A Commentary] 2nd ed. (2015), Legalis, § 5 *in fine*.

²⁹ Permanent residence is defined as ‘living in a specific town under a designated address with the intention of permanent residence’, Article 5 (9) EIC.

³⁰ Cf. n. 40 *infra*.

‘permanent right of residence’³¹, whereby the EU citizen can claim the ‘permanent right of residence’³² after five years within the country; the derivation seems arbitrary because the period is – as a matter of law – shortened to three years in certain situations.³³ Whilst the permanent residence requirement is not demanding, residence cannot be only formal and does involve a private life element.³⁴ It is safe to say that permanent residence means nothing other than the fact of having residence (and is not to be confused with registered residence, i.e. *adres zameldowania*)³⁵ or the fact of having registered residence within the country as a matter of administrative law,³⁶ though registering for elections without registering residence would be self-incriminating.³⁷

As electoral participation is contingent on not having been stripped of voting rights (Article 10.4 EIC), there is a potential problem. It should be noted that the Electoral Code does not specifically provide for the enjoyment of voting rights to be ascertained by a declaration (a specific official document is not required). This seems important because the EIC provides for a statutory instrument to regulate the distribution of information about suspension of voting rights pronounced by Polish courts³⁸ but only mentions ‘removal from the list upon the receipt of information’ in respect of EU nationals.³⁹ It is to be noted, however, that registration of voters does not expressly provide for the ascertainment of the right to vote. The Electoral Code requires the Minister for the Interior to be responsible for the exchange of information concerning the right to vote of citizens within the EU (Article 24 EIC).

In addition to the voting rights criteria spelled out in section 1.2, running as a candidate in EP elections in Poland is conditional on the double residence requirement: the EU mobile candidate needs to reside in Poland for the purposes of acquiring the right to vote in such elections (Article 10.1(2) EIC) as well as being able to document five years of residence within the EU prior to elections (Article 11.1(4) EIC). This is consonant with Article 5 of the Council Directive 93/109/EC.⁴⁰ Depending on the interpretation of active voting rights in EP elections of Polish citizens⁴¹, Polish citizens might not be obliged to be resident in Poland for the

³¹ Article 42 *et seq.*, The Act of 14 July 2006 on the entry into the territory of the Republic of Poland[...], cf. n. 10 *supra*.

³² Cf. long-term residents turnout at. 98 *infra* and demographics text at n. 10 *supra*.

³³ Article 43a EIC [three years’ period for the spouses of Polish citizens], and Article 45 EIC [three years’ residence prior to taking retirement].

³⁴ Cf. n. 44 *infra*.

³⁵ Cf. nn. 44, 54 & 55 *infra*.

³⁶ Cf. n. 55 *infra*.

³⁷ Registering residence longer than three months within the country is an obligation subject to administrative fines, cf. n. 54 *infra*.

³⁸ Regulation of the Minister of Justice on notification of municipalities of persons deprived of the right of election of 31 August 2011 (Journal of Laws No. 184, item 1091) [*Rozporządzenie Ministra Sprawiedliwości w sprawie zawiadomiania gmin o osobach pozbawionych prawa wybierania z dnia 31 sierpnia 2011 r. (Dz.U. Nr 184, poz. 1091)*] [].

³⁹ ‘and in connection with information about the deprivation of the right to vote under the laws of the relevant Member State of the European Union’. [‘*oraz w związku z informacją o pozbawieniu prawa wybierania na podstawie przepisów odpowiedniego państwa członkowskiego Unii Europejskiej.*’], Regulation of the Minister of Justice on notification of municipalities of persons deprived of the right of election of 31 August 2011 (Journal of Laws No. 184, item 1091) Article 11.6 EIC.

⁴⁰ Article 5: ‘If, in order to vote or to stand as candidates, nationals of the Member State or residence must have spent a certain minimum period as a resident in the electoral territory of that State, Community voters and Community nationals to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States. This provision shall apply without prejudice to any specific conditions as to length of residence in a given constituency or locality.’

⁴¹ Cf. text at nn. 105-116 *infra*.

purposes of establishing active voting rights but are obligated to show five years of residence in Poland or within the EU.

A candidate who is not a Polish citizen needs to make a declaration that he is not running in another Member State, state his address of prior residence within the EU (Article 344.1 (3) EIC)⁴² and provide a specific declaration as to the enjoyment of the right to stand in elections in the country of origin (Article 344.1(2) EIC).⁴³ The latter is subject to verification before and after the elections (Articles 344a-c EIC). It does not seem that the conditions are onerous in comparison to the requirements of the Polish candidate.

Local Elections

The Act on Amendment of the Electoral Ordinance for the Local Elections and other Acts were signed on 20 April 2004 and became operative on 1 May 2004 (EOLE). Voting rights remain largely unaffected by the 2011 Electoral Code as amended.

In elections to municipal councils, Polish citizens and non-national citizens of the European Union who are 18 years old at the latest on the day of the vote and reside permanently in the commune are eligible to vote. As to the condition of ‘permanently residing’ in the area of the commune, it obtains wherever the individual is actually resident at the place of residence. This means apparently that the condition cannot be met by e.g. ‘posted workers’ because being ‘actually resident’ entails that much of the individual’s private life is situated in the place of residence⁴⁴

According to his or her right to vote in local elections⁴⁵, an EU national can stand to be elected to the lowest level local assembly (the Communal Council) as well as to the second level Communal Council in cases where the lowest level commune takes the hybrid form of first and second level of local self-government⁴⁶, which would be an exception to the principle that only Polish citizens can run in second and third level local self-government. This does not give rise to confusion as to which elections are relevant for the exercise of EU voting rights.

Whilst EU residents enjoy the right of vote in local mayoral elections (Article 10.1(4) EIC in conjunction with Article 10.1(3) EIC), only a Polish citizen can be a candidate in local mayoral elections – communal executive elections (Article 11.1 (6) EIC).

TCNs are not eligible for voting or candidacy even though there is public support for creating such a right to vote in local elections on the municipality level (52,6% ‘I suppose yes’

⁴² This would concern residence before residing in Poland.

⁴³ Contrary to the Council Directive 2013/1/EU of 20 December 2012 which set the date 28 January 2014, until 15 February 2014 (Dz.U.2014.180), Article 344.1(2) EIC required the delivery of ‘A certificate duly made by the relevant authority of the Member State of the European Union of which the candidate for running in the elections is a national stating that the candidate has not been stripped of the right to stand in elections to the European Parliament in such a Member State and that the authority in question has no relevant information whatsoever concerning the stripping of such a right.’ This is still reproduced in Artur Olechno, ‘The electoral rights to the European Parliament of the citizens of the European Union in the Republic of Poland’, *Studia Wyborcze* [Electoral Studies] 2014, No. 17, p. 118.

⁴⁴ The Supreme Administrative Court stated: ‘[...] Residence must be associated with the focus of life activity in it, related not only to work, but also to the family’, Supreme Administrative Court, Resolution of 30/03/2006, I OW 265/05 (not published), Supreme Administrative Court judgment of 15.1.2009, II FSK 896/08, (Legalis).

⁴⁵ Article 11.1 (5) EIC: the right to stand as a candidate in elections to ‘legislative’ organs of territorial self-government depends on the enjoyment of voting rights in such elections whereas Article 10.1 (3) EIC provides for voting rights in local communal elections to the ‘Polish citizens and EU citizens who are not Polish citizens’ and are resident within the commune.

⁴⁶ Cf. note 11 *supra*.

and 17,1% ‘decisively yes’).⁴⁷ Even though the Polish Constitution of 1997 defines local self-government as an association of inhabitants⁴⁸, there is prospect for of non-EU third country nationals to vote. The Constitutional Tribunal, however, has expressed the view that non-citizens voting in local elections does not violate either the right to vote (Article 62 of the Constitution), the principle of national sovereignty or the principle of the Republic as the Common Good of Polish Citizens.⁴⁹ The Constitutional Tribunal did not endorse the principle of representation of residents in local self-government that the Constitution may suggest in Article 16 (see *supra*), but it did acquiesce to the competence of the legislator to fully decide on the requirements of the local elections Directive.⁵⁰

2.2. Voter Registration

Registration is not automatic for EU mobile citizens but requires appropriate application. However, such registration stands for every relevant election until deregistration.⁵¹ The system is flexible in that enlistment on the list of voters for single elections is possible. It is a burden to have to register, but the system whereby a single registration with the Register of Voters suffices for all coming relevant elections may be regarded as facilitation of electoral participation. Importantly, registration is not contingent on any non-electoral-law conditions.⁵²

For Polish citizens registration is automatic and coextensive with the registered place of residence. The Register encompasses all residents of the commune who have the right to vote (Article 18.1 EIC). Communal services maintain the Register of Voters for the relevant territory

⁴⁷ Source: *The attitude of Polish society to the issue of granting local voting rights to migrants who permanently reside in Poland*. Public Opinion Research Center (CBOS), Results of quantitative research for IOM Warsaw (Warsaw: 2014), p. 6.

⁴⁸ Article 16.1 of the 1997 Constitution: ‘The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.’

⁴⁹ cf. Judgment of the Constitutional Tribunal concerning the Accession Treaty of 11 May 2005, (case-call No. K 18/04), http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf, para. 26

⁵⁰ § 25: ‘The Polish constitutional legislator may, in a sovereign manner, regulate the process of elections to State authority organs and elected organs of local self-government within the territory of Poland. [...] Any such statutory regulation should also take into consideration the constitutional principle of sympathetic disposition towards the process of European integration and cooperation between States.’; § 26: ‘The right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship, are resident in Poland (Article 19(1) of the EIC Treaty) does not constitute a threat to the Republic of Poland as a common good of all Polish citizens (Article 1 of the Constitution) nor to its national independence. The local self-governing community participates in exercising public authority of a local nature, and decisions or initiatives regarding the State as a whole may not be adopted within local self-government (cf. Article 16 of the Constitution)’; § 27: ‘Furthermore, granting foreign EU citizens the right to vote and to stand as a candidate at local elections does not contradict Article 62(1) of the Constitution, which guarantees Polish citizens the right to elect, inter alia, their representatives to organs of local self-government. The aforementioned constitutional right is not of an exclusive character, in the sense that, should the Constitution grant it directly to Polish citizens, it might not also be vested in the citizens of other States.’, Judgment of the Constitutional Tribunal concerning the Accession Treaty of Judgment of 11 May 2005, (case-call No. K 18/04), http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf.

⁵¹ EU residents have both the right to enlist (Article 18.9 EIC) and delist (Article 18.10 EIC), which might be important in cases of conflict of electoral law. three days’ period is required for removing from the list of voters for the purposes of unregistering, cf. The case of Anne Germain, in: Marcin Rulka, Wybrane problemy wyborów do Parlamentu Europejskiego [Selected problems of elections to the European Parliament], Infos: zagadnienia społeczno-gospodarcze, nr 8 (168), Biuro Analiz Sejmowych, 23 kwietnia 2014 [Infos: socio-economic issues, No. 8 (168), Parliamentary Analysis Office, 23 April 2014] [http://orka.sejm.gov.pl/WydBAS.nsf/0/C68544BFA17B0E3FC1257CBD0046006B/\\$file/Infos_168.pdf](http://orka.sejm.gov.pl/WydBAS.nsf/0/C68544BFA17B0E3FC1257CBD0046006B/$file/Infos_168.pdf)

⁵² Cfr. text at nn. 28-37 *supra* & text at nn. 54 & 55 *infra*.

based on the registers of residents held by the Registered Residence Register in respect to Polish citizens (Article 18.2 EIC). This is done *ex officio* in respect to Polish citizens (Article 18.8 EIC). Whilst this could sound useful for encouraging first-time voters, coming of age results in registration with the Register of Voters for place of the registered permanent residence, which might be the parents' address. The data in the Register are updated on application.⁵³ The Register of Voters is the basis for the preparation of the List of Voters for relevant elections (Article 26.4 EIC). This information is a relevant background for discussing the situation of EU residents.

As mentioned, contrary to Polish citizens, EU residents need to specifically apply to be in the Register of Voters (Article 18.9 EIC) and are listed in part B of the Register of Voters, which is used to generate the List of Voters for relevant elections only. The fact that EU voters are registered in part B of the Register of Voters is insignificant. Part B of the Register of Voters is the basis for the preparation of the Part B List of Voters. Part A of the Registers and Lists is used for national elections (Article 26 EIC). Part B is only used in elections where EU voting rights are applicable – EP elections, local council and the local executive elections (Article 26.6(2) EIC). Persons holding Polish citizenship are always on Part A of both the Register and the List (Article 26.7 EIC). The non-automatic enrolment is not discriminatory insofar as EU residents are in the same situation as Polish citizens who do not have a registered place of residence and Polish citizens who wish to be enlisted in the Register of Voters according to their actual place of residence (Article 19.1 & 3 EIC), as well as persons who have no place of registered residence (Article 19.2 EIC).

Generally, EU citizens staying over three months on the territory of Poland are obligated to register their stay⁵⁴ as well as their place of residence.⁵⁵ This could well suggest the policy recommendation that registration of stay and registration of residence should entail automatic registration with the Register of Voters.

As mentioned, the system is flexible in that the Register of Voters is the administrative prerequisite for the generation of the Lists of Voters. The latter can be appended and amended before particular elections. Independently of the Register of Voters, voters can thus enlist directly on the List of Voters prepared for particular elections up to five days before the election (Article 28 EIC).⁵⁶ The only rule governing the system is the rule that a voter cannot be on two lists of voters (Article 26.2 EIC).⁵⁷

⁵³ As of 2018, this can be done by an electronic-authenticated statement or an electronically generated application form to be filed out as a signed printout, <https://obywatel.gov.pl/zaswiadczenia-i-odpisy/wpisz-sie-do-rejestru-wyborcow#scenariusz-przez-internet> (accessed on 03-10-2018).

⁵⁴ Article 20.1 of Act of 14 July 2006 on entering, residing and leaving the territory by citizens of the European Union Member States and their family members, on the territory of the Republic of Poland, [*Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin*], consolidated version]; Act of 12 December 2013 on foreigners (Journal of Laws of 2017, item 2206, as amended) [*ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach* (Dz. U. z 2017 r., poz. 2206, z późn. zm.)], taking effect on May 1, 2014, with the amendment implementing Directive (2014/66/EU) (Journal of Laws of 2018, item 107).

⁵⁵ Act of 24 September 2010 on Population Registry (Journal of Laws of 2017, item 657, as amended) [*Ustawa z dnia 24 września 2010 r. o ewidencji ludności* (Dz. U. z 2017 r. poz. 657 z późn. zm.)].

⁵⁶ The 2011 Electoral Law has scrapped down the condition that second-country residents be registered with the Register of Voters for EP Elections, formerly provided for by Article 8 of the EP Electoral Ordinance 2004 and as regulated by Article 11 of the antecedent Parliamentary Elections Ordinance. As a result, an EU citizen can directly register in the List of Voters independently of registering with the Register of Voters.

⁵⁷ The flexibility of the system is not without its discontents, however, and mass migrations in between first and second rounds of voting in mayoral elections in communes have led to a need to block the List of Voters in between the votes, cf. bill amending the Electoral Code, Sejm RP of the VII term, item 318.

As to deadlines for the authorities for registering a voter, Article 20.1 EIC obligates the local authority (*wójt*) to make appropriate changes in the Register of Voters within three days of the application upon verifying that the applicant actually resides on the territory of the commune. In the period between 21 and eight days before elections, voters can consult the List of Voters generated for particular elections (Article 36 EIC) and take appropriate steps with regard to registering on the List of Voters generated for particular elections. The decision is to be taken within two days of application and is subject to judicial review (Article 36.2 EIC).

Under the EIC, registration on the Register of Voters or the List of Voters for particular elections is independent of other registration obligations. Whereas the 2004 EPO provided for the requirement that the residence be lawful⁵⁸, the 2011 EIC does not specify this condition. Specifically, registration is independent of the requirement to register a stay required of EU nationals.⁵⁹ According to Article 19 EIC, both Polish and EU voters who live in the territory of a commune but have a registered place of residence elsewhere can register as voters in that commune upon communicating their place of residence, credentials, copy of their ID and a declaration stating their place of registered residence and nationality.⁶⁰ Article 19 EIC states that Polish citizens have to apply to be in the Register in cases where they do not have any permanent registered residence as well as in cases where they wish to be in the register of their actual place of residence as opposed to their registered place of residence. Whilst scarcity of registration translates into scarcity of data on registrations, it can be safely said that the regulation allows for easy access to voting rights for first-time voters as well as voters with administrative vulnerabilities, such as being in a low skilled job, unstable employment or subject to territorial mobility or unable to document a registered permanent address; this mirrors the flexibility afforded to Polish citizens. The only exception, probably, pertains to the fact that Polish citizens' rights are predicated on nationality and thus allow for the homeless to exercise their voting rights; the homeless could register with lists of voters upon communicating a contact address and can now expressly register with a relevant Register of Voters.⁶¹

Temporary absence from the place of residence within Poland is not an obstacle to casting the vote in EP elections. There is a possibility to obtain an attestation of the right to vote⁶² as well as to enlist in any district according to the procedure described above. In cases of temporary absence from the voting district, the voter can apply for an official statement by the communal services confirming the voter's right to cast a ballot. The statement can be obtained

⁵⁸ Article 8.1 EPO: 'in compliance with the law' [„zgodnie z prawem”].

⁵⁹ Cf. note *supra*.

⁶⁰ 'Voters permanently residing in the area of the commune without registering for permanent residence are entered in the register of voters if they submit a written request to the municipal office. The application should contain the surname, first name(s), the father's name, date of birth and the applicant's PESEL reference number. The application shall be accompanied by: 1) a photocopy of a valid document confirming the identity of the applicant; 2) a written declaration in which the applicant provides his citizenship and permanent address on the territory of the Republic of Poland.'

⁶¹ Regulation of the Minister of the Interior and Administration of 8 November 2018 amending the regulation on the register of voters and the procedure for the transfer by the Republic of Poland to other Member States of the European Union of data contained in this register [*Rozporządzenie ministra spraw wewnętrznych i administracji z dnia 8 listopada 2018 r. zmieniające rozporządzenie w sprawie rejestru wyborców oraz trybu przekazywania przez Rzeczpospolitą Polską innym państwom członkowskim Unii Europejskiej danych zawartych w tym rejestrze*], J.L. 27 November 2018, item 2209 (effective on 12 December 2018); cf. Katarzyna Kubicka-Żach, 'Osoby bezdomne będą mogły głosować w kolejnych wyborach' [The Homeless will be able to Vote in the Next Elections], www.prawo.pl, 07.01.2019, <https://www.prawo.pl/samorzad/prawo-bezdomnych-do-glosowania-pomimo-braku-miejsc-zamieszkania,353583.html>, accessed 15.05.2021]

⁶² Article 32.1 EIC: 'A voter changing his / her place of stay before the election day receives upon the application submitted in writing, by fax or in electronic form before the elections - based on the register of voters, and after drawing up a list of voters - on the basis of the electoral register, certificate of the right to vote in the place of stay on the day of the election.'

by the voter based on the Register of Voters or – once it has been generated – based on the List of Voters (Article 32.1 EIC). Delivery of such a statement to the voter is made upon the submission of an application in writing, by fax or by an electronic form (E-mail).⁶³ There does not seem to be any regulations or time-limits, but the authorities can issue attestations until the moment of transferring the List of Voters to the election authorities⁶⁴ because the statement can be issued only upon deregistering the voter from the relevant List of Voters. This can be regarded as best practice due to the flexibility with regard to presence within the territory.

In EP elections, in cases of temporary absence abroad⁶⁵, non-national EU citizens can cast their votes from abroad as is the case for Polish non-resident citizens. Citizens and resident EU citizens present in a particular district abroad can vote with the consular services (Article 35.1 EIC). Polish citizens need to document their right to vote with a valid Polish passport (Article 31.1 and 31.2 EIC) or a Polish ID when voting within the territory of the European Union (Article 35.5). EU nationals can document their right to vote with a valid ID or a passport of an EU Member State (Articles 31.1 & 31.2 EIC).⁶⁶ Polish voters who reside in Poland and vote through the consular services are not required to present an attestation of the right to vote. However, they are required to state the relevant Register of Voters (Article 35.2) for the purposes of communicating the change of the place of voting to the relevant services. Although unstated, the obligation to state the relevant Register of Voters should also apply to EU nationals voting in Polish EP elections through consular services.⁶⁷ This could be regarded as a good practice because the non-citizen EU resident is able to vote abroad in EP elections on a par with the citizens of the country.

The EIC provides for an array of voting procedures designed to facilitate voting rights for persons with vulnerabilities. Certified substantial and moderate disability gives access to casting the vote by proxy (Article 54 EIC) and by mail (Article 53a EIC) and as well as casting a vote in a priority line (administrative decision). The EIC also regulates special information rights pertaining to special voting rights (e.g., touch-reading implements) and to opportunities for casting a vote at the nearest polling station or at a polling station providing arrangements for reduced-mobility voters (Article 37a EIC). Proxy and postal voting is available to 60+ voters as per COVID innovation (Article 54.3 and 53.1a (2) EIC, respectively). Polling stations can and are set up at hospitals, care-homes and prisons (Article 12.4 EIC) as well as student-housing

⁶³ (i) The same statement can be delivered by the Captain of a Polish ship at sea where the ship has been granted the status of a polling station under Article 15 EIC (Article 34.3 EIC) because enlisting on the ship would have removed the voter from the list in the commune of origin. (ii) The statement can also be issued by the Consul based on the list of voters abroad, where the Consul issues a statement attesting the citizen's right to vote (Article 35.3 EIC). This applies both to voters resident abroad as well as voters who thought they would vote abroad but are returning to the country. Once such persons enlist to vote with the consular services they would have been removed from the list of voters in their commune of origin.

⁶⁴ 'The commune office issues certificates on the right to vote until the voter list is handed over to the chairman of the relevant electoral election commission.', Regulation of the Minister of the Interior regarding the list of voters of 29 December 2014 (Journal of Laws of 2015, item 5)

⁶⁵ The Electoral Code provides for permanent voting districts with the consular services as well as districts on Polish ships wherever at least fifteen voters are present (Article 14 & 15 EIC). They are created according to principles stated in a Regulation of the relevant Minister for Foreign Affairs.

⁶⁶ Article 35.1 EIC: 'Voters who are abroad and have valid Polish passports or – in the case of the citizens of the European Union – a valid passport or other ID document are enlisted on the list of voters prepared by the territorially competent consul.'

⁶⁷ As a matter of interpretation of the statute, however, the statute must be read that only Polish citizens who are not resident in Poland need not state their place of entry into the Register of Voters because in that case there is no need to communicate the enlistment for the purposes of delisting the voter with the List of Voters in the place of residence. As to deadlines, Applications to the List of Voters with consular services is closed three days before election date.

compounds (Article 12.7 EIC). Postal voting has been provided for persons subject to home quarantine and isolation (Article 53.1a (1) EIC).⁶⁸

According to part B of the Register, there were 530 EU citizens enrolled as voters on 31 March 2014. 198 were registered in the Warsaw Region.⁶⁹ In the 2019 EP Elections, the lists of voters recorded 2,530 voters⁷⁰ whereas the registers of long-term residency EU citizens count at 8,094 and registered migrant EU citizens count at 73,673 for 2019.⁷¹

No practical obstacles have been reported as to registration on the Register of Voters or the List of voters.

Vulnerable groups benefit from postal and proxy voting as outlined in Part 1 *supra*.

2.3. Information during the election campaign

Modest information during the election campaign is provided by state authorities. Information has also been provided by a consortium of NGOs.

In all elections, no later than 30 days before the election day, the mayor (as well as the consul and the captain of a Polish ship where applicable) is obligated to provide, in the form of a public announcement to the voters, information about:

- 1) numbers and limits of permanent and separate voting circuits;
- 2) designated seats of the electoral commissions for given elections;
- 3) premises of the district electoral commissions for voting in the region adapted to the needs of disabled voters;
- 4) the possibility of postal voting and voting by proxy for disabled voters.

One copy of the announcement is immediately forwarded to the election commissioner and the National Electoral Commission. (Article 16.1 EIC)

In all elections, at the latest 21 days before the election day, the electoral commissioner provides voters information about the date of the election, voting time, the method of voting and the conditions of validity of the vote in a given election. The electoral commissioner also provides information about the possibilities of correspondence voting and voting by a proxy for disabled voters. This is to be done through a non-addressed printed form distributed in post boxes (Article 37d.1). This obligation has only been in place since 1 January 2016.⁷²

⁶⁸ The time-frame of five days for the request has been subject to criticism in respect to quarantine. The 2020 special presidential election statute was flexible in providing for last minute arrangements for persons subject to quarantine and isolation insofar as the request for postal voting could be made up to two days before election as opposed to the five days rule that applies under the newly revised EIC. It has been suggested that this special arrangement is a reasonable timeframe in any elections (National Electoral Commission, Information on the implementation of the provisions of the Election Code and proposals to amend them, ZPOW-502-1/21, 25 January 2021, [Państwowa Komisja Wyborcza, Informacja o realizacji przepisów Kodeksu wyborczego oraz propozycje ich zmiany, ZPOW-502-1/21, 25 stycznia 2021], item 16).

⁶⁹ A. Bodnar, n. 83 *infra*, p. 130.

⁷⁰ National Electoral Commission, spreadsheet on voting within the communes, https://pe2019.pkw.gov.pl/pe2019/data/csv/wyniki_gl_na_listy_po_gminach_xlsx.zip [accessed 15.05.2021], the data does not allow for differentiating the origin of the inscription on the list of voters.

⁷¹ Office for Foreigners [Urząd do Spraw Cudzoziemców], <https://migracje.gov.pl/statystyki/zakres/polska/typ/dokumenty/widok/tabele/rok/2019/> [accessed 15.05.2021], the data concerning regularised residence of EU citizens in Poland

⁷² Dz.U.2015.1043, amended by Dz.U.2018.130; Article 5 (15).

Over the years, there have been campaigns carried out by the coalition ‘You have your say, you have a vote’⁷³:

- 'Change the country. Go to elections', before the 2007 parliamentary election;
- Check those you choose (2008) campaign at the halfway point of the term of the local councils;
- 'The Belly of Europe', before the European Parliament elections 2009;
- 'Wherever you are, vote' before the presidential election of 2010;
- 'Future councillors are right next to you! You know them? Convince them' before the local government elections 2010;
- 'Go and vote consciously!' before the 2010 local elections;
- 'Women for the election!', before the parliamentary elections of 2011;
- 'Vote and choose a Member or an MP who thinks like you' before the elections to the European Parliament 2014.

All campaigns were online, included YouTube video spots, and discussion forums. However, these campaigns only targeted Polish voters in Polish. Political parties do not target EU citizens as voters.

The 2018 local elections and the 2019 EP elections were not as extensively targeted by civil society. The National Electoral Committee, however, has since been inspired by previous social media communication by NGOs and provides video and explanatory notes that correspond to natural communication patterns on the Internet. The government e-citizen platform is also usefully deployed to communicate about deadlines and procedures as well as to provide e-administration services.

2.4. Political Parties and Candidacy Rights

EP Elections

Both Polish and EU nationals are required to show residence of at least five years in Poland or any other EU country before being able to run as a candidate (Article 10.1(2) in conjunction with Article 11.1(4) EIC). EU nationals need to prove their residence in Poland whereas Polish nationals are in principle not required to show residence in Poland.⁷⁴

The practicalities of running in the elections to the European Parliament should be noted. The lists of candidates are proposed by electoral committees that can belong to a political party, a coalition of political parties or to the voters themselves⁷⁵ (Article 341 EIC). Any

⁷³ The Stefan Batory Foundation (coordinates the work of the Coalition, www.batory.org.pl), Educa CenterCywilna (www.ceo.org.pl), the European Forum at the European Center of the University of Warsaw, the Forum for Civic Development FOR (www.for.org.pl), the Foundation Project:Poland (www.projektpolska.pl), The Foundation for the Development of the Information Society (www.frsi.org.pl), Institute of Public Affairs (www.isp.org.pl), the Outdoor Advertising Chamber of Commerce (www.igrz.com.pl), the Chamber of Press Publishers (www.iwp.pl), Polish Robert Schuman Foundation (Foundation www.schuman.org.pl), the Confederation of Employers Lewiatan (www.konfederacijalewiatan.pl), the Association of Marketing Communication SAR (www.skmsar.org), the Organisation of the Local Press (prasalokalna.eu), Association of Friends of Integration (www.integra-cja.org), the School for Leaders Association (www.szkola-liderow.pl).

⁷⁴ Cf. text at nn. –114-125 *infra*.

⁷⁵ The right to nominate candidates for deputies to the European Parliament is vested with: 1) the electoral committee of a political party; 2) a coalition electoral committee; 3) electoral committee of voters. The electoral

committee needs to propose a list containing five to ten candidates (Article 342 EIC) and the list needs to be supported by the signatures of at least 10,000 voters from the relevant voting district (Article 343 EIC). This is a difficult requirement, particularly since the number of signatures required is set to 5,000 in elections to the Sejm (Article 210 EIC) and a single candidate for a Senator only needs to present 2,000 signatures of support (Article 265 EIC). There is a 5% national threshold for the candidates to be able to win a seat (Article 335 EIC).⁷⁶ These requirements suggest that candidacy in EP elections is strongly dependent on political party resources.

Local Elections

In local elections, Polish nationals and EU nationals are required to prove their residence in Poland.

In communal elections, the right to nominate candidates for communal councillors is vested with several electoral bodies: 1) the electoral committee of a political party; 2) a coalition electoral committee; 3) the electoral committee of an organisation ; 4) an electoral committee of voters (Article 399 EIC). The electoral committee of voters can be established upon collecting 1000 signatures. To be effective, the lists of voters presented to elections have to be accompanied by supporting signatures of voters. In a commune with up to 20,000 inhabitants this must be at least 25 voters, and in a commune with more than 20,000 inhabitants this must be at least 150 voters (Article 427 EIC).

Regarding the practicalities of running in elections within a system based on the influence of political parties, it is important to note that the Constitution does not guarantee⁷⁷ and the Act on Political Parties⁷⁸ does not allow for foreigners' membership in political parties.⁷⁹ According to an opinion issued by the Legislative Council of the Government⁸⁰ and legal scholarship⁸¹, however, Article 11 of the Constitution does not prohibit amending the

committee of voters is not directly regulated in respect of EP elections but are in our opinion regulated *per analogiam* by the regulations in respect of electoral committees in parliamentary elections, where 1000 signatures of voters are required to establish an electoral committee of voters (Article 204.6 EIC)

⁷⁶ An amendment to EIC stipulating that in addition to the 5% national-vote requirement another requirement (i.e. 16,5 % of votes in every constituency) would condition the final distribution of Polish EP seats was vetoed by the President of the Republic in the summer 2018. The controversy is presented at <https://www.euractiv.com/section/future-eu/news/polish-ep-electoral-code-change-potential-flashpoint-between-brussels-and-warsaw/>.

⁷⁷ Article 11: 'The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.'

⁷⁸ Article 2 of the Act on Political Parties (*Ustawa z dnia 27 czerwca 1997 r. o partiach politycznych*), Journal of Laws 1997 No 98 item 604, as amended.

⁷⁹ The issue was raised by the European Commission on 16 April 2012 within the EU-Pilot scheme (case 3331/12/JUST).

⁸⁰ 'The Opinion of 14 September 2012 Concerning the Interpretation of Article 11 of the Constitution of the Republic of Poland and the Possibility of Amending the Act on Political Parties of 27 June 1997' [*Opinia z 14 września 2012 r. dot. interpretacji art. 11 Konstytucji Rzeczypospolitej Polskiej i możliwości ewentualnej nowelizacji ustawy z dnia 27 czerwca 1997 r. o partiach politycznych Rada Legislacyjna*], the Legislative Council, call-No. RL-0303-16/12, <http://radalegisacyjna.gov.pl/dokumenty/opinia-z-14-wrzesnia-2012-r-dot-interpretacji-art-11-konstytucji-rzeczypospolitej-polskiej>, <http://radalegisacyjna.gov.pl/sites/default/files/dokumenty/dokument.pdf>.

⁸¹ Krzysztof Wójtowicz, 'Obywatelstwo a przynależność do partii politycznych' [*Citizenship and affiliation to political parties*], *Toruńskie Studia Polsko-Włoskie Xii — Studi Polacco-Italiani Di Toruń Xii* [The Toruń Polish-Italian Studies XII - Studies Polacco-Italiani Di Toruń XII], Toruń 2016, DOI:

statute to the effect of recognising that effective residence gives rise to a special bond justifying the inclusion of residents in the system of political parties. The European Commission has conducted an infringement review (since 2013) and has initiated a procedure (since 2021) in respect to this matter maintaining that the restrictions hindering non-Polish EU citizens in Poland to join a political party are contrary to Articles 20(2)(b) and 22 of the Treaty on the Functioning of the European Union and the principle of non-discrimination on grounds of nationality.⁸²

The ban on participation in political parties by foreigners is an important obstacle for EU citizens who want to exercise their voting and candidacy rights because they are barred from political life in-between elections. As has been observed: ‘It is difficult to expect citizens of the European Union to participate effectively in political life (even if it is limited only to local elections and to the European Parliament), since they are unable to participate fully in the work of political parties.’⁸³ Further, it has been noted that “It is evident that due to the enormously important role played by parties in the political process, it is impossible to effectively exercise election rights in local and European Parliament elections without the possibility of association in political parties.”⁸⁴ There is no corroborating evidence to justify those claims and there is nothing by the way of public support for such an initiative.⁸⁵ The European Commission has underscored the problem of access to political parties for mobile EU citizens.⁸⁶ There are, however, practical issues that arise in local elections.

A clear practical obstacle faced by EU citizens who want to exercise their electoral rights to stand in elections and support their candidates results from the regulations of the Electoral Code regarding the financing of electoral committees of organisations and voters. The financial means for running electoral committees of an organisation or a group of voters can only come from donations from Polish citizens who reside permanently in the

<http://dx.doi.org/10.12775/TSP-W.2016.017>; M. Dąbrowski, Konstytucyjny aspekt zrzeszania się cudzoziemców w partiach politycznych w Polsce [The Constitutional Aspect of Associations of Foreigners In Political Parties in Poland], *Przegląd Sejmowy* 2011/2, pp. 107-124.

⁸² The procedure was first initiated in 2013. The procedure concerns Poland and the Czech Republic. The matter has been referred to the Court of Justice. EU citizens' electoral rights: Commission decides to refer CZECHIA and POLAND to the Court of Justice, European Commission Press Corner, 9 June 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1829 [accessed 01/07/2021].

⁸³ ‘Trudno się spodziewać, aby obywatele Unii Europejskiej skutecznie uczestniczyli w życiu politycznym (nawet jeśli ma się to ograniczać tylko do wyborów lokalnych oraz do Parlamentu Europejskiego), skoro nie mają możliwości pełnego uczestnictwa w pracach partii politycznych.’ A. Bodnar, *Rzeczywisty wymiar praw i wolności politycznych obywateli Unii Europejskiej*, w: *Ochrona praw obywateli i obywateli Unii Europejskiej, 20 lat – osiągnięcia i wyzwania na przyszłość*, [The actual dimension of political rights and freedoms of citizens of the European Union, in: *Protection of the rights of citizens and citizens of the European Union, 20 years - achievements and challenges for the future*, pp. 127 *et seq.*], p. 140.

⁸⁴ ‘Voting rights for foreigners – for or against? The analysis of the process of granting voting rights to third country nationals – selected examples from across the EU’, *Analysis of migrants’ enfranchisement process by example of selected EU countries*. Project co-financed from the European Fund for the Integration of Third Country Nationals. editors Sławomir Łodziński, Dorota Pudzianowska, Marta Szaranowicz-Kusz International Organisation for Migration (IOM) The Institute of Sociology of the University of Warsaw, Warsaw, October 2014.

⁸⁵ Whereas there is wide support for the TCNs right to vote in local elections on the municipality level (52,6% I suppose yes and 17,1% decisively yes), the support for the right to become members of Polish political parties is weaker (44,3 I suppose yes 13,3% decisively yes). Source: *The attitude of Polish society to the issue of granting local voting rights to migrants who permanently reside in Poland*. Public Opinion Research Center (CBOS), Results of quantitative research for IOM Warsaw (Warsaw: 2014), p. 6.

⁸⁶ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections COM/2018/044 final, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52018DC0044>, p. 11.

Republic of Poland, or from bank loans taken solely for the purposes of elections but underwritten by Polish citizens residing permanently in Poland (Article 132.3 & 132.6 EIC).⁸⁷ Resident EU citizens are thus excluded from financial political participation as are non-resident citizens. In practical terms, however, EU nationals standing as candidates are not able to provide funds for the conduct of the election campaign; Polish local election candidates are either financed by a political party or provide their own funding.⁸⁸ It would therefore be appropriate to enable EU voters and candidates to make contributions at least to individual electoral efforts, as well as to enable them to contribute to the electoral fund of political parties in cases where they are put forward as candidates by an electoral committee of a political party.

Polish political parties do not support EU nationals as candidates but two EU citizens have been elected as local councillors:

- Franz Becker was born in Pomysk Wielki in Poland. He then moved to Rumia with his parents, where he finished his education and started to work in a Municipal Public Utilities and Housing Company. In 1979 he moved with his family to Hamburg, Germany, where he lived till 2009. He came back to Poland with his wife and he started to run his own business in agritourism. In 2010, he was elected as the local councillor in Parchowo.⁸⁹
- Frédéric Coppin was born in 1969 in the north of France. He studied computerisation of accounting and worked in a bank. He was interested in issues of the local community, analyzed the life and needs of the inhabitants and often visited the commune council sessions in France. In 1997, together with his wife he moved to Poland and settled in Tułowice. In 2010, Coppin was elected as a councillor in the municipality of Tułowice. To make his functions even better he started studying in the field of local government administration in Opole. In July 2013, Frederic Coppin received Polish nationality.⁹⁰ He is the President of the Local Council.⁹¹

In the 2014 local elections, ten EU residents stood as candidates to local councils.⁹²

2.5. Turnout

No data exist as to turnout of EU Citizens and there are no estimates. As the number of voters is negligible, there has not been any debate about the influence of EU voters on political outcomes in Poland.

⁸⁷ Tomasz Gąsior, *Kontrola finansowania komitetów wyborczych. Zagadnienia prawnoadministracyjne* [The Control of Financing of Electoral Committees. Administrative Problems] Warszawa : Wydaw. Sejmowe, 2015.

⁸⁸ Paweł Stępień, 'Wybory samorządowe 2014 – perspektywa praktyczna i ocena systemu 'wyborczego [Polish local election in 2014 – the practical perspective and the evaluation of the electoral system], *Studia Wyborcze* [Electoral Studies], 19/2015, p. 93.

⁸⁹ European Year of Citizens 2013 Faces, http://europa.eu/citizens-2013/sites/default/files/content/131115_PL_FoY_Franz_Becker_EN.pdf

⁹⁰ http://europa.eu/citizens-2013/sites/default/files/content/131115_PL_FoY_Frederic%20Coppin_PL.pdf

⁹¹ <https://web.facebook.com/Frederic-Coppin-Przewodnicz%C4%85cy-Rady-Gminy-Tu%C5%82owice-575081759305219/>

⁹² Information provided by Wojciech Dąbrówka, press officer with the National Electoral Committee, <https://www.portalsamorzadowy.pl/polityka-i-spoleczenstwo/w-Polish-Press-Agency,-W-wyborach-samorzadowych-moga-glosowac-samorzadowych-moga-glosowac-obywatele-ue,113372.html>. UE [EU Citizens can vote in Local elections], 12 .09.2018, <https://www.portalsamorzadowy.pl/polityka-i-spoleczenstwo/w-wyborach-samorzadowych-moga-glosowac-obywatele-ue,113372.html> [re-accessed: 02.07.2021].

EP Elections

In the EP Elections of 2014, the national turnout was 22.7% (with 28.09% for the *mazowieckie* Voivodship and 17.42% for *warmińsko-mazurskie* voivodship).⁹³ In 2009, the turnout was at 24.53%.⁹⁴ In 2004, turnout was at 20.1%.⁹⁵ There is no data as to EU mobile citizens voting.

As to resident non-citizens voting in the 2019 EP elections, the turnout calculated⁹⁶ against a broader category of active voters⁹⁷ amounts to 51%; it is to be noted that the inscription rate of EU citizens is rather low in Polish EP elections.⁹⁸

Local Elections

In local elections, the national turnout ranges slightly above 47 % in the first round and 39.97% in the second round⁹⁹ nationally.¹⁰⁰ In 2014, 679 out of 985 registered EU-resident voters voted in the first round and 430 out of 737 registered voters voted in the second round, the latter overall number being different because not all communes had the second round.¹⁰¹

In 2018, the turnout of active EU voters stood at 75% (1,381 out of 1,845 registered EU voters were for the local elections).¹⁰² The national turnout was 48.83%.¹⁰³

⁹³ <http://pe2014.pkw.gov.pl/pl/>

⁹⁴ <http://pe2009.pkw.gov.pl/PUE/PL/WYN/F/index.htm>

⁹⁵ <http://pe2004.pkw.gov.pl/WynWyb/pdf/art128zal4.rtf>

⁹⁶ National Electoral Commission, spreadsheet on voting within the communes, https://pe2019.pkw.gov.pl/pe2019/data/csv/wyniki_gl_na_listy_po_gminach_proc_xlsx.zip [accessed 15.05.2021]

⁹⁷ i.e. voters who registered with either the register of voters or the list of voters for this particular election; the voters who registered with the Register of Voters might not have done this for this particular 2019 EP elections.

⁹⁸ Whilst the voter lists count 2530 (National Electoral Commission, spreadsheet on voting within the communes, https://pe2019.pkw.gov.pl/pe2019/data/csv/wyniki_gl_na_listy_po_gminach_proc_xlsx.zip [accessed 15.05.2021]), registers of long-term residency EU citizens count at 8094 and migrant registered EU citizens count at 73673 for 2019, Office for Foreigners [Urząd do Spraw Cudzoziemców], <https://migracje.gov.pl/statystyki/zakres/polska/typ/dokumenty/widok/tabele/rok/2019/> [accessed 15.05.2021], the data concerning regularised residence of EU citizens in Poland.

⁹⁹ The second round pertained to the election of executive posts (mayor, *wójt* and president of towns).

¹⁰⁰ http://samorzad2014.pkw.gov.pl/357_rady_woj

¹⁰¹ the elections being based on majority.

¹⁰² Based on the National Electoral Commission spreadsheet available at <https://wybory2018.pkw.gov.pl/xls/2018-frekwencja-i-niewa%C5%BCne-w-obwodach.zip>, columns.AZ and BE [accessed 15.05.2021].

¹⁰³ <https://wybory2018.pkw.gov.pl/pl/frekwencja/0411#f1000001> [accessed 15.05.2021].

3. Non-Resident Citizens' Franchise in National and EP Elections when Residing in Other EU Member States

3.1. Overview of Relevant Administrative Regulations

All matters are governed by the Electoral Code, with an important delegation of matters to be regulated by the Minister for Foreign Affairs relating to the establishment of polling districts abroad, the creation of the Lists of Voters and organisation of polling stations by the consuls (Articles 14.1, 35.4, & 47.9 EIC, respectively).

The Polish electoral system does not provide for a special representation of citizens living abroad. The representation of voters voting abroad is based on the system of 'assimilated representation' – the votes cast abroad are assimilated¹⁰⁴ into the voting district for Central Warsaw for both voting with consular services (Article 14.3¹⁰⁵) and voting on-board Polish ships (Article 15.4 EIC).¹⁰⁶¹⁰⁷ The principle of assimilated representation does not influence the presidential elections and parliamentary elections to the Sejm or to the European Parliament as those are governed by proportional representation¹⁰⁸ and votes cast translate into the national electoral result. Assimilated representation might appear rather odd in the majoritarian system in elections to the Senate as all votes cast abroad go into the election of the Senator in one of the Warsaw regions.¹⁰⁹

National Elections

The Polish Electoral Code does not require residence within the Republic of Poland for voting in parliamentary or presidential elections (Article 10.1.(1) EIC) – the nationality and age requirements suffice. Despite a problematic formulation¹¹⁰, residence is not a condition for voting in EP elections. The Electoral Code generously provides for the exercise of voting rights abroad (Article 35 EIC). Local self-government elections, however, include a residence condition (Article 10.1.(2-4) EIC) and no provision for voting abroad applies. Similar principles govern running in national elections.

¹⁰⁴ In the event of the results of elections in overseas polling stations in consulates and sea ships not being communicated within 24 hours of the vote, the voting in such polling stations is considered null and void in parliamentary Sejm and Senate elections, presidential elections and national elections, and elections to the European Parliament (Articles 230.2, 272.2, 314.2, 353.2 EIC, respectively).

¹⁰⁵ Article 14.3 EIC. The voting circuits referred to in § 1 are part of the electoral district proper for the Śródmieście district of the capital city of Warsaw.

¹⁰⁶ Article 15.4 EIC. The voting circuits referred to in § 1 are part of the electoral district proper for the Śródmieście district of the capital city of Warsaw.

¹⁰⁷ with Article 78.4 EIC somewhat dragging behind legislative change and providing for the results to voting districts relevant to the headquarters of the ship-owner.

¹⁰⁸ Cf. n. 23 *supra*.

¹⁰⁹ In 2015, Barbara Borys-Damięcka was elected as the Senator in respect of the area covering inter alia Central Warsaw (Białołęka, Bielany, Śródmieście, Żoliborz) receiving 57,510 votes from abroad totalling at 164,796. Anna Anders – now a Senator elected in supplementary elections in 2016 – received 78,452 votes from abroad but came in second with the total of 154,746 votes.

https://nowyjork.msz.gov.pl/pl/informacje_konsularne/wybory/wyniki_wyborow_parlamentarnych_w_polsce & http://parlament2015.pkw.gov.pl/351_Wyniki_Senat/0/0/44.

¹¹⁰ Cf. text at 111-124 *infra*.

EP Elections

In respect to the problem of statutory entrenchment of the Polish non-resident citizens' right to vote and be a candidate in EP elections, it should be noted that the formulation of Article 10 EIC is unclear as to the residence condition.¹¹¹ Specifically, it is not clear if a national residence is a condition to vote in EP elections for both Polish citizens and EU nationals or only for the latter. The grammatical form of the sentence and the use of commas suggest that the final specification 'and resides in Poland' pertains to *both* the EU residents as well as the Polish national. The argument might be made by insisting on the meaning of the comma used before the term 'and' [Polish – 'oraz'],¹¹² However, there are also arguments to the contrary.¹¹³ Putting the obligations under the Council Directive 93/109/EC aside, internal instruments confirm the latter interpretation. First of all, the 2004 Electoral Ordinance did not provide for the residence condition of Polish citizens at all¹¹⁴ and no changes in this respect have been discussed.¹¹⁵ The Regulation issued as its statutory instrument rather suggested that citizens had the right to choose to vote in Polish EP elections regardless of residence.¹¹⁶ The new Regulation implementing the 2011 EIC repeats the same intuition.¹¹⁷ Likewise – and following Article 4.1¹¹⁸ of Council Directive 93/109/EC – the 2011 Electoral Code intimates that citizens have the right to choose where they vote in EP elections.¹¹⁹ Secondly, the 2011 Electoral Code provides for consular polling stations in EP elections as generously as it does for other national elections where any Polish citizen has the right to vote regardless of their residence and where voting districts abroad are specifically created for the purpose of European Parliament

¹¹¹ Article 10.1.(2) EIC: '[...] a Polish citizen who is 18-years-old on the day of the elections and a citizen of the European Union who is not a Polish citizen and is 18-years-old on the day of the elections, and resides in the territory of the Republic of Poland'. [(...) obywatel polski, który najpóźniej w dniu głosowania kończy 18 lat oraz obywatel Unii Europejskiej niebędący obywatelem polskim, który najpóźniej w dniu głosowania kończy 18 lat, oraz stale zamieszkuje na terytorium Rzeczypospolitej Polskiej;].

¹¹² B. Banaszak, n. 28 *supra*, § 5.

¹¹³ 'The holding of Polish citizenship is sufficient to show the special bond in the case of a Polish citizen' [whereas EU citizens need to show bonding by residence – P.K.] ['Wystarczającym wyrazem istnienia takiego związku w przypadku obywatela polskiego jest natomiast polskie obywatelstwo.'] Czaplicki Kazimierz W. i in., Kodeks wyborczy. Komentarz. [The Electoral Code. A Commentary], LEX 2014, at Article 10.

¹¹⁴ Article 7 EPO provided simply that: 'The right to vote (active electoral right) of members of the European Parliament in the Republic of Poland has every Polish citizen who reaches 18 years of age at the latest on the day of the vote.'

¹¹⁵ No mention of such a major change has been discussed in: Anna Rakowska & Krzysztof Skotnicki, "Changes in Electoral Law Introduced by the Election Code", *Przegląd Sejmowy* [The *Sejm* Review] 4(105)/2011.

¹¹⁶, Regulation of the Minister of Internal Affairs and Administration on the Register of Electors in Elections to the European Parliament, 6 April 2004, journal of Laws no. 62, item 583.

¹¹⁷ In respect to striking off lists of voters: 'In the elections to the European Parliament, part A of the list includes voters who are Polish citizens, with the exception of voters **who volunteered to vote** in the European Parliament elections held by another Member State of the European Union.' § 3.2 and '8) who have **declared their willingness to vote** in European Parliament elections held by another Member State of the European Union - in the case of elections to the European Parliament.', Regulation of the Minister of the Interior regarding the list of voters of 29 December 2014 (Journal of Laws of 2015, item 5).

¹¹⁸ 'Community voters shall exercise their right to vote either in the Member State of residence or in their home Member State. No person may vote more than once at the same election.'

¹¹⁹ Article 24.1 EIC ('The minister competent for computerisation shall provide the competent authorities of the European Union Member States, upon their request, with data concerning Polish citizens wishing to exercise their electoral rights in the territory of another European Union Member State, to the extent necessary to exercise these rights') and Article 25 (4) EIC ('[...]the procedure of transferring by the Republic of Poland to other EU Member States data on citizens of these countries entered in the register of voters and those removed from the register of voters, as well as Polish citizens wishing to exercise their electoral rights in the territory of another European Union Member State, taking into account in particular the form and dates of exchange of these information, as well as the need to ensure the protection of personal data.').

elections.¹²⁰ Lastly, there is also a constitutional argument to be made that participation in EP elections partakes in the exercise of national sovereignty (Article 4 of the Constitution) and thus the rights of Polish citizens cannot be constrained by the residence condition even though the Constitution does not cover EP elections as part of the right to vote.¹²¹ In 2014 EP elections, polling stations were created worldwide under the Regulation of the Minister for International Affairs¹²² and this interpretation was confirmed by the National Electoral Committee Polish to the effect that citizens enjoyed the right to choose whether they would participate in EP elections according to residence or nationality.¹²³¹²⁴ It is to be noted, however, that this interpretation is not self-evident and that Polish citizens' right to vote and stand as a candidate in EP elections regardless of the place of residence is not entrenched by statute and could well be amended by the executive.

As to running in EP elections, Polish nationals are required to show residence of at least five years in Poland or any other EU country before being able to run as a candidate (Article 10.1(2) in conjunction with Article 11.1(4) EIC) as well as – according to one interpretation of the Electoral Code¹²⁵ – prove residence for the purposes of ascertaining voting rights in Poland.

3.2. Voter Registration

National elections and EP elections

Citizens who reside permanently abroad can cast votes from abroad in national and EP elections (Article 35.1 and 35.5) by voting with the consular services in person. Postal voting is no longer generally available as of 2018.¹²⁶ They can also vote by returning to the country on election day, provided they obtain a statement issued by the relevant consular services affirming their right to vote (Article 35.3 EIC or enrol on the list of voters before the deadline of five days.); direct enlistment at the domestic polling station is also possible in national elections (parliamentary, presidential, and EP) upon producing proof of residing abroad permanently (Article 52.3 EIC) and subject to the condition of communicating such inscription to the relevant consul for the place of residence abroad (Article 31 EIC).

¹²⁰ Article 14.1 EIC reads ‘In order to conduct elections to the Sejm and to the Senate, elections of the President of the Republic and elections to the European Parliament in the Republic of Poland, voting circuits for Polish citizens residing abroad shall be established if there are at least 15 electors and if it is possible to forward the voting results to the proper electoral committee immediately after its completion’.

¹²¹ Article 62.1 of the Constitution: ‘If, no later than on the day of voting, he has attained eighteen years of age, Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local government.’

¹²² Regulation of the Minister of Foreign Affairs of 16 April 2014 on the establishment of voting districts in the elections to the European Parliament in the Republic of Poland for Polish citizens staying abroad [Rozporządzenie Ministra Spraw Zagranicznych z dnia 16 kwietnia 2014 r. w sprawie utworzenia obwodów głosowania w wyborach do Parlamentu Europejskiego w RP dla obywateli polskich przebywających za granicą (Dz. U z 2014 r., poz. 509)].

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20140000509/O/D20140509.pdf>.

¹²³ National Electoral Committee [Państwowa Komisja Wyborcza] ZPOW-903-9/14, http://pkw.gov.pl/496/Informacje_ogolne/2/8421/Informacja_o_warunkach_udzialu_obywateli_polskich_w_glosowaniu_w_obwodach_glosowania_utworzonych_za_granica_i_na_polskich_statkach_morskich_w_wyborach_do_Parlamentu_Europejskiego_ktore_zostana_zarzadzane_na_dzien_25_maja_2014_r

¹²⁴ http://www.europarl.europa.eu/poland/pl/wybory_2014/jak_glosowac.html.

¹²⁵ Cf. text at nn. 111-124 *supra*.

¹²⁶ Cf. text and nn. 17-19 & 68 *supra*.

There is no Register of Voters abroad, and voters abroad need to register on the List of Voters prepared by the consular services for the relevant elections (parliamentary, presidential, EP).

The entry on the List of Voters with the consular services is made on the basis of a personal oral application, in writing, by phone, telegram, telefax or in electronic form. The application should contain surname and first name (first names), father's name, date of birth, PESEL reference number, designation where the voter resides abroad, the number of a valid Polish passport, as well as the place and date issue, and in the case of Polish citizens *temporarily* staying abroad the place of entering the voter in the Register of Voters. The preparation of the Lists of Voters is regulated by regulations of the Minister for Foreign Affairs (Article 35.4 EIC). Applications can be made at the latest three days before the election day (Article 35.2 EIC) but review mechanisms are specifically withdrawn (Article 37.3 EIC) and it is difficult to say if this time-limit is enforceable. There is a system of registration through an online form available on the ephemeral special-election-purposes website of the Ministry for Foreign Affairs at www.wyborz.msz.gov.pl. the system's first antecedent was the electronic form provided in the UK at <http://www.wybory.co.uk>¹²⁷ in 2007.

The lack of a Register of Voters abroad is problematic not only in respect of the obligation to register for any particular elections but also in respect of the *ad hoc* nature of the organisation of polling stations. In other words, the number of active voters reflects the fact that voting abroad requires both a substantial commute to the polling station as well as substantial waiting time queuing outside the polling station abroad. Whilst the National Electoral Committee suggests that postal voting be reconsidered for voters abroad, it has been proposed that the statute should regulate the number of polling committees and auxiliary personnel. In the 2020 presidential elections, for example, two polling stations in Manchester were set up to process 22,250 votes and three polling stations in London processed more than 18,000 votes each.¹²⁸ The administrative aspect is important because the statute provides for the results abroad to be voided unless they are communicated within 24 hours, whereas the 2020 presidential elections statute had provided for a time-limit of 48 hours¹²⁹; the statute thus should allow the resources to process vote counts particularly if postal voting should be reintroduced.

There is a rather disappointing failure to disconnect the electoral rights of the Polish diaspora from the electoral rights of persons exercising EU mobility rights who still retain a strong interest in electoral results in Polish elections. Likewise, the statutory concretisation of voting rights abroad is in no way EU-specific. This means that the system seeks to give equal weight and opportunity to voting rights world-wide whereas it could concretise EU obligations better in respect of mobile EU citizens' right to vote in EP elections specifically. Since the right to vote in national EP elections is entrenched in European law and EU mobility indirectly affects political outcomes in national elections, it would seem that the EIC should regulate the exercise of voting rights by citizens within the EU so as to provide effective access with many more polling stations distributed adequately across the territories, as well as postal or e-voting opportunities.

As local elections are not covered by voting abroad provisions and there is no provision for voting by correspondence or e-voting, the exercise of EU mobility rights translates into relinquishment of electoral rights in local elections, which seems particularly unfortunate in the case of short-term EU mobility. Mobile citizens lose their residence and thus their voting rights

¹²⁷ <http://www.mojawyspa.co.uk/artykuly/19879/Zasady-glosowania-w-wyborach-do-Sejmu-RP-i-Senatu-RP> [accessed 02.08.2018].

¹²⁸ National Electoral Commission, ZPOW-502-1/21, item 14.

¹²⁹ National Electoral Commission, ZPOW-502-1/21, item 14.

immediately after registering abroad as voters. There is, however, an under-developed regulatory aspect of short-term mobility in respect to voting in local elections: short-term mobile citizens can retain their voting-rights residence when out-of-the country but such exercise of EU freedoms translates into effective relinquishment of voting rights in local elections because there is no voting-opportunities regulation.

3.3. Turnout

National elections

As there is no register of voters abroad, the turnout abroad can only be calculated on the basis of persons who have registered on the list of voters as opposed to the number of persons having the right to vote. In other words, the turnout statistics calculate those who wished to vote and registered as compared to those who actually turned up to vote.¹³⁰ In national parliamentary elections, such turnout was 71.59% in 2005¹³¹ 78.26% in 2007¹³², 85.84 % in 2011¹³³, and 87.64% in 2015.¹³⁴ In the 2019 parliamentary elections, national turnout was at 60.74 % and the active voter turnout abroad was 90.38%.¹³⁵ In the 2020 presidential elections, the turnout of active voters abroad was 86% for persons voting in person and 87% for postal voters in the first round of voting¹³⁶ and 67% (voting in person) and 83% (voting by post) in the second round¹³⁷, with a sizeable change of registered voters (373,929 for the first and 524,884 for the second round). There is much media excitement regarding the influence of votes cast abroad as the results come in late accompanied by the glamour of diaspora electorship and have the magic of potentially swaying the overall electoral result. Politicians thus do court electors abroad.¹³⁸ It is to be noted, however, that the votes cast abroad contribute c.a. 1% of all votes in elections and thus have little impact on the overall result.¹³⁹

In public debate and electoral law scholarship, there is a tendency to consider electoral rights holders in terms of having registered for the elections as opposed to persons who are vested with electoral rights that are not exercised through non-registration. In fact, the numbers are disappointing. In respect to Polish mobile EU citizens, the UK numbers are telling. Consider

¹³⁰ In 2015, Polish voters in Georgia attained the turnout of 100% -- there were 143 persons who registered and actually turned up to vote, http://parlament2015.pkw.gov.pl/350_Wyniki_Sejm_zagranica/0/32 [accessed 02.08.2018].

¹³¹ <http://www.wybory2005.pkw.gov.pl/SJM/PL/WYN/F/index.htm> [accessed 02.08.2018].

¹³² <http://www.wybory2007.pkw.gov.pl/SJM/PL/WYN/F/index.htm> [accessed 02.08.2018].

¹³³ <http://wybory2011.pkw.gov.pl/att/pl/000000.html#tabs-1> [accessed 02.08.2018].

¹³⁴ http://parlament2015.pkw.gov.pl/350_Wyniki_Sejm_zagranica

¹³⁵ Based on the National Electoral Commission,

<https://sejmsenat2019.pkw.gov.pl/sejmsenat2019/pl/frekwencja/pl> [accessed 15.05.2021].

¹³⁶ Based on the National Electoral Commission spreadsheet based on voting districts

https://prezydent20200628.pkw.gov.pl/prezydent20200628/data/1/csv/wyniki_gl_na_kand_po_obwodach_xlsx.ip [accessed 15.05.2021].

¹³⁷ Based on the National Electoral Commission spreadsheet based on voting districts

https://prezydent20200628.pkw.gov.pl/prezydent20200628/data/2/csv/wyniki_gl_na_kand_po_obwodach_xlsx.ip [accessed 15.05.2021]

¹³⁸ Magdalena Lesińska, *Partycypacja Polaków głoszących za granicą w wyborach krajowych: analiza wyników wyborów parlamentarnych i prezydenckich w Polsce w latach 1990-2011*, [Participation of Poles voting abroad in national elections: analysis of the results of parliamentary and presidential elections in Poland in 1990-2011] Center of Migration Research Paper 79/137, December 2014, p. 46.

¹³⁹ Lesińska, n. 138 *supra*, p. 47.

the peak¹⁴⁰ overseas electoral involvement in the second round of presidential elections in 2010: there were c.a. 560,000¹⁴¹ Polish migrants in the UK in 2010 – only 64,232 registered to vote and only 44,651 actually turned up to vote.¹⁴² In 2011 parliamentary elections, there were 625,000 Polish migrants throughout the UK¹⁴³; only 29,314 registered and 25,107 voted throughout the UK.¹⁴⁴ In the 2015 parliamentary elections, there were some 720,000 Polish migrants in the UK¹⁴⁵ – 63,281 registered, and 54,460 voted.¹⁴⁶ In 2020 presidential elections, 165,161 UK voters registered for the second round.¹⁴⁷

EP elections

In EP elections data is scarce, the global national turnout was 74.45% in 2009¹⁴⁸ with 19,319 persons voting abroad. As to non-resident citizens in the 2019 EP elections, the turnout calculated¹⁴⁹ for active voters¹⁵⁰ registered on voting lists abroad amounts to 84% (116,863 registered and 98,262 voted)¹⁵¹, keeping in mind that the data encompasses some resident citizens who exercised their right to vote at the consular polling station. The domestic turnout communicated by the National Electoral Commission is set at 45.68%¹⁵² but calculates all votes cast based on idiosyncratic assumptions as to the number of persons eligible to vote at home and abroad.

4. Pandemic-Related Legislative Changes and Administrative Measures

4.1 Pandemic-related measures introduced in the legislation

The Polish legislator has made ephemeral and large-scale as well as durable and modest pandemic-specific amendments to the way voting rights are exercised.

¹⁴⁰ Cfr. Lesińska, n. 138 *supra*, p. 27

¹⁴¹ Office for Statistics data on the size and vectors of emigration from Poland, https://stat.gov.pl/cps/rde/xbcr/gus/lud_infor_o_rozm_i_kierunk_emigra_z_polski_w_latach_2004_2010.pdf, p. 3, [accessed 02.08.2018].

¹⁴² <http://prezydent2010.pkw.gov.pl/PZT/PL/WYN/F/149901.htm> [accessed 02.08.2018].

¹⁴³ https://stat.gov.pl/cps/rde/xbcr/gus/L_Szacunek_emigracji_z_Polski_lata_2004-2012_XI_2012.pdf, p. 3, [accessed 02.08.2018].

¹⁴⁴ Lesińska, n. 138 *supra*, p. 43.

¹⁴⁵ https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5471/2/9/1/informacja_o_rozmiarac_h_i_kierunkach_czasowej_emigracji_z_polski_w_latach_2004-2015.pdf, p. 3, [accessed 02.08.2018].

¹⁴⁶ http://parlament2015.pkw.gov.pl/350_Wyniki_Sejm_zagranica/0/82, [accessed 02.08.2018].

¹⁴⁷ Based on the National Electoral Commission spreadsheet based on voting districts https://prezydent20200628.pkw.gov.pl/prezydent20200628/data/2/csv/wyniki_gl_na_kand_po_obwodach_xlsx.zip [accessed 01.07.2021].

¹⁴⁸ <http://pe2009.pkw.gov.pl/PUE/PL/WYN/F/index.htm>, [accessed 02.08.2018].

¹⁴⁹ National Electoral Commission, spreadsheet based on voting districts, https://pe2019.pkw.gov.pl/pe2019/data/csv/wyniki_gl_na_kand_po_obwodach_xlsx.zip [accessed 15.05.2021]

¹⁵⁰ i.e. voters who registered for the elections by enrolling on the list of voters or by enrolling on a list of voters and requesting an attestation of the right to vote, the latter number stands at 5,233 (out of 98,262 total votes cast abroad and 116,863 enrolments abroad) and concerns both resident citizens travelling abroad as well as non-residents voting outside of the polling station of original enrollment abroad.

¹⁵¹ n. 149 *supra*

¹⁵² National Electoral Commission [Państwowa Komisja Wyborcza], <https://pe2019.pkw.gov.pl/pe2019/pl/frekwencja/pl> [accessed 15.05.2021]

Large-scale and ephemeral arrangements were made for the presidential elections that had to be held at a later date than constitutionally mandated¹⁵³ because the original design for the elections was improvised¹⁵⁴ as universal postal voting to be administered by the National Post Office¹⁵⁵ and was not adopted in time by statute. The presidential elections actually took place on 28 June and 12 July 2020 and were governed by a special-purpose statute.¹⁵⁶ The presidential elections statute elaborated for these elections provided for postal voting generally and derogated the Electoral Code to this extent. Whilst the statute was a trimmed-down version of the original and controversial postal voting reverie, the special purpose arrangements were particularly fitting for voting abroad¹⁵⁷ and at home.¹⁵⁸ The presidential elections statute that made it into the official journal of laws provided for a right to voting by correspondence at home and abroad, although no special arrangements were made to allow for changing this in between the rounds of elections, which was unfortunate to the extent that the special purpose statute regulated special elections that took place in the summertime period (which is when people tend to go away for vacation once the children are not subject to education obligations). The Electoral Code already provided for *ad hoc* registration of voters for casting their vote abroad. The system has evolved to encompass a single online registration form administered by

¹⁵³ The abortive presidential elections were scheduled for 10 May and were dubbed the ‘envelope elections’ because they were prepped as postal-only elections. They did not take place because the relevant enabling statute was never enacted; the elections were voided on 7 May as the National Electoral Committee declared it did not have a legal basis to certify the voting-card forms. On 7 May 2020, the National Electoral Committee issued the statement that the elections would not take place because the Committee was not competent to validate voting forms; on 10 May 2020 the Committee made the determination that the technical impossibility of holding elections was equivalent to there being no candidates and thus the elections would be called anew (Resolution of the National Electoral Committee of 10 May 2020 [Uchwała Państwowej Komisji Wyborczej], 129/2020, https://pkw.gov.pl/uploaded_files/1589173994_uchwala-nr-129.pdf [accessed 15.05.2021]).

¹⁵⁴ The parliamentary majority’s candidate recorded a considerable and unanticipated advantage in opinion polls both because of the natural advantage of the executive during the pandemic and because of what appeared as political inadequacy of the opposition’s candidate. It is to be noted that Poland has a semi-presidential system of government where the President participates in legislation by presidential veto (overturning of which requires a special majority), constitutional veto, and the time the office takes to promulgate laws as well as nominate nominees to offices and dignities as under presidential ‘prerogatives’.

¹⁵⁵ The Polish Post Office is a public company controlled by the state. It is submitted that the problem did not reside in the recourse to universal postal voting or in involving the state-owned postal company as such but rather in the fact that the company was able to incur considerable costs with no administrative or contractual legal basis, on the one hand, and that the haste and scale of the operation was such as to dispel any pretence of procedural and organisational due diligence on the other. Public companies that incurred costs preparing for the abortive postal voting received due compensation some months later despite the fact that no official documents were issued by the government. The ‘one-off compensation to cover reasonable costs incurred directly in carrying out the wish of the President of the Council of Ministers’) was awarded on the basis of a posterior COVID-burdens statute, https://pkw.gov.pl/uploaded_files/1609932034_komunikat-prasowy-06012021.pdf [accessed 15.05.2021].

¹⁵⁶ Act on Special rules of organisation of the general election for the President of the Republic of Poland ordered in 2020 with the possibility of voting by mail of 2020.06.02, [*Szczególne zasady organizacji wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r. z możliwością głosowania korespondencyjnego*, Dz.U.2020.979].

¹⁵⁷ Elections in Italy and the UK were conducted exclusively by correspondence, cf. n. 162 *infra*.

¹⁵⁸ The presidential election statute was flexible in providing for last minute arrangements for persons subject to quarantine and isolation insofar as the request for postal voting could be made up to two days before election as opposed to the five days rule that applies under the newly revised EIC. It has been suggested that this special arrangement is a reasonable timeframe in any election (National Electoral Commission, Information on the implementation of the provisions of the Election Code and proposals to amend them, ZPOW-502-1/21, 25 January 2021, [*Państwowa Komisja Wyborcza, Informacja o realizacji przepisów Kodeksu wyborczego oraz propozycje ich zmiany, ZPOW-502-1/21, 25 stycznia 2021*], item 16).

the Ministry for Foreign Affairs for voting abroad¹⁵⁹ and a single ‘e-election’ platform for voting within the national territory¹⁶⁰; both systems operated on the traditional decentralised registers of voters.¹⁶¹ Under the 2020 presidential elections statute, postal voting applied generally and was thus fortunate to the extent that, for example, polling stations were not available throughout Italy and thus postal voting was the only available avenue to cast a vote.¹⁶² All citizens – non-resident and resident but stranded abroad – could not only enrol on the list of voters but also request postal voting. The same postal voting arrangements were made available for non-resident voters under the 2020 presidential elections statute.

As to general provisions, on the other hand, special general arrangements were made in the Electoral Code as amended in late March 2020 by a pandemic-related statute.¹⁶³ The amendment provided for wider postal voting opportunities for resident citizens subject to administrative quarantine and isolation at home (Article 53a 1a (1) EIC), and for proxy and postal voting for the 60+ (formerly 75+) on a par with persons who have a certified substantial or moderate disability (Article 54.1 EIC and Article 53a.1a (2) EIC, respectively). Non-resident voters who have a disability, are 60+ or are administratively sequestered, on the other hand, are not subject to special postal voting provisions that apply to domestic voters under the COVID-revised EIC and thus quarantine and seniority are not the basis for postal voting abroad. The statute had already provided for polling in care homes, hospitals and on-board Polish ships at sea, as well as prisons and student-housing compounds so that this aspect of polling administration caters for persons who might find themselves stranded where they might otherwise not vote. It has been noted, however, that this aspect of polling requires an amendment to allow for flexibility: the five-person polling committee applies when there are anything from two to over 1,500 voters in hospitals, prisons and similar polling stations and polling formalities are inadequate in many circumstances.¹⁶⁴

4.2 Pandemic-related inadequacies of the electoral law

Considering the larger political context as well as the manner in which amendments to electoral code were made by the way of late night and last minute amendments to a COVID-specific

¹⁵⁹ Available at <https://ewybory.msz.gov.pl/>. The system was unavailable in the last two hours for registration before the second round of election, which sparked controversy, cf. Justyna Lasota-Krawczyk, Bogdan Frymorgen, Mariusz Piekarski, ‘Padła strona internetowa MSZ. Co z głosowaniem korespondencyjnym za granicą?’ [The website of the Ministry of Foreign Affairs has fallen. What about postal voting abroad?], RMF radio website, https://www.rmf24.pl/raporty/raport-wybory-prezydenckie2020/najnowsze-fakty/news-padla-strona-internetowa-msz-co-z-glosowaniem-korespondencyjnymId,4584083#crp_state=1 [accessed 15.05.2021].

¹⁶⁰ The service is disabled in between elections [<https://www.gov.pl/web/gov/zgloszenie-glosowania-korespondencyjnego-dla-osob-glosujacych-w-polsce>] but the procedures are reviewed at the information note at <https://www.gov.pl/web/cyfryzacja/druga-tura--skorzystaj-z-e-uslug-wyborczych> [accessed 15.05.2021].

¹⁶¹ Cf. text at n.166 infra and nn. 51-68 *supra*.

¹⁶² The Supreme Court accepted that the statute did not provide the right to vote at the polling station abroad (Resolution of the Supreme Court of 30 July 2020, I NSW 2266/20, LEX No. 3035363).

¹⁶³ Amendment of the Law on special solutions related to prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them and some other laws; i.e. special solutions related to prevention, counteraction and eradication of COVID-19, other infectious diseases and emergencies caused by them OJ.2020.374 of 2020.03.07.[P.K.] of 2020.03.31, OJ.2020.568 [Zmiana ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw; (i.e. Szczególne rozwiązania związane z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych. Dz.U.2020.374 z dnia 2020.03.07 –P.K.) Dz.U.2020.568 z dnia 2020.03.31].

¹⁶⁴ National Electoral Commission, ZPOW-502-1/21, item 10.

statute¹⁶⁵ and renegotiated before the 2020 presidential elections, it is notable that the system has not been reported under revision in preparation for future *force majeure* events beyond the rather modest permanent modifications.

One area of concern is the way the register of voters and lists of voters are administered and concerns the limits of the decentralised system of registers of voters, on the one hand, as well as the limits of informal procedures on the other. The National Electoral Commission has consistently called for a central register of voters to be created. The issue was raised in early 2020¹⁶⁶ but continues to be relevant insofar as the 2020 presidential elections were held over the holiday period and showcased the limits of the system based on a decentralised register of voters where the exercise of voting rights outside of the home commune requires the authorities to both enlist and delist the voter at home. The Central Register of Voters would be necessary to allow voters to change enlistment effectively in between the two rounds of presidential elections¹⁶⁷ as well as allow the exercise of postal voting rights by persons placed under quarantine and otherwise stranded outside of the commune of original enlistment.¹⁶⁸ In conditions of limitations of the freedom of movement and quarantine, the decentralised register of voters can paralyse the exercise of the right to vote in both national and self-government elections; the latter require registering and voting locally. In terms of the administrative aspect, the administration is unable to anticipate the number of voters in domestic¹⁶⁹ and foreign polling stations¹⁷⁰ so as to provide adequate polling staff and adequate human resources for processing votes. The second area concerns the ability of the administration to process right-of-vote requests based on informal applications that might result in voiding the right to vote. The state-of-emergency administration of elections has highlighted the weaknesses of the existing system for tracking the right to vote across national and global territory. Whereas the request for postal voting can be made by telephone, it has been noted that the authorities cannot verify the identity of the voter except in cases where the voter has a disability certificate (official records) or is subject to quarantine (information by the sanitary authorities) and thus voters 60+ should be required to make more formal applications in order to avoid misadministration.¹⁷¹ The same considerations were made in respect of the enlistment abroad insofar as the consular authorities are required to proceed to remove the voter from the original enlistment without any proof that the application made over the phone is made by the voter¹⁷². Further, it has been suggested that telegram and telefax should be removed from the Electoral Code as a means of communicating formal requests.¹⁷³ Providing for informal requests to be processed can result either in the administration refusing to proceed on such a request thus frustrating the applicant or – conversely – in the administration proceeding on such a request and changing enlistment without positive proof that the request is made by the right-holder.

¹⁶⁵ Patryk Słowik, ‘Stealth Legislation Under the Cover of the Night: The Law and Justice changed the electoral code in a horror-inducing procedure’ [*Nocna wrzuta w Sejmie: PiS zmienił Kodeks wyborczy w trybie budzącym zgrozę*], *Gazeta Prawna*, 28 marca 2020, <https://prawo.gazetaprawna.pl/artykuly/1464622,kodeks-wyborczy-zmiana-2020-koronawirus.html>, [15.05.2021]

¹⁶⁶ National Electoral Commission, ZPOW-501-5/20, 10 February 2020, item 1.

¹⁶⁷ National Electoral Commission, ZPOW-502-1/21, item 1.

¹⁶⁸ National Electoral Commission, ZPOW-502-1/21, item 17.

¹⁶⁹ In the holiday township of *Krynica Morska*, the total of 4692 votes were cast. 1126 account for votes cast by the local residents, 2563 votes were cast under attestations of the right to vote, and thus 1003 persons enrolled on the voting lists directly. National Electoral Commission, ZPOW-502-1/21, item 11.

¹⁷⁰ The lists of voters are closed five days prior to election and no database of potential applications exists.

¹⁷¹ National Electoral Commission, ZPOW-502-1/21, item 19.

¹⁷² National Electoral Commission, ZPOW-501-5/20, item 16.

¹⁷³ National Electoral Commission, ZPOW-501-5/20, item 16.

4.3 Pandemic-related reform prospects

The electoral law experiences of the pandemic can substantiate two observations regarding the statutory entrenchment of voting rights.

First of all, the experience of anticipating *ad libitum* elections administered by a publicly-owned company in circumstances of improvisation and political discontent would suggest that electoral law should be technically elaborated to provide and formally entrench one system for holding elections in circumstances of a pandemic. Many commentators noted that political participation of citizens would have been harmed if the 2020 presidential elections had not guaranteed the integrity of the vote. The voting system and voting rights should be legislatively entrenched to guarantee the right to vote and integrity of voting regardless of special circumstances. This would suggest that the electoral system should provide for remote voting and other forms of casting a vote where out-of-country voters effectively enjoy the same guarantees and privileges as domestic voters. It is perhaps interesting to note that e-voting was never considered even though a mass postal voting scheme that was considered has many weaker points in respect to the integrity of voting. It would seem that for the right to vote to be guaranteed, electoral law should anticipate basic or subsidiary voting techniques designed for special circumstances and take account of e-voting options. Whereas the National Electoral Committee suggests providing for postal voting applicable generally¹⁷⁴, postal or remote voting might be reconsidered as the default polling technique abroad¹⁷⁵; the logic is irresistible considering that the national elections gave rise to practical (resources) and legal (consent by the hosting country as applicable) obstacles for organising polling stations abroad.¹⁷⁶

Secondly, the pandemic has put into relief one of the major weaknesses of the way out-of-the-country voting rights are provided for. As has been noted above¹⁷⁷, the EIC delegates the organisation of polling stations abroad to statutory instruments issued by the Minister for Foreign Affairs. Accordingly, the presidential elections produced the effect where it was not certain if and how voters would be able to exercise their right to vote.¹⁷⁸ Out-of-the-country voting is set up with no particular emphasis on guaranteeing an effective right to vote to citizens and with no consideration of the fact that citizens resident within the EU are structurally in a different position in respect to voting rights than the wider Polish diaspora world-wide. Since the right to vote is constitutionally entrenched and the freedom of movement within the EU is a structural feature distinguishing other kinds of out-of-the-country voters, however, it would appear that out-of-the-country voting within the EU should require both better statutory and organisational entrenchment than is currently the case as well as the availability of remote voting considering that out-of-the-country voters do not enjoy the neither the privileges afforded to resident vulnerable groups nor the privilege of voting in polling stations in the vicinity that are part of the voting rights arrangement domestically.

¹⁷⁴ National Electoral Commission, ZPOW-502-1/21, item 16

¹⁷⁵ National Electoral Commission, ZPOW-502-1/21, item 14

¹⁷⁶ Resources concern the ability of recruitment of staff meeting electoral law requirements and capable to process volumes of in-person or postal voting; many countries reserve the right to allow for polling stations to be opened and the pandemic mobility legal or practical restrictions are also relevant, n. 170 *supra* and n. 178 *infra*.

¹⁷⁷ Cf. § 3.1 *supra*.

¹⁷⁸ The abortive presidential elections produced ecstasies upon the communication of a draft instrument a month before the elections were due, cf. ‘*Habemus* the Regulation. The Ministry of Foreign Affairs has issued a decree on voting abroad. 103 electoral districts have been created [Jest rozporządzenie MSZ ws. głosowania za granicą. Utworzono 103 obwody wyborcze]’, Polish Press Agency, 14.04.2020 <https://polskieradio24.pl/5/1222/Artykul/2491377,Jest-rozporzadzenie-MSZ-ws-glosowania-za-granica-Utworzono-103-obwody-wyborcze> [accessed 15.05.2021].

Finally, the pandemic has revealed a number of technical points that might be an obstacle to political participation. On the one hand, moving election dates should have an express statutory basis and should be regulated insofar as it undermines the opportunities of candidates and supporters who are disadvantaged in terms of resources and planning; the national presidential elections were informally ‘inadvertently postponed’¹⁷⁹ in 2020 and local mayoral elections in Rzeszów were (in)formally¹⁸⁰ postponed in 2021. Because such situations can put candidates at a considerable disadvantage, funds should be made available so as to alleviate the consequences of prolonging campaigning falling on candidates with no backing in large political parties. On the other hand, the circumstances of the pandemic have revealed specific campaigning inequalities where meetings and rallies can be organised on the borderline of breaching official sanitary rules of conduct by some candidates and where the state institutions might deploy technical resources inimical to the principle of equality of candidates. As the circumstances of a pandemic systematically advantage the incumbent executive, electoral law should regulate campaigning in special circumstances. As the matter might seem marginal and beyond reach of domestic political actors, however, it is suggested that the integrity of campaigning and involvement of state actors in times of sanitary crises is ripe for consideration by supra-national bodies providing soft law and benchmarks of electoral law decency in this respect.

5. Conclusion

Non-Citizen Residents

Regarding the obstacles to electoral participation by mobile EU citizens in Poland, first there is non-automatic registration with the Register of Voters. Secondly, mobile EU citizen cannot join political parties and cannot finance their own campaign or the campaign of their fellow EU mobile citizens. Whilst the formal matter of membership in political parties has been subject to procedures, it would seem that barring EU citizens from financing political parties or individual campaigns should also be a matter of concern. Thirdly, the National Electoral Committee is not tasked with the provision of information to mobile EU citizens, the provision of relevant electoral statistics or more generally the provision of information in English.

Given the demographic profile of the country, mobile citizens can be incentivised to participate in elections by:

- First, improving the system of Register of Voters, whereby registration would be tied in with other administrative procedures relevant for registration of stay within the territory and – importantly – the registration of residence. These are done by the same authorities that are relevant for the registration of voters. The system, however, is correct in not conditioning voter registration on the compliance with any such obligations. It is a burden to have to register, but the system whereby a single

¹⁷⁹ Cf. nn.153 & 156 *supra*.

¹⁸⁰ The statutory basis for such scheduling might need to be amended to allow for and regulate such rescheduling. The Prime Minister’s power to call elections might not cover the competence to recall or reschedule elections that have already been called. The relevant Article 474.2 EIC reads: ‘If it is necessary to hold an election for the mayor before the expiry of the term of office for reasons specified in the laws, the Prime Minister shall order by regulation early elections under the procedure laid down in Article 372 [*W razie konieczności przeprowadzenia wyborów wójta przed upływem kadencji z przyczyn określonych w ustawach, Prezes Rady Ministrów zarządza, w drodze rozporządzenia, wybory przedterminowe w trybie określonym w art. 372*].’

registration with the Register of Voters suffices for all coming relevant elections may be regarded as facilitation of electoral participation; we advocate, however, that registration with the Register of Voters should be automatic and tied into other procedures, particularly since administrative registration could be the basis of targeting foreign language information to right-holders.

- Secondly, approaching EU mobile citizens by mail and email (information packages in English) in order to give effect to the obligation of providing effective voting rights to mobile EU citizens.
- Thirdly, changing the law to allow for participation in political parties by resident EU citizens as well as their financial participation at least in individual electoral campaign efforts.
- Fourthly, providing in the Electoral Code that mobile EU citizens have the opportunity to finance and otherwise contribute to political campaigns if they stand as candidates in local elections; EU mobile citizens should enjoy a positive right to transfer financial means into election funds of electoral committees in cases where such committees are established by electors or political parties.
- Fifthly, the National Electoral Committee should be tasked with reporting on the effective implementation of voting and candidacy rights of mobile EU citizens in terms of voter registration and voting statistics as well as with addressing instructional and promotional materials to mobile EU citizens.
- Finally, EP elections would be more interesting to non-citizen residents if campaigns were not based firmly on domestic political platforms, issues and contests, whereas local elections would be more interesting if resident non-citizens were allowed the opportunity of participating in political parties as well as financing political parties and campaigns in local elections.

It is worth mentioning that the Polish EIC can be viewed as providing an example of a good practice: there is a degree of flexibility registering for voting within the Polish territory¹⁸¹ and non-citizen EU resident are even able to cast their ballots in Polish EP elections in polling stations abroad on a par with Polish citizens¹⁸².

Non-Resident Citizens

A number of obstacles to non-resident citizens' exercise of electoral rights in respect to national and EP elections have been identified. First of all, the implementation of the right to vote is not EU-specific and addresses the electoral interests of the Polish diaspora as a whole whereas it could take account of the different nature and structure of EU mobility to provide for better voting opportunities. Secondly, there is no Register of Voters of non-resident citizens. Polish citizens need to register for particular elections and exercise their right of vote in conditions that are essentially improvised by the Ministry for Foreign Affairs and consular services in the provision of registration and polling stations. Thirdly, in 2018 mobile EU citizens were deprived of the right to vote by correspondence whereas the postal voting arrangement for the 2020 presidential election has proved capable of incentivising voters. Non-resident citizens who are members of vulnerable groups (persons with disabilities, parents and seniors) are structurally disadvantaged compared to the situation of resident citizens. Fourthly, in elections

¹⁸¹ Cf. text at nn. 51-57 *supra*.

¹⁸² Cf. text at nn. 62-65 *supra*.

to the Senate, non-resident citizens do not have their own representation as they vote for the representative of one of the Warsaw districts and – in contradistinction to elections governed by proportional representation – do not influence the general electoral result as according to the representation method adopted in those elections. Fifthly, short-term mobile EU citizens preserve a strong interest in political choices made in territorial self-government elections but have been stripped of effective voting rights by the non-provision of postal or e-voting. Finally, the provision of information and promotion of electoral participation by the National Electoral Committee is qualitatively and quantitatively modest.

As far as policy proposals in respect of non-resident citizens is concerned, a number of policy recommendations can be made:

- First, Polish legislation should provide for effective concretisation of the right to vote in EP elections specific to mobile EU citizens as opposed to current provisions that address the voting rights of the Polish diaspora worldwide. This would allow for a better concretisation of voting rights of mobile EU citizens who preserve greater interest in electoral outcomes than non-EU residents. According to this logic, the Polish EIC should also provide for opportunities of non-resident citizens to contribute financially to political parties and individual electoral efforts whilst retaining restrictions for non-resident citizens from outside the EU.
- Secondly, it is not clear from the text of Article 10 EIC if national residence is a condition to vote in EP elections for both Polish citizens and EU nationals or only for the latter. The formulation of this provision should be amended so as not to leave room for doubts as to the right to vote by non-resident citizens in EP elections.
- Thirdly, a Register or country-specific Registers of Non-Resident Voters should be created for voters residing within the EU in order to facilitate registration for elections as well as structure the administration of polling stations abroad.¹⁸³ There is a missed opportunity in not coordinating the creation of such a Register with a register of persons subject to consular protection or a register of persons seeking to remove tax residence in the country of nationality.
- Fourthly, as to voter representation, it seems that in cases where Senators represent local constituencies there could be a Senator representing the constituency of mobile citizens. Some foreign voters might retain an interest in influencing the election of the Central Warsaw senator but the votes cast do not translate into the overall national result.
- Fifthly, as to voting methods, remote voting should be reintroduced for nationals voting from within the EU and – taking account of the unimpressive experience in postal voting¹⁸⁴ – it seems that there is nothing extravagant in proposing that an e-voting mechanism be introduced¹⁸⁵ involving a single administrative identification profile that

¹⁸³ Cf. Skąd się wzięły kolejki Polaków za granicą 21 października – jak uniknąć błędów w przyszłości? [On October 21, where did the queues of Poles abroad come from - how to avoid mistakes in the future?], HFHR and FOR, December 2007, https://for.org.pl/upload/File/raporty/Raport_o_glosowaniu_Polakow_za_granica_FINAL.pdf, [accessed 02.08.2018].

¹⁸⁴ Magdalena Wrzalik, 'Geneza i ewolucja głosowania korespondencyjnego w Polsce' [The Genesis and Evolution of Postal Voting in Poland], *Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie, Gubernaculum et Administratio*. Issue 1 (13)/2016, pp. 123-139.

¹⁸⁵ Krzysztof Korycki, 'Alternatywne techniki głosowania a frekwencja wyborcza' [Alternative Voting Techquest and Voter Turnout], *Studia Wyborcze [Electoral Studies]*, 23 (2107), pp. 83-102.

would thus dispel concerns about the personal quality of the act of casting the vote.¹⁸⁶ It is suggested that that EU movement rights, EP voting rights and a constitutionally entrenched right to vote could be the basis for benchmarking the effectiveness of the right to vote; Polish citizens resident within the EU should be afforded opportunities and effortlessness on a par with domestic voters and thus benefit from a voting rights scheme going beyond what is available to the Polish diaspora world-wide.

- Sixthly, the matter of postal and electronic voting in local elections and EP elections by short-term mobile citizens should be a matter of EU law. Many commentators have noted that voters respond differently to national and local political programs and personalities. Securing the right to vote in local elections for seasonal migrants might underscore the tangibility of political choices and encourage electoral participation and might tie in with securing the ability of seasonal and permanently non-resident voters to vote for candidates in EP elections in the most relevant constituency. It is noted that special circumstances of the pandemic suggest that remote voting be made available in local elections and EP elections as a collateral to the freedom of movement principle.
- Finally, as advocated by NGOs, the National Electoral Committee should evolve into an institution that conducts information campaigns and educational activities (as is the case, for example in the UK), and political campaigns should be obligated to promote voting (e.g. by a compulsory requirement for 20% of materials being dedicated to the promotion of voting as such)¹⁸⁷. The National Electoral Committee should have a responsibility in administering out-of-the country polling within the EU as well as involve non-resident voters as voters and as stakeholders in the electoral system. There is no reason, finally, why – as a measure of actual electoral participation – the National Electoral Committee should not be tasked with estimating the turnout within the EU based on the estimates of total number of non-resident voters within the EU rather than on the number of actively registered voters.

¹⁸⁶ The state uses authenticated electronic communication for many purposes, including voter registration in 2018, but such facilities have not been discussed as relevant for the purposes of e-voting.

¹⁸⁷ ‘Jak zwiększyć wyborczą frekwencję?’ [How to increase electoral attendance?], http://www.ngo.pl/x/411167/site_skin/v5?sitename=dzialaj, [accessed 4.04.2018].

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