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## **THE ELECTORAL RIGHTS TO THE EUROPEAN PARLIAMENT OF THE CITIZENS OF THE EUROPEAN UNION IN THE REPUBLIC OF POLAND**

### **INTRODUCTION**

The Treaty establishing the European Community (TEC), in Article 19 paragraph 2 introduced both a right to vote and a right to stand for election to the European Parliament. It is important to note that the Court of Justice of the European Union decided that electoral rights are not conferred on the EU citizens<sup>1</sup>. This means that the member states may, through internal regulations, extend the rights to vote and to stand for election over the people, who, not being EU citizens, have a close relationship with this state<sup>2</sup>. Beside the treaty itself Directive 93/109/EC of 6 December 1993 determines specific solutions referring to electoral rights to the European Union. Poland's accession to the European Union was connected with an obligation to adjust the provisions of law to the Community regulations also in this area.

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<sup>1</sup> For more see: A. G u b r y n o w i c z, *Obywatelstwo Unii Europejskiej – stan obecny i perspektywy*, „Zeszyty OIDE” 2008, nr 9. p. 28–33; A. B o d n a r, *Obywatelstwo Unii Europejskiej a ochrona praw podstawowych obywateli państw członkowskich*, *ibidem*, p. 80–89.

<sup>2</sup> The European Court of Justice in the dispute between Spain and Great Britain over electoral rights of the people not being citizens of the EU yet residing in Gibraltar stated that “while citizenship of the Union is destined to be the fundamental status of nationals of the Member States [...] that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union”. C-145/04: Spain vs. United Kingdom, European Court reports 2006, p. I-7917, <http://curia.europa.eu/juris> of 20.05.2013.

The objective of this paper is to present the solutions adopted in the Polish electoral laws to the European Parliament in the context of the Community regulations and to conduct a brief comparative analysis on legal requirements imposed by the Union legislator. The amendment of electoral laws always poses some questions. What is the aim of the amendment? Is this the issue of some shortcomings of the law (like in the case of the Polish reform) or perhaps the reason was not on the merits? Another question is whether the Polish legislator made most of the electoral reform in Poland to introduce amendments into the electoral law to the European Parliament even if the initial legislation might have complied with the EU guidelines. The act which originally regulated these issues is the Act of 23 January 2004 the Electoral Law to the European Parliament<sup>3</sup> as well as the currently binding Election Code of 5 January 2011, which superseded the aforementioned Act. The change of the electoral law is also a good moment to verify the efficiency of the previous legislation.

The problem is, however, that on the basis of the Election Code, which entered into force on 1 August 2011, no elections to the European Parliament have been held. Therefore, the present paper might only be the introduction to the prospective assessment of the amendments to the Electoral Law.

## THE EUROPEAN PROVISIONS

Before the Polish solutions are discussed it is noteworthy to present the aforementioned framework stipulated by the EU regulations. The Act concerning elections of European Parliament members in the universal direct election of 1976 regulated only general rules (directness, proportionality), in specific questions referring to electoral laws of the member states<sup>4</sup>. These regulations were only specified in 1993 by the aforesaid Directive<sup>5</sup>. In accordance with

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<sup>3</sup> Due to the adjudication and literature the author sees a need for referring to the previous legislation. More on the subject of the EP electoral law see: A. Olechno, *The Electoral Rights of the Citizens of the European Union in the Republic of Poland*, [in:] R. David, J. Nęcka, D. Sęhnałek (eds.), *Cofola 2009 Key Points and Ideas*, Brno 2009. See also other papers on PE elections under the previous legislation, e.g. E. Dydak, *Wybory do Parlamentu Europejskiego*, Warszawa 2003 or A. Sokala, B. Michalak, A. Frydrych, R. Zych, *Wybory do Parlamentu Europejskiego. Prawne, polityczne i społeczne aspekty wyborów*, Toruń 2010.

<sup>4</sup> See also: A. Grzelak, *Wybory do Parlamentu Europejskiego w prawie Unii Europejskiej* [in:] *Parlament Europejski. Wybrane zagadnienia*, „Zeszyty OIDE” 2004, nr 4, p. 24–53.

<sup>5</sup> Directive of the Council 93/109/EC of 6 December 1993 establishing specific conditions of exercising the right to vote and the right to be elected in elections to the European Parliament by the Union citizens with residence in a member state of which they are not citizens. See also:

Directive 93/109/EC the right to vote in EP elections should be vested in people being citizens of the EU within the meaning of Article 17 TEC and meeting the remaining conditions of the right to vote, which a particular country imposes upon its citizens (Article 3). The Union Directive allowed for conferring this right on condition of a certain minimal period of residence on the electoral territory of this state. However, this condition should be recognized as met also in the case of residence in another member state during this period (Article 5)<sup>6</sup>. In addition the member state of residence may check if the EU citizen who expressed his/her will to exercise his/her electoral right in this state has not been deprived of this right in the state of his origin (Article 7). The Directive granted the right to be elected to the person who is a EU citizen under Article 17 TEC and meets the remaining conditions of the electoral law which the state in point imposes upon its citizens and decided that if the citizens of the state of residence may stand for elections only on condition that they have had its citizenship for a certain minimal period, it is recognized that the EU citizens met this condition, if during this period they were citizens of one of the member states and if the citizens of the state of residence may stand for elections only on condition of a certain minimal period of residence on the electoral territory of this state, this condition is recognized as met, if they resided in another member state during this period. Moreover, a EU citizen deprived his electoral rights in the state of residence or origin cannot exercise the right to be elected (Article 6). The state of residence may demand from the state of origin information thereupon.

Article 9 additionally obligates the state of residence to place in the register of voters a person who expresses a will of exercising his/her electoral right to the EP on the basis of documents required in the case of its citizens. Similar rules are applied towards standing for the EP (Article 10). Refusal of registering is connected with an opportunity of utilizing the same legal measures to which the citizens of the state of residence are entitled to (Article 11).

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Communication from the Commission to the European Parliament and Council on the application of Directive 93/109/EC to the June 1999 elections to the European Parliament COM(2000) 843 final, 18.12.2000.

<sup>6</sup> By virtue of the provisions of the Directive a member state of the Union may impose additional restrictions involving the requirement of residence in this country for a certain period, not exceeding 5 years in relation to voting and 10 years in relation to becoming a candidate, if the number of people of voting age, exceeded on 1 January 1993 20% of all Union citizens of voting age living in the particular country (Article 14).

## THE ELECTIONS STATUTE OF 2004 AND THE ELECTION CODE OF 2011

In response, the Act of 23 January 2004: the European Parliament Election Law<sup>7</sup> conferred the right to vote on the citizens of Poland and the citizens of the EU who reside permanently on the territory of the Republic of Poland and turned 18 at the latest on the day of election and who are in the register of voters (Articles 7 and 8) simultaneously depriving of the right to vote people deprived of the right to vote in their state of origin (Article 8 para 2)<sup>8</sup>, granting the right to vote, on the other hand, to people entitled to vote who at the latest on the day of election turn 21 and for 5 years have permanently resided on the territory of the Republic of Poland or another member state (Article 9) as well as depriving of the rights to stand as candidates people without voting rights.

In the case of the right to be elected it was required from a citizen of the European Union who was not a Polish citizen that s/he resided permanently on the territory of the Republic of Poland or on the territory of another member state of the European Union for at least 5 years (Article 9 of the European Parliament Election Law). In the event of submission of candidature of a European Union citizen, the candidate was obligated to attach a written consent for standing for the EP to a statement confirming his/her registration in the register of voters in the commune where s/he permanently lives, as well as the statement mentioned below, repeated in the Election Code, that s/he does not stand for elections to the European Parliament in another European Union member state and a certificate of his/her right to be a candidate (Article 64 para 3 of the Election Law).

It was quite a scrupulous fulfillment of requirements imposed by the directive however exploiting possible limitations. There are three types of these restrictions. Firstly, the legislator did not decide to grant voting rights to the third-country citizens who reside on the territory of the Republic of Poland. The principle of absolute minimum, however falling under the legislative principle of member states was applied here. The extension of voting rights to non-EU citizens is just an exception. Secondly, permanent residence is the premise to obtain voting rights, which corresponds with the first condition and confirms the will to confer these rights on the people whose

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<sup>7</sup> Dz. U. No. 25, *item* 219.

<sup>8</sup> On the issue of compatibility of Articles 8 and 9 of the Electoral Law, and indirectly Directive 93/109/EC with Article 4 para 1 of the Constitution including the principle of sovereignty of the Nation, the Constitutional Tribunal made a decision on 31 May 2004 (K 15/04, OTK-A 2004/5/47).

legal status is similar to that of Polish citizens. This aspect will be discussed in more detail in the following sections of the paper, taking into consideration its restrictive character, in particular. Finally, there is also a requirement of entry in the register of voters, preceded by the requirement to produce necessary documents, including those which were issued by the country of origin. Therefore, the application of the principle of minimum by the Polish legislator seems to be fully justified.

The legislator adopted similar solutions in the Election Code of 5 January 2011, being in force now, which regulated in one act of law provisions of all electoral procedures, including elections to the European Parliament<sup>9</sup>. Specific regulations are included in Section VI of the act entitled just “Elections to the European Parliament”. Article 338 of this Section refers in the unregulated questions directly to appropriate provisions of Section III of the Election Code. Moreover, the provisions concerning elections to the European Parliament can be found in Section I comprising Introductory provisions.

By virtue of Article 10 para 1 item 2 the right to be elected in elections to the European Parliament was granted to, beside the citizens of Poland, also citizens of the European Union who are not Polish citizens, who at latest on the day of voting turn 18 and permanently reside on the territory of the Republic of Poland, which meant only a slight alteration in comparison to the substance of the aforementioned Article 8 of the law. Paragraph 2 of this article deprives the right to be elected people who are deprived of public rights by a decision of a court or a Tribunal of State as well as incapacitated by a final decision of a court, which should also refer to citizens of the European Union.

They are not even slight alterations therefore the comments referring to the previous legislation need to be recalled here. It could also be highlighted that the legislator did not take an opportunity to change the subjective scope of the electoral laws thus confirmed the Parliament’s intention of 2003/2004.

## THE REGISTER OF VOTERS

More detailed provisions on the register of voters seem to be of lesser importance but their presentation may show the possible extent of formal limitations. The permanent register of voters includes people permanently residing in the area of the commune, who are eligible to vote, by one may be

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<sup>9</sup> Dz. U. 2011, No. 21, *item* 112.

registered in one register of voters only<sup>10</sup>. Part B of the register of voters comprises European Union citizens who are not Polish citizens and who reside permanently on the territory of the commune and are entitled to exercise electoral rights in the Republic of Poland (Article 18 para 9 of the Code). This part of the register presents the surname and the first name (names), father's name, date of birth, nationality (citizenship) of a European Union member state, passport number or a number of another document confirming the identity and the address of residence of the voter.

Citizens of the EU who were registered in the register of voters in the country of residence remain there until they meet the requirements of exercising the right to vote. The citizen of the EU may apply in writing for crossing him out of the register of voters at any time, resigning in this way from an opportunity to vote in a particular place. The information on registering and removal from part B of the register by the head of the commune, the local head of province and then by the minister of interior is transferred to appropriate authorities of European Union member states.

Under the previous legislation a voter (unless s/he had already been registered due to the registration of permanent residence), was registered on his/her request not later than on the 30<sup>th</sup> day of the decision on the elections in which s/he intends to participate. The application in point was to be appended with appropriate documents, for example a declaration which includes the applicant's address of permanent residence. Neither the Directive nor the Election Code to the European Parliament has defined the term "permanent residence". The Constitutional Tribunal's resolution of 21 August 1991 stated that "permanent residence on the territory of the Republic of Poland means a stay for at least 5 years with intention of permanent residence in any place situated on the territory of the Republic of Poland in this period. Permanent residence is a matter of fact and its establishment depends on the circumstances of a given case" (W. 7/91, OTK in 1991, item 24). The interpretation of Article 8 of the Act of 28 June 1991: the Electoral Law to the Sejm of the Republic of Poland adopted then was helpful in determining the term "permanent residence" used in the Electoral Law to the European Parliament and the Election Code.

Currently Article 19 of the Code states that the voters permanently residing on the territory of a commune without permanent residence registration are registered in the register of voters if they file in the commune office therefor a written application including the surname, the first name (names), father's name, the date of birth and the PESEL number of the applicant as well as

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<sup>10</sup> See the decision of the Constitutional Tribunal of 31 May 2004 (K 15/04, OTK-A 2004/5/47).

a photocopy of a valid document confirming the applicant's identity and a written declaration in which the applicant provides his/her nationality (citizenship) and the address of his/her permanent residence on the territory of the Republic of Poland.

The commune keeps and updates a permanent register of voters. Everyone can file a complaint to the *wójt* (head of commune) or *burmistrz* (mayor) against irregularities in the register of voters, especially in the case of omitting the voter in the register. It is possible to file a complaint against the decision on rejecting the complaint to the proper local district court within 3 days of the delivery of the decision (Article 20 of the Code).

On the basis of the register persons who are entitled to the right to vote are registered into the register of voters, separate for individual, ordained elections. In the event of elections to the European Parliament, part B of the register includes citizens of the European Union who are not Polish citizens, eligible to exercise voting rights in the elections which were ordained in the Republic of Poland.

These regulations seem to be of primary importance here. Redefining the notion of 'permanent abode' results in less restrictive character in comparison to the 2004 Act, which again is a manifestation of the legislator's will to extend the subjective scope of the electoral law gradually. Obviously, it is a slight change, however, reversing the present tendency, which also concerns the regulations on the possibility to vote outside ordinary circuits.

Citizens of the European Union have also the right to vote on Polish ships at sea or Polish electoral constituencies abroad. The registration in the register of voters kept by the captain of the ship or a locally proper consul is performed on application of the voter filed at the latest 3 days before the day of elections<sup>11</sup>.

## THE PASSIVE ELECTORAL RIGHT

Article 11 § 1 item 4 sounds similarly to the previous regulation providing the right to be elected for the persons who have the right to vote in PE elections, who at the latest on the day of the elections turn 21 and have resided on the territory of the Republic of Poland or on the territory of another member state of the European Union for at least 5 years.

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<sup>11</sup> In the case of European Union citizens not being Polish citizens the application should include the surname and first name(s), father's name, date of birth, address, number of an ID document as well as the place and date of its issuing.

The Amendment to the Constitution of the Republic of Poland of 2 April 1997 passed on 7 May 2009 extended the premises of the right to be elected stating that a person convicted to imprisonment for an intentional crime persecuted by public indictment cannot be elected to the Sejm or the Senate<sup>12</sup>. Satisfying the provisions of the Constitution the Election Code repeated these restrictions in paragraph 2 of the aforementioned Article 11. This means that the persons who were convicted to imprisonment for an intended crime prosecuted by public indictment or an intended tax offence are deprived of the right to be elected. The legislator reminded that this premise also concerns EP elections in Article 365 of the Code, which refers to the verification procedure for deputies in Article 248 vested in the Minister of Justice<sup>13</sup>.

On the one side, it is the only significant derogation from the 2004 legal status. On the other side, it needs to be emphasized here that despite completely different reasons for the amendment (the amendment to the Constitution not to the PE Electoral Law) it is heading for the opposite direction than the proposals mentioned while presenting the right to vote. It, *de facto*, results in the limitation of subjective scope, more importantly, adopting the provisions which are not binding in the country of origin of at least some EU citizens.

On the basis of Article 11 para 3 the right to be elected cannot be exercised by a EU citizen deprived of the right to be elected in the EU member state of which s/he is a citizen.

Lists of the candidates proposed by electoral committees of political parties, coalitions or voters, have to be supported by signatures of at least 10 thousand voters living in the particular constituency. In accordance with Article 334 of the Code, the candidacy of a EU citizen not being a Polish citizen requires, beside a written consent to standing for, a statement that s/he does not stand for the European Parliament election in another member state of the European Union as well as a certificate issued by a proper organ of the member state of the European Union whose citizen s/he is, that s/he was not deprived of the right to stand for the European Parliament in this country or that this organ has no information on depriving him this right.

It is also important to bear in mind that persons holding offices or fulfilling functions determined by the provisions of the European Union law (Article 333 of the Code) are deprived of the right to be elected, and taking up the

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<sup>12</sup> The added section 3 of Article 99 of the Constitution. Act of 7 May 2009 on an amendment to the Constitution of the Republic of Poland, Dz. U. 2009, No. 114, *item* 946.

<sup>13</sup> With the participation of the National Electoral Commission, the data from the National Criminal Register and the decision of the Marshall of the Sejm on a possible extinction of the mandate, which finishes the procedure.

functions during the term of the office results in losing the mandate apart from losing the right to be elected, not having it during the election or nullification of the election<sup>14</sup>.

## CONCLUSION

Finally, it is important to underscore that so far citizens of the EU have not exercised very willingly the aforementioned rights. Voter turnouts among EU citizens in the EP elections outside their countries of origins have not exceeded 30-40%, which is a result of both internal solutions of the member states as well as potential voters' access to information. On the other hand, these numbers are not considerably far from voter turnouts among the citizens of the EU voting in their own countries, which means that the problem generally concerns the participation in the elections (in Poland in the years 2004 and 2009 the voter turnouts were, respectively, 20.9% and 24.5%) and not just the disadvantages of the legal solutions under discussion.

We should not expect that slight changes concerning elections to the European Parliament proposed in the Election Code in comparison with the Electoral Law of 2004 may affect the will of a higher number of people to take part in elections. It is important to remember, however, that it was not the aim of the author of the amendment, who sought to standardize electoral rules in the country and not reform the electoral law for the EP, which is confirmed, for example, in slight differences between the contents of the two acts of law. It also confirms the lack of consistent amendments relating the right to vote and the right to stand as a candidate. A statement might be made here that the legislator's actions resulted in accidental outcomes. On the other hand, the provisions of both the 2004 Electoral Law and the Electoral Code which are in force now, fully comply with the Union regulations. Thus, due to lack of discussion in this respect, one may draw a conclusion that the provisions adopted in 2010 will (at least for some time) remain in force.

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<sup>14</sup> The principle *incompatibilities* has obviously much broader scope in the case of Polish citizens; the aforementioned situations concern EU citizens limited with the census of the Polish citizenship (deputy, senator etc.).

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## Summary

The Treaty establishing the European Community (TEC), in Article 19 paragraph 2 introduced both a right to vote and a right to stand for election to the European Parliament. The objective of this paper is to present the solutions adopted in the Polish electoral laws to the European Parliament in the context of the Community regulations and to conduct a brief comparative analysis on legal requirements imposed by the Union legislator. The amendment of electoral laws always poses some questions. What is the aim of the amendment? Is this the issue of some shortcomings of the law (like in the case of the Polish reform) or perhaps the reason was not on the merits? Another question is whether the Polish legislator made most of the electoral reform in Poland to introduce amendments into the electoral law to the European Parliament even if the initial legislation might have complied with the EU guidelines. The act which originally regulated these issues is the Act of 23 January 2004 the Electoral Law to the European Parliament as well as the currently binding Election Code of 5 January 2011, which superseded the aforementioned Act. The change of the electoral law is also a good moment to verify the efficiency of the previous legislation.

**Key words:** European Parliament, electoral rights, elections.

## **PRAWA WYBORCZE OBYWATELI POLSKI W WYBORACH DO PARLAMENTU EUROPEJSKIEGO**

### **Streszczenie**

Traktat ustanawiający Wspólnotę Europejską (TWE) w art. 19 ust. 2 wprowadził czynne i bierne prawo wyborcze w wyborach do Parlamentu Europejskiego. Celem niniejszego artykułu jest właśnie przedstawienie rozwiązań przyjętych w polskich ordynacjach wyborczych do Parlamentu Europejskiego na tle przepisów wspólnotowych. Chodzi o akt pierwotnie regulujący te kwestie, czyli ustawę z dnia 23 stycznia 2004 r. Ordynacja wyborcza do Parlamentu Europejskiego oraz obecnie obowiązujący kodeks wyborczy z 5 stycznia 2011 r., który zastąpił powyższą ustawę. Zmiana ordynacji wyborczej rodzi zawsze pytanie o cel tej nowelizacji. Czy np. w przypadku polskiej reformy wynikało to z niedociągnięć pierwotnej ustawy czy powód miał tak naprawdę niemerytoryczny charakter. Z drugiej strony, nawet jeżeli początkowy stan prawny wypełniał wytyczne unijne, czy polski ustawodawca wykorzystał reformę wyborczą w Polsce do wprowadzenia zmian w ordynacji do Parlamentu Europejskiego. Problemem jest jednak fakt, że w według kodeksu wyborczego, który wszedł w życie 1 sierpnia 2011 r. nie zostały przeprowadzone żadne wybory do Parlamentu Europejskiego. Stąd należy zaznaczyć, że niniejszy artykuł może być jedynie wprowadzeniem do przyszłej oceny nowelizacji ordynacji wyborczej.

**Słowa kluczowe:** Parlament Europejski, wybory, prawo wyborcze.