

STUDY

Requested by the PETI committee



# *Obstacles to participation in elections and the exercise of voting rights, inside the E.U.*

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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, addresses some major issues of obstacles to elections in general and of obstacles to participation inside the EU more specifically. This is done by focusing on Member States and examples with regard to municipal elections, and European elections, but also in general on de-facto access to the exercise of the right to vote. Various recommendations are formulated.

This document was requested by the European Parliament's Committee on Petitions.

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Original: EN

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Manuscript completed in September 2020

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## LIST OF ABBREVIATIONS

<b>AGRI</b>	Agriculture and Rural Development Committee
<b>ALDE</b>	Group of the Alliance of Liberals and Democrats for Europe
<b>BAS</b>	Brake-assist systems
<b>BGBI</b>	Bundesgesetzblatt
<b>BWahlO</b>	Bundeswahlordnung
<b>BWahlG</b>	Bundeswahlgesetz
<b>CAP</b>	Common Agricultural Policy
<b>CFP</b>	Common Fisheries Policy
<b>CMO</b>	Common market organisation
<b>CoR</b>	Committee of the Regions
<b>CULT</b>	Culture and Education Committee
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECOSOC</b>	Economic and Social Committee
<b>ECTS</b>	European Credit Transfer System
<b>EHRR</b>	European Human Rights Reports
<b>EP</b>	European Parliament
<b>EPP-ED</b>	Group of the European People's Party and European Democrats
<b>EU</b>	European Union
<b>EUWahlO</b>	EuWahlordnung
<b>FAO</b>	Food and Agriculture Organisation of the United Nations
<b>FPS</b>	Frontal protection systems
<b>GDP</b>	Gross Domestic Product
<b>GM</b>	Genetically-modified
<b>Greens/EFA</b>	Greens/European Free Alliance
<b>GUE/NGL</b>	Confederal Group of the European United Left – Nordic Green Left
<b>IFI</b>	International Fund for Ireland
<b>IND/DEM</b>	Independence/Democracy Group

<b>NRWO</b>	Nationalratswahlordnung
<b>PKW</b>	Polish National Election Commission
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on Functioning of the European Union
<b>US</b>	United States



## EXECUTIVE SUMMARY

### Introduction

The right to vote in national parliamentary elections is a fundamental right in the Member States of the European Union and an integral part of any system of representative democracy. However, the access to the right to vote does not only comprise the existence of a legal or constitutional right to cast a ballot in regular, direct, free, equal and secret elections. Even where such a right exists on paper, for certain categories of people (for example disabled people), electoral participation can be hampered by physical barriers that can sometimes prevent voting. Such barriers may range from a lack of assistance for voters with a mental disability in the voting booth to inaccessible language of information provided on electoral processes, to a lack of adaptation of the ballot paper for visually impaired voters. Similarly, also voters from another Member State may face restrictions in the exercise of their voting rights based on registration requirements or factors relating to lack of knowledge about the political parties or candidates or party programs or political issues or electoral system.

This study addresses some major issues of obstacles to elections in general and of obstacles to participation in local and European elections inside the EU more specifically. In this regard, it looks into four sub-questions in particular:

- 1) Are there legal and constitutional obstacles to the participation of EU citizens in local and European elections in the Member States?
- 2) Are there practical, de-facto obstacles to the participation of EU citizens in local and European elections in the Member States? These can include, amongst others, specific procedures for registration that might be difficult for non-nationals to understand; language barriers, which are not facilitated through translation of instructions and ballot papers into other languages; a lack of assistance in cases of mental or physical disabilities.
- 3) Which EU Member States do not allow for their citizens who reside in another EU Member State to vote for the national parliament, and why?
- 4) Are there specific obstacles to the participation and organization of EU and national citizens in local, national and European elections posed by the current pandemic "Corona virus" crisis?

### Legal and constitutional obstacles to the participation of EU citizens in local and EP elections in another Member State

Under European Union (EU) law, every EU citizen has the right to vote and stand as a candidate at EP elections in the EU country in which he or she resides, under the same conditions as nationals of that State. This has several implications. Firstly, the conditions under which the right to vote can be exercised is determined by national laws and can greatly diverge between different EU Member States. Obstacles to the right to vote can include registration requirements (presuming they do apply indeed to all voters) but also more practical ones relating to the availability of information in certain languages, accessible for EU citizens. Other obstacles that can make voting for EU citizens in another Member State than their own more difficult can include a lack of understanding of the political system and language of the country, as well as a lack of identification with political parties in the host country. In this respect, it should be noted that actual legal and constitutional obstacles specifically aimed at or indirectly addressed for EU citizens in an EU host Member State would constitute a violation of EU law. However, national legal and constitutional obstacles, even though with validity for all voters (nationals or EU citizens), could also have a disproportionate impact on EU citizens. These might include rules about

registration and about linguistic aspects of voting and the (complexity or peculiarities of the) voting process.

In quite some Member States, for example, it is compulsory to be formally registered as a voter, as a separate act apart from being a formal resident or citizen. In this regard, in more than half of the EU Member States, there exists an obligation for non-national EU voters to register themselves separately on the electoral register, which can constitute an additional hurdle to the exercise of their voting rights. In other countries, in turn, the registration as a voter is automatic, after one has registered as a resident: Austria (except Burgenland), Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, and Sweden.

### **Practical and *de facto* obstacles to elections**

The right to vote in paper does always not necessarily translate into a *de facto* right to be able to vote in practice. For certain categories of people (for example disabled people), electoral participation can be hampered by physical barriers that can sometimes even prevent voting. Such barriers may range from a lack of assistance for voters with a mental disability in the voting booth to inaccessible language of information provided on electoral processes, to a lack of adaptation of the ballot paper for visually impaired voters. The question is therefore how different Member States deal with people who have a disability which impairs their right to vote, and if, and how, assistance is being provided to such voters. Such assistance in EU Member States ranges from providing information on elections in simple language; to assistance in the voting booth in the form of an accompanying person or an electoral officer; to possibilities of voting by postal ballots for immobile voters who cannot come physically to the voting station. It also includes language assistance and information in other languages than the official language of the Member States on electoral procedures or regulations for homeless people without a residence address.

### **EU Member States and voting rights of their own nationals residing in another EU Member States**

As has been mentioned above, under EU law, every EU citizen has the right to vote and stand as a candidate at EP elections in the EU country in which he or she resides, under the same conditions as nationals of that State. At the same time, EU law makes no provisions regarding the right of EU citizens to vote for their national parliaments while residing in another EU Member State. Thus, while there are EU-wide rules on the right of EU citizens to vote in European elections that do not depend on their residence in their Member State of nationality, this is not the case with national elections. The right of EU citizens to vote in national elections while residing in another Member State is therefore dependent on national laws, which have adopted different approaches to the issue. These approaches can be summarized as: 1) disenfranchisement, whereby a citizen residing abroad (within the EU even) is deprived of the right to vote altogether; 2) procedural restrictions, whereby Member States do not go as far as disenfranchise their citizens residing in another Member State, but instead impose some procedural requirements in order for them to be able to vote; and 3) no restrictions, whereby Member States do not impose any restrictions on the right to vote in national elections of their citizens residing outside their territory.

While some Member States such as Denmark and Malta have a constitutionally enshrined residence requirement in order to be eligible to vote – albeit with many exceptions – other Member States such as France have no such restrictions. Even other Member States such as Greece or Italy even explicitly list exhaustive grounds on which the right to vote may be limited, residence in another country not being amongst those grounds, thereby explicitly excluding the possibility of disenfranchising citizens

on grounds of residence abroad. In Germany and Ireland in turn, the limitations on the right to vote in national parliamentary elections for citizens residing abroad is not enshrined in the constitution but in secondary law. The crucial difference of this approach to the Danish or Maltese one is that it would be much easier and less cumbersome to amend the rules enshrined in ordinary statutes, as opposed to amending rules codified in the constitution. An amendment of the Danish constitution would, amongst others for example, require new elections as well as a referendum. It would hence be much more difficult to grant the right to vote in national elections to Danish expatriates than to German expatriates. Germany also is special in this regard in that it has included the notion of being “familiar, personally or directly, with the political situation in Germany and are affected by it” as an exception to the general disenfranchisement of expatriates. Other Member States such as Austria do not limit the right to vote of their citizens living abroad as such but impose more requirements on them than on citizens residing within their territory. While Austrian citizens living in Austria are automatically registered on the electoral rolls, Austrians living abroad must file a request to that effect. It is thinkable that such an extra requirement may have a deterrent effect on some voters living abroad, who would perhaps not take the extra step in order to be able to vote.

### **Elections in times of the Corona pandemic**

Specific obstacles to elections that Member States were confronted with in the year 2020 was the restrictions imposed by the Corona pandemic, as social distancing rules made voting in person more difficult. While it may be justified that a specific election is postponed due to an urgent crisis as exemplified by corona. The starting point ought to be that elections and all political campaigning that precedes and surrounds them, must be facilitated, since the frequency of elections and the need to follow the constitutional rules for the regularity of the democratic process and the holding into account of those in power and the possibility of changes of government, is of the essence. Provided that elections can be fair; and that secret and fair and transparent campaigns, with equal arms for those who participate, can take place. If in urgent situations of an epidemic it is crucial that an election must be temporarily postponed, however, we suggest that doing so requires meeting a variety of criteria, to prevent it from becoming a partisan issue; the same applies for a non-postponement but an organization of the voting process and election campaign that are non-partisan and transparent and fair.

Examples of elections that were affected by the pandemic are the municipal elections in Bayern, in which the first round took place on March 15 and the second round of March 29. Because of Corona the second round took place solely through voting by the post. The Basque and Galician parliamentary elections, in turn, have been postponed for the duration of the corona crisis, and also the second round of the French municipal elections were cancelled and postponed due to the Corona lockdown measures in France; the first round of the Polish presidential elections de-facto did not take place.

In Poland an agreement was reached in parliament to set a new date for the elections; the PKW (national electoral commission) decided on May 7 that the polling stations remained closed and the elections were basically cancelled. On the same day parliament however approved legislation to the effect that the elections were to be held via postal ballot. This law was initially stopped in the senate, one reason being that election rules may not be amended less than six months before the elections, but the lower house had the law adopted still. Also, a ruling was sought of the Constitutional Court. The announcement to hold a postal ballot had led to debate about the possibilities of effectively doing so, about the reliability of the mail services and about the secrecy of the vote, how to permit Polish citizens abroad to participate, as well as about the fairness or balance of the election campaign. The announcement to hold a postal ballot had led to debate about the possibilities of effectively doing so,

about the reliability of the mail services and about the secrecy of the vote, about permitting Polish citizens abroad to participate, as well as about the fairness or balance of the election campaign.

In The Netherlands the Minister of Home Affairs sent a letter to parliament on 22 May 2020 indicating that the government is planning to investigate different scenarios for the regular Second Chamber/Tweede Kamer elections as planned for 17 March 2021. In the letter it was envisaged that postponement might not seem yet very likely; however, investigation will be started into the feasibility for corona measures (distancing) of polling stations; as well an indication was given that constitutionally spoken a postponement might be possible, if the legislature would so decide, until at the latest March 2022. Finally, the minister indicated to research possibilities of voting by post/letter-scenarios for the regular Second Chamber elections as planned for 17 March 2021 and/or make adaptations to the actual voting process (larger voting stations, expanding the possibilities of voting by proxy, for instance).

## Conclusion

The right to vote is an essential and fundamental right through which EU citizens can express their preferences directly in EP elections and indirectly (Article 10 section 2 TEU) through national elections after which the national parliament may hold national ministers accountable for their actions in the Council and the European Council. Furthermore, national parliaments do perform quite a few other fundamental roles under EU law in EU constitutional law, such as in the political and economic dialogue and the Early-Warning System, these and are recognized to that effect in Article 12 TEU.

In light of this, any limitations – whether practical or legal – of the right to vote must be as limited as possible and any (legal and practical) limitation must be shown to be necessary and indispensable and proportional for the protection of a legitimate and pressing aim. Member States are under a duty (positive obligation) to not only recognize and respect the right to vote but also to take away as many practical hurdles and obstacles as can reasonably be expected so as to enable all those formally entitled to exercise the right to vote to express their vote. This means that ballot stations must have sufficient opening hours, are well-accessible for all, that other means than voting in a polling station are made available (specifically in but not limited to, corona-times), that disabled or linguistically impaired voters can indeed avail themselves of their right to vote by making available to them easy to read ballot papers, information in the polling station, through the internet etc. The aspect of information about the voting process and political system and party programs does also relate to EU citizens that are entitled to vote in their host country for European and municipal elections. This does require information in at least some other EU languages than the language of the host country for EU citizens, through the Internet in relevant sites, in the polling station and possibly also on the ballot papers. But also, accessible procedures for EU citizens for registration to the right to vote process.

Member States should also take into account the special situation that voters who are homeless find themselves in. Registration as a voter should not exclusively be tied to registration as a resident in a municipality of the Member State in which elections are held, even though we recognize that the right of EU citizens to vote in municipal elections in another Member State of the EU is tied to residence in that municipality. We therefore suggest a separate electoral register for homeless voters, on the condition that they are not registered in another municipality, whereby information on voting and voting cards are handed out in person, and not sent out by post.

For the aspect of holding elections in times of a pandemic we do appreciate that many States were taken by surprise in 2020: however since the frequency of elections is another paramount aspect of the right to vote, we do suggest that states (and this does also apply to the EU with regard to European elections) do reflect on consequences of a pandemic for the voting process and to develop the

necessary steps to ensure that elections can take place with all necessary precautions, and that a regular procedure exists for a possible postponement of an election in the gravest of circumstances. Such steps and regulations must ensure that the holding of elections or the possible postponement does not become a party-political issue nor an abuse of majority-parties or parties in power.

## 1. GENERAL INFORMATION

This study is based on a neutral approach and on existing available data, research and analysis from various sources and documents from national and international institutions. The study will provide also basis for inputs and policy recommendations. Relevant information (e.g. legislative developments or policy documents) during the elaboration of the study shall be taken into account to ensure that it is up-to-date on the date of publication.

This study will look into four sub-questions in particular:

- 5) Are there legal and constitutional obstacles to the participation of EU citizens in local and European elections in the Member States?
- 6) Are there practical, de-facto obstacles to the participation of EU citizens in local and European elections in the Member States? These can include, amongst others, specific procedures for registration that might be difficult for non-nationals to understand; language barriers, which are not facilitated through translation of instructions and ballot papers into other languages; a lack of assistance in cases of mental or physical disabilities.
- 7) Which EU Member States do not allow for their citizens who reside in another EU Member State to vote for the national parliament, and why?
- 8) Are there specific obstacles to the participation and organisation of EU and national citizens in local, national and European elections posed by the current pandemic "Corona virus" crisis?

These can include, amongst others, questions on whether elections should be organized during a pandemic:

- Could and should emergency laws postpone elections and if so for how long and how to prevent that this postponement is not abused by majority parties;
- How the process of casting a ballot is impacted by social distancing rules;
- The tension between the state of emergency and the democratic right to vote;
- The fair balance in campaigning for government and opposition parties, and the possibilities of an effective campaigning.

These issues will mostly fall under Member States constitutional competences but there is also the need to know the perspective from EU law. The study does not seek to provide a full comprehensive analysis of the legal and constitutional situation in all 27 EU Member States; rather it will provide an overview of the four identified issues with a more in-depth look into a selected and significant number of Member States and in particular from the EU law perspective. The constitutional provisions in Member States might differ, and most likely will need to be clarified by Constitutional Courts, but the EU Law (including Council of Europe) is mostly relevant for this research.

For part four of the study (obstacles posed by the pandemic) it would in particular make sense to look into those Member States where elections either have taken place or will happen in 2020: these include, amongst others, the municipal elections and Senate elections in France (March and September 2020 respectively), presidential elections in Poland (May 2020), but also the local elections in the Land of North-Rhine Westphalia in Germany (September 2020) and Basque and Galician regional elections in Spain (April 2020).

## .1. Research question and framework

We have divided this report in the 4 relevant chapters as outlined in the Table of contents. In this introductory chapter we have briefly indicated the importance of the right to vote and its features and perspectives, to serve as a guideline for a full understanding of our conclusions and recommendations.

## .2. The essence of the right to vote

In literature and under international human rights treaties, as well as under the EU Charter of Fundamental Rights, the right to vote is considered to be a fundamental right and to contain the following minimum requirements:

- The right to vote for parliaments and legislative assemblies
- At regular intervals
- With each voter having an equal vote
- With secrecy of the ballot
- And strict rules as to the restrictions of the right to vote and be elected.

As the EU Charter states for the EP elections: they must be direct, free, secret and general. For Member States Article 3, 1<sup>st</sup> protocol ECHR states: free elections at reasonable intervals, by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature<sup>1</sup>. The ECtHR has ruled that this right to vote is a condition of the effective political democracy and enshrines a characteristic of an effective political democracy. The article is understood to contain the right to vote and the right to stand as a candidate for elections. Any restrictions of the (passive and active) right to vote must not thwart the free expression of the people and must reflect the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.<sup>2</sup>

The last aspect (interference with the free expression of the opinion of the people) is an important criterion to assess restrictions of the right to vote; and so is the consideration whether there has been arbitrariness or a lack of proportionality.<sup>3</sup> Article 3 does not prescribe or proscribe a specific electoral system: the choice for any such system is for the states, however under the condition that a system facilitates elections at reasonable intervals, by secret ballot, and under conditions which ensure the free expression of the will of the people. It furthermore requires a fair and proper system of voter registration, and it also requires very weighty considerations to justify the disenfranchisement of sections of the electorate<sup>4</sup>. Any review of the outcome of elections must furthermore be fair and not arbitrary. Also, the impartiality of the bodies examining challenges of outcomes of elections, must be

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<sup>1</sup> This latter requirement limits the scope of the article since it does not cover elections for presidents, for instance. Whether or not local assemblies do fall within the scope of Article 3 would depend on their scope of autonomy (ECtHR 2 September 1998, Ahmed, 29 EHRR 1, ECHR 1999-VI; (in Hirst no 2 (chamber judgment) 30 March 2004, the Chamber states that local elections fall outside the scope. Elections for the European Parliament clearly fall within the scope of Article 3: *Matthews v. United Kingdom*, ECtHR 18 February 1999, 28 EHRR361, ECHR 1999-I.

<sup>2</sup> *The Welfare Party vs. Turkey*, ECtHR 13 February 2003 [GC] 37 EHRR 1, ECHR 2003-II.

<sup>3</sup> See: B. Rainey, E. Wicks, C. Overy, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford University Press 2017, p. 598.

<sup>4</sup> Case law at point concerns disenfranchisement of prisoners, disallowing a blanket ban.

sufficiently guaranteed. The states are under a duty to uphold the integrity of elections, which is specifically relevant in those cases in which a violation of a national election law is concerned. This is specifically relevant in those cases where it is alleged that this violation has resulted in a failure to hold free and fair elections.<sup>5</sup>

The main positive obligation flowing from Article 3, the essence of the article, is for states to have election legislation and to organize elections that meet the standards as laid out before. With rules containing regular elections, ensuring the expression of the free will of the people and ensuring the secrecy of the vote; as well as upholding the integrity of elections and ensuring impartiality of those who supervise elections. This also showed in another case where the court relied upon the importance for a domestic system for effective examination of individual complaints concerning electoral rights. Furthermore, in the previous paragraph, we noted a positive obligation to ensure a more or less balanced media coverage. And finally, this report presumes the obligation to remove obstacles and ensure the effective enjoyment of the right to vote.

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<sup>5</sup> *Karimov v. Azerbaijan*, ECtHR 25 September 2014.



## 2. LEGAL AND CONSTITUTIONAL OBSTACLES TO THE PARTICIPATION OF EU CITIZENS IN LOCAL AND EP ELECTIONS IN ANOTHER MEMBER STATE

### 2.1. Introduction

Directive 93/109/EC<sup>6</sup> lays down the detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State (the host state) of which they are not nationals. Article 20(2)(b) TFEU states that all EU citizens have the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State. This has several implications. Firstly, the conditions under which the right to vote can be exercised is determined by national laws and can greatly diverge between different EU Member States. Obstacles to the right to vote can include registration requirements (presuming they do apply indeed to all voters) but also more practical ones relating to the availability of information in certain languages, accessible for EU citizens. Other obstacles that can make voting in another Member State than their own more difficult can include a lack of understanding of the political system and language of the country, as well as a lack of identification with political parties in the host country.<sup>7</sup>

Phrased as in the title of this chapter, legal and constitutional obstacles specifically aimed at or indirectly addressed for EU citizens in an EU host Member State would constitute a violation of EU law. However, national legal and constitutional obstacles, even though with validity for all voters (nationals or EU citizens), could also have a disproportionate impact on EU citizens. These might include rules about registration and about linguistic aspects of voting and the (complexity or peculiarities of the) voting process. Or also about the legal absence of assistance for non-national voters when entering a polling station. For assistance in casting the vote we do refer to Chapter 3, which focuses on disability-assistance, but which shows that various aspects of assistance could also be relevant for non-nationals, such as EU-citizens.

### 2.2. Becoming a voter in the host state

EU citizens, residing in a Member State other than their own, have the right to participate in European and municipal elections in their host countries. This often leads to prerequisites, however, that they are registered as, or otherwise become, a voter in their host country. In quite some Member States it is compulsory to be formally registered as a voter, as a separate act apart from being a formal resident or citizen. The EU maintains a website which provides the relevant information in this respect.<sup>8</sup> In more than half of the EU Member States, there exists however an obligation for non-national EU voters to

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<sup>6</sup> Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, *OJ L 329*, 30.12.1993.

<sup>7</sup> D. S. Hutcheson and L. Russo, "Turnout and Registration of Mobile European Union Citizens in European Parliament and Municipal Elections", *FAIR EU Analytical Report 2019*, p. 56 (available at: <https://faireu.ecas.org/wp-content/uploads/2019/07/D3.7.pdf>, last accessed on 6 September 2020).

<sup>8</sup>Website Your Europe, *Municipal Elections*, available at: [https://europa.eu/youreurope/citizens/residence/elections-abroad/municipal-elections/index\\_en.htm](https://europa.eu/youreurope/citizens/residence/elections-abroad/municipal-elections/index_en.htm), last accessed on 4 September 2020.

register themselves separately on the electoral register.<sup>9</sup> In other countries the registration as a voter is automatic, after one has registered as a resident: Austria (except Burgenland), Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, and Sweden. Also, for voting as a EU resident for the European Parliament information is available on an EU website.<sup>10</sup>

Member States, in which registration is not automatic, include, for example, Belgium, where registration has to be done by the non-Belgian EU citizen themselves at the municipality of residence. Registration must only happen once, after which voters remain registered for all upcoming elections.<sup>11</sup> Voting is mandatory for all registered voters. Also, in Spain registration is not automatic but voluntary like in Belgium, though without any voting requirements.<sup>12</sup> Hutcheson and Russo showed in their report that registration requirements can constitute a significant obstacle to the participation of EU citizens to European Parliament and municipal elections in EU Member States, with registration rates being lower in Member States that do not have automatic registration.<sup>13</sup>

But the question of becoming a voter in a Member State other than their own does not only concern registration requirements. It can also be affected by residence requirements, which can differ from Member State to Member State. Finland, for example, has an automatic registration system for non-Finnish EU citizens but requires EU citizens to have been resident in Finland at least 51 days before the elections.<sup>14</sup> And furthermore, becoming a voter and participating as a voter in the host country may also be limited because of factors relating to lack of knowledge about the political parties or candidates or party programs or political issues, and about the municipal council which is the object of a municipal election. With limited knowledge of the relevant national official language of the host country, this might constitute a reason for the non-exercise of their rights as EU citizen.

### 2.3. Availability of information

However, despite these arrangements it is urgent that national administrations make the relevant national information about the rules, best practices and practices to avoid available in relevant languages in their national information packages and websites. It is one thing to know one must register, it is another to understand how to do it and have access to the relevant documents and forms, and in languages one can fully understand. This would also apply to rules about voting and casting the vote, the election system, and political party programs and standing as a candidate (even though in the latter capacity one may be expected to understand and write and speak the domestic language since that language is the official language of the relevant elected assembly/council), and for information and comprehension of the workings of a municipal council.

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<sup>9</sup> D. S. Hutcheson and L. Russo, "Turnout and Registration of Mobile European Union Citizens in European Parliament and Municipal Elections", *FAIR EU Analytical Report 2019*, p. 8 (available at: <https://faireu.ecas.org/wp-content/uploads/2019/07/D3.7.pdf>, last accessed on 6 September 2020).

<sup>10</sup> Website Your Europe, *European Elections*, available at: [https://europa.eu/youreurope/citizens/residence/elections-abroad/european-elections/index\\_en.htm](https://europa.eu/youreurope/citizens/residence/elections-abroad/european-elections/index_en.htm), last accessed on 4 September 2020.

<sup>11</sup> D. S. Hutcheson and L. Russo, "Turnout and Registration of Mobile European Union Citizens in European Parliament and Municipal Elections", *FAIR EU Analytical Report 2019*, p. 23 (available at: <https://faireu.ecas.org/wp-content/uploads/2019/07/D3.7.pdf>, last accessed on 6 September 2020).

<sup>12</sup> *Ibid.*, p. 36.

<sup>13</sup> *Ibid.*, p. 60.

<sup>14</sup> *Ibid.*, p. 44.

In The Netherlands the website of the national Electoral Council, which provides information about all elections to be held in The Netherlands, is available in Dutch as well as in English, but/and no other languages<sup>15</sup>. Considering that many EU citizens originate from countries where English may not be the first or second language, it is to be encouraged that relevance is had to languages of major countries of origin. In France a non-official website provides information specifically about the right to vote and obligation to register<sup>16</sup>, and refers for the specific procedure and steps to an official website, which is only available in French<sup>17</sup>. In Belgium, Vlaanderen hosts a website in English about (municipal) elections and also addresses the participation of EU-citizens<sup>18</sup>. This site refers to another site for detailed information as to how to proceed to vote as a foreigner, which site however exists only in Dutch<sup>19</sup>. In Germany, municipal elections are organized on State by State basis so there is no information available on the federal level. The next upcoming municipal elections are the ones in North-Rhine Westphalia on 13 September 2020.<sup>20</sup> However, while there is information on the elections in German as well as in accessible language on the website of the Ministry of the Interior in North-Rhine Westphalia,<sup>21</sup> no link to information in English is available. As for the European Parliament elections in Germany, for example, there is general information on the election and who can vote available in all official EU languages,<sup>22</sup> but once one clicks on the link for further information on how to register as a voter, such information is only available in German or in English.<sup>23</sup>

In itself, search engines are extremely helpful in helping people find the relevant web pages, but when one cannot navigate in one's own language nor in another (major) EU language, finding the information might be complicated. Even when brochures may exist and can be obtained in municipal buildings, in modern times it could be argued that this information ought to be available through the internet. The existence of a recognition of the right to vote for EU citizens does seem to include as a positive obligation not only to take away legal barriers but also to provide the information and forms and steps to take for the EU citizens who may have limited knowledge of the domestic language. In the same vein we will discuss in a later chapter the question as to make information about elections available for less literate people, or people with hearing or vision disabilities. A similar obligation, to seek inclusion in the election process for all, must be considered to be available in offering information in different languages. Which, maybe not for the ballot paper itself, ought also to include information

<sup>15</sup> Website Kiesraad, available at: <https://english.kiesraad.nl>, last accessed on 6 September 2020.

<sup>16</sup> Website Angloinfo, *Voting in France, For Foreigners*, available at: <https://www.angloinfo.com/how-to/france/moving/voting>, last accessed on 7 September 2020.

<sup>17</sup> Website Service Public de République Française, *Élections: droit de vote d'un citoyen européen en France*, available at: <https://www.service-public.fr/particuliers/vosdroits/F1937>, last accessed on 7 September 2020.

<sup>18</sup> Website Informatie van Vlaamse overheid, *Elections in Belgium*, available at: <https://www.vlaanderen.be/en/authorities/elections-belgium>, last accessed on 7 September 2020.

<sup>19</sup> Website Vlaanderen kiest 2018, available at: <https://www.vlaanderenkiest.be>, last accessed on 7 September 2020.

<sup>20</sup> Website Bundeswahlleiter, *Künftige Wahltermine in Deutschland*, <https://www.bundeswahlleiter.de/service/wahltermine.html>, last accessed on 7 September 2020.

<sup>21</sup> Website Ministerium des Innern des Landes Nordrhein-Westfalen, *Kommunalwahlen 2020*, available at: <https://www.im.nrw/kommunalwahlen2020>, last accessed on 7 September 2020.

<sup>22</sup> Website Bundesministerium des Innern, für Bau und Heimat, *Elections to the European Parliament 2019*, available at: <https://www.bmi.bund.de/EN/topics/constitution/electoral-law/european-elections/european-election-2019/european-election-2019-node.html>, last accessed on 7 September 2020.

<sup>23</sup> Website Bundeswahlleiter, *Information for Union citizens*, available at: <https://www.bundeswahlleiter.de/en/europawahlen/2019/informationen-waehler/unionsbuerger.html#43e01302-dc86-43ab-8471-b220448ac316>, last accessed on 7 September 2020.

about the lay-out and accessibility and transparency of the ballot paper and how to tick the relevant boxes or fill out names and political parties and how elections translate in the composition of an elected body.

## **2.4. Mobility and voting**

For EU citizens, especially those who use the freedom of movement for work and (temporary) residence in another Member State, and may do so frequently but not so much on a permanent basis, one may ask whether the home country or the host country have done their utmost to facilitate for them the right to vote, either at home or abroad. For these categories of migrant workers, presence at the spot to vote might conflict with their obligations to work. For those cases it seems urgent that Member States do offer flexible arrangements, such as voting by proxy or by letter/mail. Mobility of citizens ought to be supported and not penalized by effectively stripping them from democratic rights.

## **2.5. Concluding remarks**

Supra we have argued the necessity to make information available in the Internet in EU languages about the registration to vote, the voting process and casting a ballot. Furthermore, the right to vote is to be enhanced by making available proxy voting or voting by mail for EU-citizens that exercise their mobility and cannot return home, or to the host state, to cast the vote on election day.

### 3. PRACTICAL AND *DE FACTO* OBSTACLES TO ELECTIONS

#### 3.1. Introduction

The right to vote in national parliamentary elections is a fundamental right in the Member States of the European Union and an integral part of any system of representative democracy. However, the access to the right to vote does not only comprise the existence of a legal or constitutional right to cast a ballot in direct, free, equal and secret elections. Even where such a right exists on paper, for certain categories of people (for example disabled people), electoral participation can be hampered by physical barriers that can sometimes prevent voting. Such barriers may range from a lack of assistance for voters with a mental disability in the voting booth to inaccessible language of information provided on electoral processes to a lack of adaptation of the ballot paper for visually impaired voters.

This chapter is devoted to an analysis how some selected EU Member States deal with people who have a disability which impairs their right to vote. The question is if, and how assistance is being provided and the purpose is as of yet to gaining insight and also the collection of inspiring examples. It should be noted that an analysis of and description of practice, the implementation in reality, an analysis of numbers and size and possible stumbling blocks, is, however, beyond the scope of this inventory. The first part of this section will deal with the question of how the accessibility of national elections for people with intellectual disabilities is promoted and whether measures exist to remove practical obstacles to the right to vote. The second part will deal with the question of how voters with disabilities may be assisted in the voting booth, and which form such assistance may take. The third part will look into the question of whether some forms of positive obligations exist to make available information or assistance to voters who are not fluent in the language of the State in which the election takes place. The countries selected for answering these questions are Austria, Denmark, Finland, Germany, and Sweden, in order to cover a variety of practices. In order to remove these barriers, it is suitable that practices which improve access to voting and electoral participation must be implemented in Member State of European Union.

#### 3.2. Measures to promote the accessibility of national elections to voters with a disability

One of the most common measure to increase the accessibility of elections to voters (with or without a mental disability) is the use of simple language.

In Austria, no restriction is provided for by law on the right to vote of voters with (mental) disabilities. The accessibility of general elections at federal level is promoted by making information available to voters both in simple, more accessible language on the website of the Ministry of the Interior, where a button entitled 'easier reading' can be clicked on next to each information text that is provided in ordinary language.<sup>24</sup> Easier reading in this context means shorter sentences, whereby important words are printed in bold, as well as a much larger font.

In a similar manner, the Swedish Riksdag provides election info on its website. This information<sup>25</sup> is available in the Swedish language, in easy to read Swedish, in sign language and in audio. The Finnish

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<sup>24</sup> Website Bundesministerium Inneres, Nationalratswahlen, available at: <https://www.bmi.gv.at/412/Nationalratswahlen/>, last accessed on 7 September 2020.

<sup>25</sup> Website Sveriges Riksdag, available at: <http://www.riksdagen.se/sv/>, last accessed on 7 September 2020.

Ministry of Justice, for example, has also created a document that explains the voting process with a large number of pictures, including how to fill out and fold the ballot paper.<sup>26</sup>

Also in Germany the accessibility of general elections at federal level and European elections is promoted by making information available to voters both in simple, more accessible language and in sign language on the website of the Federal Returning Officer (*Bundeswahlleiter*).<sup>27</sup> Information in simple language includes the questions of who can vote, when and where the vote takes place, how to vote (including an explanation of the first and second vote and the possibility to abstain), when a vote is considered invalid and how the votes are counted. Simple and accessible language in this context means shorter sentences whereby important words are printed in bold, while difficult words are marked by underlining. The website also includes pictures, for example of the ballot paper when explaining the two different types of votes. Moreover, information on the general election and the voting process in simple accessible language are, in addition to the *Bundeswahlleiter*, provided by a number of organizations such as: Bundesvereinigung Lebenshilfe e.V., Sozialverband Deutschland, Aktion Mensch, Behindertenbeauftragte Niedersachsen, Antidiskriminierungsstelle des Bundes, Bundeszentrale für politische Bildung. The *Bundeszentrale für politische Bildung* (Federal Agency for Civic Education) has also created a voting advice quiz in 2002 called Wahl-O-Mat,<sup>28</sup> which is intended to help voters find out which party their political positions on a range of topics are the closest to. The Wahl-O-Mat provides users with 38 different statements on various political topics. Users may then choose whether they agree, do not agree or are neutral towards the position stipulated; based on these choices the Wahl-O-Mat then tells the user which political party's positions are the most compatible with their views. It is not, however, available in simple language.

But accessibility to elections may also include measures at the voting station itself. In this regard, for example, Section 45(3) of the Danish Elections Act provides that at each polling station notices should be put up indicating all the names of parties and candidates in the order listed on the ballot paper.

### 3.3. Forms of assistance in the voting booth

In Austria, the Electoral Code (Nationalrats-Wahlordnung, NRW)<sup>29</sup> provides for various forms of assistance in the voting booth. §66(1) NRW thus states that the Electoral Authority (*Wahlbehörde*) must necessarily make available ballot templates to blind voters or voters with a visual impairment so as to enable them to cast a vote autonomously. Voters with a physical or sensory disability may be further assisted during the voting process by another person, who they designate themselves and who they must confirm to the returning officer (*Wahlleiter*). In such a case an exception is made to the rule that the voting booth may be entered by only one person at a time, thus allowing for the helper (*Begleitperson*) to enter the voting booth with the person (s)he is assisting. The right to avail oneself of assistance during the voting process is not excluded by the use of ballot templates. Voters with a physical or sensory disability are defined as those who cannot be reasonably expected to mark the

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<sup>26</sup> Eduskuntavaalit 2015, Brochure on parliamentary elections, available at: <https://vaalit.fi/documents/5430845/7567748/Plain+language+Finnish.pdf>, last accessed on 7 September 2020.

<sup>27</sup> Website Bundeswahlleiter, *Was muss ich über die Bundestags-Wahl wissen?*, available at: <https://www.bundeswahlleiter.de/info/leichte-sprache/bundestagswahl.html>, last accessed on 7 September 2020.

<sup>28</sup> Website Bundeszentrale für politische Bildung, *Wahl-O-Mat*, available at: <http://www.bpb.de/politik/wahlen/wahl-o-mat/>, last accessed on 7 September 2020.

<sup>29</sup> Bundesgesetz über die Wahl des Nationalrates (Nationalrats-Wahlordnung 1992 – NRW) (StF: [BGBl. Nr. 471/1992](#)), last amended on 17 May 2018.

ballot paper without assistance (§66(2) NRWO). In cases of doubt, it is for the Electoral Authority<sup>30</sup> to decide on the admissibility of the provision of assistance at the polling station; in any case such assistance must be noted down in written (§66(3) NRWO). False claims of blindness, visual impairment or physical disabilities are subject to the imposition of fines (§66(4) NRWO). More generally, there is also always the possibility for voters with (mental) disabilities to vote by postal ballot. Every voter who is in possession of a voting card (*Wahlkarte*) may cast their ballot outside of the designated polling station (§37(2) NRWO) and by postal ballot (§60 NRWO). Such voting cards are, amongst others, issued to voters who for health reasons cannot cast their vote at the polling station (§38(1) NRWO) as well as those who are incapable to go to their designated polling station on the day of the election on grounds of sickness, age or other reasons that prevent them from walking or moving as well as imprisonment (§38(2) NRWO). When voting by postal ballot the voter must affirm by signing an affidavit (*eidesstattliche Erklärung*) that he or she has marked the ballot paper personally, in secret and without undue influence by others (§60(2) NRWO). Where such an affidavit is missing or where it has been proven that it was not signed by the voter him- or herself, the vote is invalid (§60(3) NRWO).

For voters mentioned under §38(2) NRWO special Electoral Authorities ('flying election commissions')<sup>31</sup> can be appointed who visit them during specified election times in order to enable them to cast their ballot (§73(1) NRWO). This does not necessarily have to be in a separately established voting booth, but the members of the Electoral Authority may also visit the voters in the room as long as the secrecy of the voting can be ensured (§§73(2) and 72(3) NRWO). Voters under §38(2) NRWO include people, who on the election day, are unable to move due to sickness, age, imprisonment or other reasons. In addition, there are special rules for voters whose personal mobility is limited either because they are elderly, bedridden or imprisoned. For example, in larger medical institutions and nursing homes separate polling stations may be established in order to facilitate voting for the inhabitants (§72(1) NRWO). Voters in such institutions that are still capable of walking cast their ballot in the polling stations set up in their respective institutions (§72(1) NRWO), while bedridden voters may be visited by the Electoral Authority in their room for the purpose of casting their ballot as long as the secrecy of the voting can be ensured (§72(3) NRWO). Separate polling stations may also be established in prisons (§74 NRWO); §72 NRWO applies mutatis mutandis.

Furthermore, voters with a physical or sensory disability in Austria may be assisted during the voting process by another person, designated and confirmed to the returning officer (*Wahlleiter*) by the voter him- or herself under §66(1) NRWO. The helper (*Begleitperson*) may enter the voting booth with the voter with the only procedural requirement being that the voter must be able to confirm the person rendering assistance to the returning officer.<sup>32</sup> In cases of doubts, it is for the Electoral Authority (*Wahlbehörde*) to decide on the admissibility of the provision of assistance at the polling station; in any

<sup>30</sup> Bundesministerium für Inneres, "Leitfaden für die Gemeinden für die Nationalratswahl am 15. Oktober 2017", Guidelines 2017, p. 42 (available at: [https://www.bmi.gv.at/412/Nationalratswahlen/Nationalratswahl\\_2017/files/NX101\\_Leitfaden\\_Gemeinde-Version-2-E.pdf](https://www.bmi.gv.at/412/Nationalratswahlen/Nationalratswahl_2017/files/NX101_Leitfaden_Gemeinde-Version-2-E.pdf), last accessed on 7 September 2020).

<sup>31</sup> Website Bundesministerium Inneres, *Elections in Austria*, available at: [https://www.bmi.gv.at/412\\_english/](https://www.bmi.gv.at/412_english/), last accessed on 7 September 2020.

<sup>32</sup> Bundesministerium für Inneres, "Leitfaden für die Gemeinden für die Nationalratswahl am 15. Oktober 2017", Guidelines 2017, p. 38 (available at: [https://www.bmi.gv.at/412/Nationalratswahlen/Nationalratswahl\\_2017/files/NX101\\_Leitfaden\\_Gemeinde-Version-2-E.pdf](https://www.bmi.gv.at/412/Nationalratswahlen/Nationalratswahl_2017/files/NX101_Leitfaden_Gemeinde-Version-2-E.pdf), last accessed on 7 September 2020).

case such assistance must be noted down in written (§66(3) NRW). Under §66(1) NRW it is for the voter to designate and confirm the helper (*Begleitperson*) to the returning officer, meaning that assistance is conditional upon the voter being able to do so. Helpers who are not or cannot be confirmed by the voter are not allowed. No further stipulations are made with regard to who may constitute a helper.

In Germany, §57 of the Electoral Code (Bundeswahlordnung, BWahlO)<sup>33</sup> and §33(2) Electoral Act (Bundeswahlgesetz, BWahlG)<sup>34</sup> provide that a voter who is unable to read or who is prevented from marking or folding the ballot paper or putting it in the ballot box due to a physical limitation may designate another person of whose assistance the voter wishes to avail himself or herself for casting his or her vote and intimate this to the Electoral Board. The helper may also be a member of the Electoral Board designated by the voter. The assistance rendered must be limited to the fulfillment of the voter's wishes and the helper may go to the polling booth together with the voter if the nature of the assistance to be rendered so demands. The helper may not disclose any knowledge obtained while rendering another person assistance in casting his or her vote. Because the right to vote is personal, the voter must cast the vote personally (§14 BWahlG); this means that the voter must always be present in the voting booth. More generally, there is always the possibility for voters with disability to vote per postal ballot (§§14(3) and 36 BWahlG). §57 BWahlO applies *mutatis mutandis* (§66(3) BWahlO). §66(3) BWahlO furthermore states that where the voter has had his or her ballot paper marked by a helper, the latter shall affirm that he or she has marked the ballot in accordance with the stated wish of the voter by signing the affidavit regarding the postal ballot and that the helper must have completed the sixteenth year of age. The person providing assistance to the voter must affirm on the polling card in lieu of an oath to the Constituency Returning Officer that the ballot paper has been marked in accordance with the declared intent of the voter (§36 BWahlG). §§57(4) and 45(2) BWahlO furthermore provide the legal basis to produce ballot paper templates for the blind or those with a visual impairment, which enables blind voters or voters with a visual disability to vote independently and without assistance. With regard to wheelchair users, the polling card will also specify whether or not a polling station is accessible for voters that are dependent on a wheelchair – where it is not, voting may take place in a different, accessible, polling station or through postal ballot. For old and hospitalized voters it is possible for municipalities to reach agreement with the managements of smaller hospitals or smaller senior citizens' or nursing homes to permit the persons there eligible to vote who have a polling card valid for the constituency to vote before a Mobile Electoral Board (§62 BWahlO.); this means that the voter must always be present in the voting booth. More generally, there is always the possibility for voters with disability to vote per postal ballot (§§14(3) and 36 BWahlG). §57 BWahlO applies *mutatis mutandis* (§66(3) BWahlO). §66(3) BWahlO furthermore states that where the voter has had his or her ballot paper marked by a helper, the latter shall affirm that he or she has marked the ballot in accordance with the stated wish of the voter by signing the affidavit regarding the postal ballot and that the helper must have completed the sixteenth year of age. The person providing assistance to the voter must affirm on the polling card in lieu of an oath to the Constituency Returning Officer that the ballot paper has been marked in accordance with the declared intent of the voter (§36 BWahlG). §§57(4) and 45(2) BWahlO furthermore provide the legal basis to produce ballot paper templates for the blind or those with a visual impairment, which enables blind voters or voters with a visual disability to vote independently and without assistance. With regard to wheelchair users, the

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<sup>33</sup> Bundeswahlordnung in der Fassung der Bekanntmachung vom 19. April 2002 (BGBl. I S. 1376), last amended on 19 June 2020 (BGBl. I S. 1328)

<sup>34</sup> Bundeswahlgesetz in der Fassung der Bekanntmachung vom 23. Juli 1993 (BGBl. I S. 1288, 1594), last amended on 25 June 2020.



polling card will also specify whether or not a polling station is accessible for voters that are dependent on a wheelchair – where it is not, voting may take place in a different, accessible, polling station or through postal ballot. For old and hospitalized voters it is possible for municipalities to reach agreement with the managements of smaller hospitals or smaller senior citizens' or nursing homes to permit the persons there eligible to vote who have a polling card valid for the constituency to vote before a Mobile Electoral Board (§62 BWahlO).

Assistance for voters in Germany may take place both inside and outside the voting booth at the polling station depending on the nature of the assistance required (§57 BWahlO). The only procedural requirement stated is that a voter requiring assistance for reading, marking or folding the ballot paper or putting it in the ballot box must notify such need and the person whose assistance he or she wishes to avail him/herself of to the Electoral Board. It is also possible to designate a member of the Electoral Board as helper. Where assistance is given in voting by postal ballot, the person providing assistance to the voter must affirm on the polling card in lieu of an oath to the Constituency Returning Officer that the ballot paper has been marked in accordance with the declared intent of the voter (§36 BWahlG). Blind voters or those with a visual impairment may avail themselves of a template for voting (§57(4) BWahlO), while voters in a wheelchair may cast their ballot at a different polling station or through postal ballot where their designated station is not accessible. It is for the voter to designate another person of whose assistance he or she would like to avail him/herself at the polling station; such person may also be a member of the Electoral Board (§57 BWahlO). For assistance given in voting per postal ballot, the law prescribes a minimum age of 16 years old for the helper (§66(3) BWahlO); no such requirement is explicitly made in the law with regard to assistance at the polling station, even though it can be found in individual instructions for Electoral Boards in the different polling district.<sup>35</sup>

In Sweden, Section 3 of Chapter 7 of the Election Act provides for the possibility for voters who cannot cast their vote by themselves due to an impairment to request assistance by the voting clerks or another person to the extent that this is necessary. It does not further define 'impairment'. Section 3a allows for voters who, owing to illness, impairment or old age, cannot personally make their way to a vote reception point may, upon request, give their ballot papers to a mobile voting clerk. Where a polling station is not accessible for voters with impairments at any time during the election, the voting clerks may receive these voters' vote envelopes outside the vote reception point, provided this can be effectuated in a secure way (section 7a of Chapter 8 of the Electoral Act). effected in a secure way (section 7a of Chapter 8 of the Electoral Act).

Another possibility is voting by messenger. Under section 4 of Chapter 7 of the Election Act, voters who, owing to illness, impairment or old age, cannot personally make their way to a polling station, as well as imprisoned voters, may deliver their ballot papers there by messenger. The messenger must be the voter's spouse or cohabitee, their children, grandchildren, parents or siblings; somebody who provides the voter with care in a professional or similar capacity or who otherwise takes care of the voter's personal affairs, rural postmen employed by Posten AB or employees at a remand center or penal institution (section 5 of Chapter 7 of the Election Act). In any case, the messenger must have attained the age of 18. Postal voting is also foreseen in Sweden but only for voters staying abroad or onboard a vessel in foreign traffic; thus, it is not allowed under the Election Act for voters with a disability residing in Sweden (section 11 of Chapter 7 of the Election Act). If a voter votes by messenger, he or she must

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<sup>35</sup> For example: Stadt Leipzig, "Anleitungsmaterial für allgemeine Wahlvorstände zur Bundestagswahl am 24.09.2017", Guidelines 2017, p. 6 (available at: [https://www.leipzig.de/fileadmin/mediendatenbank/leipzig-de/Stadt/02.1\\_Dez1\\_Allgemeine\\_Verwaltung/12\\_Statistik\\_und\\_Wahlen/Wahlen/Wahl\\_aktuell/BTW\\_2017/Allgemeine\\_Wahlvorstaende\\_Anleitung.pdf](https://www.leipzig.de/fileadmin/mediendatenbank/leipzig-de/Stadt/02.1_Dez1_Allgemeine_Verwaltung/12_Statistik_und_Wahlen/Wahlen/Wahl_aktuell/BTW_2017/Allgemeine_Wahlvorstaende_Anleitung.pdf), last accessed on 7 September 2020).

insert the ballot paper into a vote envelope in the presence of the messenger and a witness (unless the messenger is a rural postman), who both must certify this on the envelope (section 7 of Chapter 7 of the Electoral Act). Both the witness and the messenger must have attained the age of 18 years. Voters who are not known to the messenger shall produce an identity document or in another way verify her or his identity; if they do not do so the messenger may not receive the vote by messenger (section 9 of Chapter 7 of the Electoral Act). A messenger who is not known to the voting clerks must also produce an identity document or in another way verify her or his identity (section 8 of Chapter 8 of the Electoral Act). Where an envelope does not satisfy the requirements stipulated above or where the messenger cannot verify his or her identity, the voting clerks may not accept the vote (section 9 of Chapter 8 of the Electoral Act). In order to qualify as a messenger, a person must be the voter's spouse or cohabitee, their children, grandchildren, parents or siblings; somebody who provides the voter with care in a professional or similar capacity or who otherwise takes care of the voter's personal affairs, rural postmen employed by Posten AB or employees at a remand center or penal institution (section 5 of Chapter 7 of the Election Act). In any case, the messenger must have attained the age of 18. At the polling station also the voting clerks may assist the voter in the voting process or 'another person', though the law does not stipulate who such other persons may be (section 3 of Chapter 7 of the Election Act). If a voter votes by messenger, he or she must insert the ballot paper into a vote envelope in the presence of the messenger and a witness (unless the messenger is a rural postman), who both must certify this on the envelope (section 7 of Chapter 7 of the Electoral Act). Both the witness and the messenger must have attained the age of 18 years. Voters who are not known to the messenger shall produce an identity document or in another way verify her or his identity; if they do not do so the messenger may not receive the vote by messenger (section 9 of Chapter 7 of the Electoral Act). A messenger who is not known to the voting clerks must also produce an identity document or in another way verify her or his identity (section 8 of Chapter 8 of the Electoral Act). Where an envelope does not satisfy the requirements stipulated above or where the messenger cannot verify his or her identity, the voting clerks may not accept the vote (section 9 of Chapter 8 of the Electoral Act). In order to qualify as a messenger, a person must be the voter's spouse or cohabitee, their children, grandchildren, parents or siblings; somebody who provides the voter with care in a professional or similar capacity or who otherwise takes care of the voter's personal affairs, rural postment employed by Posten AB or employees at a remand centre or penal institution (section 5 of Chapter 7 of the Election Act). In any case, the messenger must have attained the age of 18. At the polling station also the voting clerks may assist the voter in the voting process or 'another person', though the law does not stipulate who such other persons may be (section 3 of Chapter 7 of the Election Act).

In Denmark, as a general rule, voting takes place in the voting booth which only the voter is allowed to enter (Section 48 of the Elections Act). Section 49(1), however, states that voters who on account of disability, poor health or for similar reasons are unable to walk into a polling station or voting booth or in any other way are unable to vote in the prescribed way, may request the assistance needed to cast their vote. This may call for the necessary modifications of the prescribed procedure and may entail access to cast one's vote immediately outside the polling station. Sections 49(2) and (3) specify that such assistance in voting is rendered by two polling supervisors or appointed electors. Instead of one of the supervisors or appointed electors the voter can demand assistance in voting by a person of his/her own choice, excluding candidates standing for a party in the multimember constituency. In any case, assistance to cross off the ballot paper may be rendered only when the voter is able to indicate direct and unambiguously to those rendering assistance the party or candidate for which he wants to vote (section 49(4) of the Elections Act).

In Denmark it is also possible for voters to vote in advance (section 53 of the Elections Act). This applies, for example, to voters who are hospitalized and may cast their votes in advance in the hospital but also

to voters who reside in care homes or housing for the elderly or prison or voters who stay in places outside their homes where the local authority offers individual assistance, care and attendance to persons who on account of physical or mental impairment have special needs (section 54 of the Elections Act). Voters who on account of illness or disability are unable to turn up at a polling station may vote in advance in their homes except where granted the opportunity of casting their vote in one of the institutions, housing or accommodation facilities mentioned in above (section 54(4) of the Elections Act). Under section 47a of the Elections Act a voter may on application cast his vote on election day at a different polling station of the nomination district in his residential municipality from the one to which the voter is affiliated according to the electoral register. Where a voter casts his vote in advance (see above) this must be done to two vote receivers who are local government or institution officials (section 55 of the Elections Act). Sections 49(2) and (3) of the Elections Act specify that assistance in voting can be rendered either by two polling supervisors or appointed electors or by a person of the voter's own choice, excluding candidates standing for a party in the multimember constituency. No other requirements are specified in the law.

In Finland, Section 73 of the Finnish Election Act states that the election board must assign a polling assistant to be present at all polling stations, wearing distinctive marks or signs, in order to assist the voter in marking the ballot upon his or her request. The provision does not specify that only physically or mentally disabled persons may avail themselves of the assistance of an assistant; rather it says that a voter in general has the right to use a member of the election board as an assistant in marking the ballot-paper if this does not delay the voting process. Such polling assistants are appointed by the election board under section 16 of the Election Act. In addition, voters whose ability to mark the ballot is essentially weakened may use the help of an assistant of his or her choosing to mark the ballot; such a chosen assistant may not be a candidate to be elected or the latter's spouse, child, sibling or parent. In any case, the assistant is required to conscientiously comply with the directions of the voter and keep secret the information received in connection to voting (section 73 of the Elections Act).

There is also the possibility to vote in advance. Section 46 of the Elections Act states that every eligible voter may vote in advance at the general advance polling stations in Finland and in the Finnish diplomatic missions abroad. Eligible voters who are in hospital, in a facility with round-the-clock treatment or another operational unit of social services designated by the local executive as an advance polling station or in a penal institution may vote in advance in the said institution. In addition, eligible voters whose ability to move or function is limited to the degree that they are unable to come to the polling or advance polling station without undue difficulty may vote in advance at their home in Finland; the same applies to the caregiver of such persons (section 46 of the Elections Act). In the context of at-home voting the election official must ensure that besides him- or herself, another person over the age of 18 appointed or approved by the voter is present; such person may not be a candidate in the elections (section 54 of the Election Act). Also, in advanced voting, voters have a right to assistance. Thus, section 58 of the Elections Act states that on the request of the voter an election official or member of the electoral commission shall assist him or her in the voting. Similar to voting at the polling station, a person whose ability to mark the ballot is essentially weakened may, during the voting, use the help of an assistant of his or her own choosing, as long as such person is not a candidate or a candidate's spouse, child, sibling or parent. No further specifications are made in the law with regard to what kind of help is precisely envisaged by these regulations. may vote in advance at their home in Finland; the same applies to the caregiver of such persons (section 46 of the Elections Act). In the context of at-home voting the election official must ensure that besides him- or herself, another person over the age of 18 appointed or approved by the voter is present; such person may not be a candidate in the elections (section 54 of the Election Act). Also in advanced voting, voters have a right to assistance. Thus, section 58 of the Elections Act states that on the request of the voter an election

official or member of the electoral commission shall assist him or her in the voting. Similarly to voting at the polling station, a person whose ability to mark the ballot is essentially weakened may, during the voting, use the help of an assistant of his or her own choosing, as long as such person is not a candidate or a candidate's spouse, child, sibling or parent. No further specifications are made in the law with regard to what kind of help is precisely envisaged by these regulations.

Any voter may ask a member of a polling station to assist him/her in the voting process, when this does not delay the voting process unduly, and under the condition that the assistant does follow the instructions of the voter carefully and keeps the voting a secret (section 73 Elections Act). In the Elections Act no further procedures are. Section 76 Elections Act enables voters to fill out the ballot paper outside the voting booth when doing so inside the booth would constitute an undue burden, provided that secrecy can be guaranteed. Section 70 of the Elections Act requires that a list of candidates is hung up in the polling station, the waiting area, and in each voting booth, but does not specify as to the size or the size of the font, and does not provide for a template for visually impaired voters. At each polling station there are polling assistants assigned, who can assist voters in marking the ballot. Alternatively, voters whose ability to mark the ballot is essentially weakened may use the help of an assistant of his or her choosing to mark the ballot as long as the assistant is not a candidate or a candidate's spouse, child, sibling or parent (section 73 of the Elections Act).

### 3.4. Language assistance to non-fluent voters

One of the obstacles that voters may face in national, European and municipal elections is the lack of information provided in a language, which they understand, in the case that they are not fluent in the language of the Member State they are residing in. As has been mentioned above, in The Netherlands the website of the national Electoral Council, which provides information about all elections to be held in The Netherlands, is available only in Dutch and English, but/and no other languages<sup>36</sup>. Similarly, also in France information about the specific procedure that must be followed in order to be able to vote is only available in French<sup>37</sup>. In Belgium, Vlaanderen hosts a website in English about (municipal) elections and also addresses the participation of EU-citizens<sup>38</sup>. This site refers to another site for detailed information as to how to proceed to vote as a foreigner, which site however exists only in Dutch<sup>39</sup>. In Germany, no detailed information on the upcoming municipal elections in North-Rhine Westphalia is available in English,<sup>40</sup> while general information on the European Parliament election is available in all official EU languages,<sup>41</sup> but no detailed information on how to register as a voter, which is only available in German or in English.<sup>42</sup> As for the national elections in Germany, there is also only information in

<sup>36</sup> Website Kiesraad, available at: <https://english.kiesraad.nl>, last accessed on 6 September 2020.

<sup>37</sup> Website Service Public de République Française, *Élections: droit de vote d'un citoyen européen en France*, available at: <https://www.service-public.fr/particuliers/vosdroits/F1937>, last accessed on 7 September 2020.

<sup>38</sup> Website Informatie van Vlaamse overheid, *Elections in Belgium*, available at: <https://www.vlaanderen.be/en/authorities/elections-belgium>, last accessed on 7 September 2020.

<sup>39</sup> Website Vlaanderen kiest 2018, available at: <https://www.vlaanderenkiest.be>, last accessed on 7 September 2020.

<sup>40</sup> Website Ministerium des Innern des Landes Nordrhein-Westfalen, *Kommunalwahlen 2020*, available at: <https://www.im.nrw/kommunalwahlen2020>, last accessed on 7 September 2020.

<sup>41</sup> Website Bundesministerium des Innern, für Bau und Heimat, *Elections to the European Parliament 2019*, available at: <https://www.bmi.bund.de/EN/topics/constitution/electoral-law/european-elections/european-election-2019/european-election-2019-node.html>, last accessed on 7 September 2020.

<sup>42</sup> Website Bundeswahlleiter, *Information for Union citizens*, available at: <https://www.bundeswahlleiter.de/en/europawahlen/2019/informationen-waehler/unionsbuerger.html#43e01302-dc86-43ab-8471-b220448ac316>, last accessed on 7 September 2020.

German and English (as well as simple language and sign language) offered on the website of the Federal Returning Officer.<sup>43</sup> No further requirements for language assistance to voters non-fluent in German is provided in the electoral laws.

### 3.5. Obstacles to homeless voters

The biggest obstacle that homeless voters face both in their own and in another Member State of the EU is the registration requirement. In quite some Member States it is compulsory to be formally registered as a voter.<sup>44</sup> In more than half of the EU Member States, there exists an obligation for non-national EU voters to register themselves separately on the electoral register.<sup>45</sup> In other countries the registration as a voter is automatic, after one has registered as a resident: Austria (except Burgenland), Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, and Sweden.<sup>46</sup> For voters that are not registered, this means that either they cannot vote or that they have to go through higher hurdles of voting. In Germany, for example, German voters that are not registered at a permanent address in Germany, may vote but their registration in the electoral register is not automatic as it is for other residents: voters without a permanent address must submit a request themselves to be registered in the electoral roll, both for the national elections (§16(2)(1) BWahlO) and the European Parliament elections (§15(2)(1) EUWahlO). This is, however, different for non-German EU citizens without a permanent address in Germany. According to §17a(4) EUWahlG, EU citizens submitting a request for registration on the electoral role of their municipality must include in their documents, amongst others, an address in Germany. This requirement would preclude a homeless, non-German EU citizens from voting in the European Parliament elections in Germany. The prevalence of this issue was also addressed, for example, in a petition to the European Parliament on the violation of the petitioner's fundamental rights, including political rights such as the right to vote in local, national and European elections, because of his homelessness.<sup>47</sup>

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<sup>43</sup> Website Bundeswahlleiter, *Election to the 20<sup>th</sup> German Bundestag*, <https://www.bundeswahlleiter.de/en/bundestagswahlen/2021.html>, last accessed on 7 September 2020.

<sup>44</sup> Website Your Europe, *Municipal Elections*, available at: [https://europa.eu/youreurope/citizens/residence/elections-abroad/municipal-elections/index\\_en.htm](https://europa.eu/youreurope/citizens/residence/elections-abroad/municipal-elections/index_en.htm), last accessed on 4 September 2020.

<sup>45</sup> D. S. Hutcheson and L. Russo, "Turnout and Registration of Mobile European Union Citizens in European Parliament and Municipal Elections", *FAIR EU Analytical Report 2019*, p. 56 (available at: <https://faireu.ecas.org/wp-content/uploads/2019/07/D3.7.pdf>, last accessed on 6 September 2020).

<sup>46</sup> Website Your Europe, *European Elections*, available at: [https://europa.eu/youreurope/citizens/residence/elections-abroad/european-elections/index\\_en.htm](https://europa.eu/youreurope/citizens/residence/elections-abroad/european-elections/index_en.htm), last accessed on 4 September 2020.

<sup>47</sup> European Parliament, Petition No 0695/2017, by F.M. (Italian) on the recognition of the European citizenship and access to healthcare for homeless citizens, 29.6.2018.<sup>48</sup> Article 39 (1) Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. (2) Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot. Article 40 Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

### 3.6. Concluding remarks

The dilemma of many regulations with regard to assistance within the casting of the vote is the reconciliation of the free and secret ballot and the enabling of the right to vote of a voter with a mental and/or physical inability. This balance is struck for instance by stipulating that the voter must be capable to express his/her voting preference clearly and unequivocally. Or it may be mandated that an 'election official' must be present and supervise any assistance given to a voter by a third person, such as a family member. An 'election official' entrusted with this task may be employed to work in the polling station in an official capacity or otherwise be appointed as such.

In quite some countries where assistance is being permitted this assistance may often be provided by an 'election official' or another official tasked with this duty; when this is the case (s)he will also have to draft and sign a protocol of the assistance rendered, or to supervise that an assistance rendered by a third person is according to a written statement of the voter; and to ensure that the secrecy of the ballot is ensured. An assessment of a physical or mental disability is not as such laid down in the rules; generally, there appears not to be a necessity for such assessment since in those cases where an assistance is permitted, they usually do allow to bring an assistant of own choice. Therein may lie a risk, however: ensuring that assistance is necessary and does not hinder the voter from casting a free vote, without being effectively forced by an assistant.

It is of the essence to ensure and to build in guarantees that the voting process itself is secret and free and that the individual voter him-/herself indicates, personally and after independent will-formation, how (s)he wants to vote, without any undue influence because of the assistance rendered. To supervise these aspects is an important role for the polling station / 'election official'. In this respect it may be important that requirements are being set: to make the election officials supervise the assistance, and allow them to intervene if they notice or suspect undue influence; to have a protocol filled out and signed indicating that assistance was rendered and by whom and how; to have the assistant involved sign a form containing a statement that assistance was rendered according to the voting wishes of the voter; or that specific requirements are set with respect to the identity of the assistant.

In some countries the legislation allows for voters to vote from home, in advance, by post, or by proxy. In general, these features can facilitate the participation in the voting process for disabled people, for people with linguistic difficulties, for voters who work abroad during election day, and people who need assistance and explanations about voting.

For the benefit of voters with a mental disability we have not noted that the ballot paper has been adjusted occasionally to reduce its complexity. This complexity is, it must be noted, in many cases due to the complexity of the electoral system. The only adaptations that do occur are adjustments as to font size, or even clearer indication of the size of the box(es) that must be ticked. The complexity of the electoral system and of the ballot paper can be countered by accessible Internet pages explaining the system and the ballot paper, by posters in a polling station again explaining in schematic ways the election system and voting process, possibly by handing out to each voter a small flyer about filling out the ballot paper and about the election process, and finally by ensuring an atmosphere that questions can be asked to the official present or to have a special person appointed and present who can provide assistance and answer questions.

## **4. EU MEMBER STATES AND VOTING RIGHTS OF THEIR OWN NATIONALS LIVING IN ANOTHER EU MEMBER STATE**

### **4.1. Introduction**

Under European Union (EU) law, every EU citizen has the right to vote and stand as a candidate at EP elections in the EU country in which he or she resides, under the same conditions as nationals of that country. The same applies to municipal elections in that country. In this regard, article 22 of the Treaty on Functioning of the European Union (TFEU) states that: “Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.” While Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals provides detailed arrangements whereby citizens of the Union residing in a Member State of which they are not nationals may exercise the right to vote and to stand as a candidate there in municipal elections. Both the right of EU citizens to participate in European Parliament and municipal elections while residing in another EU Member State is also enshrined in the EU Charter of Fundamental Rights.<sup>48</sup>

What the EU law does not cover, however, is the right of EU citizens to vote for their national parliaments while residing in another EU Member State. Thus, while there are EU-wide rules on the right of EU citizens to vote in European elections that do not depend on their residence in their Member State of nationality, this is not the case with national elections. This part of the study will deal with the question of which different rules have been adopted by the EU Member States when it comes to the right to vote in national elections of their citizens residing in another EU Member State. As with the rest of the study, this part does not seek to provide a comprehensive overview over the legal situation in all 27 Member States. Rather, it will focus on a number of selected countries to highlight the various approaches that can be found throughout the Union in this regard. First, this part will frame the issue with regard to its relevance in the wider democratic system of the EU. Then it will successively deal with three different approaches to the right to vote in national elections of EU citizens residing in another EU Member State: namely 1) disenfranchisement, 2) procedural restrictions, and 3) no restrictions, before concluding with some remarks.

### **4.2. The right to vote for non-resident national citizens**

The right to vote is a fundamental right in the Member States of the European Union. Who may participate in national elections is, however, a matter for the Member States. The EU only requires that EU nationals residing in another Member State be treated the same as the nationals of that Member State when it comes to participating in municipal and European elections. Whether EU nationals residing in another Member State may vote in national elections in their host country in turn depends on the legal framework of each individual country. The same principle applies to the right of EU citizens to vote in their national elections despite residing abroad, which is the one dealt with in this part of the study. What is interesting to note in this regard is that the Member States in focus do not

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<sup>48</sup> Article 39 (1) Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. (2) Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot. Article 40 Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

differentiate between the right of their nationals to vote in national elections while living in another EU Member State or while living in a third country. For the purpose of this question it thus does not make a difference whether an EU citizen moves to another EU country or decides to take up residence outside of the EU.

The issue of a restriction of the right to vote of EU citizens in national elections on grounds of a residence abroad is two-fold. On the one hand, the deprivation of an expatriate's right to vote in national elections would be in particular harmful in cases where the host country equally does not allow citizens of other EU Member States residing in their territory to vote in the national elections<sup>49</sup>. In that particular case, the citizen would be deprived of their right to vote in national parliamentary elections anywhere, and thus deprived of their right to political participation, which is an inherent right in a democracy. Moreover, article 10(1) TEU clearly states that the "functioning of the Union shall be founded on representative democracy." EU citizens are directly represented at EU level by the European Parliament, while Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, who in turn are democratically accountable to their national parliaments at home (article 10(2) TEU). A loss of the right of an EU citizen to vote for any national parliament in the Union would arguably also have an impact on the concept of dual legitimacy in the EU as such.

On the other hand, disenfranchisement due to a residence in another Member State may also hinder EU citizens from freely exercising their right to free movement in the European Union. This would even be applicable where restrictions on the right to vote do not amount to complete deprivation. In some cases, restrictions may also find the form of higher administrative hurdles or more difficult requirements to register as a voter for nationals residing in another EU Member State. While such restrictions do not deprive the citizen of their right to vote in national elections, they may have a deterrent effect nonetheless – either on their willingness to move to another EU Member State or on their willingness to jump through the hoops in order to be able to vote in their home country while residing abroad.

### **4.3. Disenfranchisement of citizens residing in another EU Member State**

Disenfranchisement is the deprivation of the right to vote altogether. This section will only deal with disenfranchisement of EU citizens living in another EU Member State other than their own. It will not deal with disenfranchisement under national law on other grounds such as mental disabilities or imprisonment. Of the 27 EU Member States, five countries have barred citizens residing abroad from voting in national elections,<sup>50</sup> albeit with exceptions.

In Denmark, the Constitution itself provides for a residence requirement in Denmark in order to be eligible to vote. Section 29 of the Danish Constitution thus reads: "Any Danish subject who is permanently domiciled in the Realm, and who has the age qualification for suffrage as provided for in Sub-section (2) of this section shall have the right to vote at Folketing elections, provided that he has not been declared incapable of conducting his own affairs. [...]" The Danish Parliamentary Election Act

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<sup>49</sup> Website Europe Street News, "Majority in EU support full voting rights for other EU citizens", 14 July 2020, available at: <https://europastreet.news/majority-in-eu-support-full-voting-rights-for-other-eu-citizens/>, last accessed on 6 September 2020.

<sup>50</sup> E.M. Poptcheva, "Disenfranchisement of EU citizens residing abroad – Situation in national and European elections in EU Member States", *In-Depth Analysis for the European Parliament*, European Parliamentary Research Service 2015 (available at: [http://knjiznica.sabor.hr/pdf/E\\_publicacije/Disenfranchisement\\_of\\_EU\\_citizens\\_resident\\_abroad.pdf](http://knjiznica.sabor.hr/pdf/E_publicacije/Disenfranchisement_of_EU_citizens_resident_abroad.pdf), last accessed on 5 September 2020).



specifies that the age requirement for voters is 18 years old. The general rule is thus that any Danish citizen, who has attained the age of 18 and would otherwise be able to vote, may no longer vote in national parliamentary elections if they move abroad and deregister from the civil register in Denmark. The exceptions to the residence requirement are laid down in Section 2 of the Danish Election Act. Citizens residing abroad are, for example, considered to be a permanent resident in Denmark if they intend to return to the realm within two years of leaving the country, in which case they retain the right to vote if they sign a document confirming such intention. Other exceptions include employees of the Danish State on service abroad; employees of a Danish public agency or any local private undertaking or association; employees of international organizations of which Denmark is a member; persons on service in foreign countries for a Danish relief organization; persons staying abroad for the purpose of education or for health reasons; persons co-habiting with a person comprised in the previous categories. organisations of which Denmark is a member; persons on service in foreign countries for a Danish relief organisation; persons staying abroad for the purpose of education or for health reasons; persons co-habiting with a person comprised in the previous categories.

In a similar manner, also the Maltese Constitution provides for a residence requirement in order to be eligible to vote in national elections. Article 57 of the Maltese Constitution states that a person is not qualified to register as a voter for the elections of members of the House of Representatives, unless he is a Maltese citizen, has attained the age of sixteen years, and is “resident in Malta and has during the eighteen months immediately preceding his registration been a resident for a continuous period of six months or for periods amounting in the aggregate to six months”. Exceptions are listed for citizens who are ordinarily resident in Malta but have not been resident in Malta by reason of service abroad in the public service; or by reason of service abroad in, or as a member of, a disciplined force.

The enshrinement of the residence requirement in the constitution is important in as far as it makes an amendment of the rules on disenfranchisement more cumbersome. No differentiation is made here between a residence in another EU Member State and a residence in a third country. In contrast, the rules on disenfranchisement on grounds of residence abroad in Germany, Cyprus and Ireland are enshrined in ordinary law.

In Germany, the residence requirement is enshrined in the Federal Electoral Code. Section 12 states that all German citizens that have reached the age of 18 and have “had a domicile or have otherwise been permanently resident in the Federal Republic of Germany for at least three months” and are not otherwise disqualified are eligible to vote. Exceptions to this rule are listed in Paragraph 2 of Section 12, according to which German citizens resident in other territories outside the Federal Republic of Germany on the day of election are eligible to vote provided that they either, since the age of 14, were permanently resident in Germany for an uninterrupted period of at least three months and this stay dates back not more than 25 years; or for other political reasons have become familiar, personally or directly, with the political situation in Germany and are affected by it. In addition, exceptions are made for seamen and members of their households whose ship is eligible to fly under the Federal flag; for boatmen in inland navigation and members of their households if the ship is enrolled in a German ship’s register; persons serving a term of imprisonment imposed by a court of law as well as for other persons accommodated in an institution or respective institution. The decision on whether the requirements to be eligible to vote in national elections are met is taken by the municipality in charge. In any case, an application for entry into the voters’ register must be submitted at least 21 days before election day to the municipality in charge. Voters residing abroad must register newly for each election.

Similarly, in Ireland disenfranchisement on grounds of residence abroad is also written in secondary legislation. Section 8 of the Irish Electoral Act provides that a person is entitled to be registered as a

voter in the national parliamentary elections in a constituency if he has attained the age of 18, is an Irish citizen and is ordinarily resident in that constituency. Section 11 specifies that a person is deemed to not have given up ordinary residence if he intends to resume residence within 18 months after leaving. In such a case, the person must make a written statement to that effect (Section 11(3)). Furthermore, exceptions are made for whole time members of the Defense Forces, who would but for their service be ordinarily resident in Ireland; as well as members of diplomatic missions, consular posts and permanent missions of Ireland to international organizations, who are posted abroad, and their spouses or civil partners.

In Cyprus, in order to be able to register in the electoral list and receive a voting card, citizens must have attained the age of 18 and been a permanent resident of Cyprus for at least six months at the time of submission of the application.<sup>51</sup> This means that citizens, who have lived abroad for more than six months are not eligible to vote in national elections. Exceptions are made for persons belonging to the Cypriot diplomatic corps or holding another position in public service abroad as well as their spouses.<sup>52</sup>

It is interesting to note that none of the disenfranchisement rules in Denmark, Malta, Germany, Ireland or Cyprus for citizens living abroad make a distinction between citizens residing in another EU Member State and citizens residing in a third country. All countries grant exceptions to citizens who are abroad in public service, but only Germany allows for citizens residing abroad to vote based on the criteria of having “become familiar, personally or directly, with the political situation in Germany and are affected by it”. This addition was introduced in 2013 following a judgment of the German Bundesverfassungsgericht, finding a disenfranchisement of German citizens not having lived in Germany for three months to be unconstitutional.<sup>53</sup>

#### **4.4. Procedural restrictions on the right to vote of citizens residing in another EU Member State**

Other Member States do not go as far as disenfranchise their citizens residing in another Member State, but instead impose some procedural requirements in order for them to be able to vote.

In Austria, for example, there is a different procedure for citizens living in Austria and citizens residing abroad when it comes to voting. According to §3 of the Austrian Electoral Record Act, Austrian citizens residing abroad are entitled to be registered or remain in the electoral register but they must file a request to that effect, whereas the registration is automatically done for Austrian citizens residing in Austria (§2(1) Austrian Electoral Record Act). Moreover, citizens residing abroad must declare their eligibility to remain in the electoral register once every ten years (§3(3) Austrian Electoral Record Act). In addition to filing a request to be registered, citizens residing abroad must also make a request to an Austrian representation for a voting card (§38 Austrian Electoral Act), with which they can cast their ballot abroad. The voting card must be received sufficiently on time before the elections by the

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<sup>51</sup> Website Civil Registry and Migration Department, *Issue of Voting Booklet*, available at: <http://www.moi.gov.cy/moi/crmd/crmd.nsf/All/3FE9742142AB6892C2257D2C00324C5E?OpenDocument>, last accessed on 7 September 2020.

<sup>52</sup> E.M. Poptcheva, “Disenfranchisement of EU citizens residing abroad – Situation in national and European elections in EU Member States”, *In-Depth Analysis for the European Parliament*, European Parliamentary Research Service 2015 (available at: [http://knjiznica.sabor.hr/pdf/E\\_publicacije/Disenfranchisement\\_of\\_EU\\_citizens\\_resident\\_abroad.pdf](http://knjiznica.sabor.hr/pdf/E_publicacije/Disenfranchisement_of_EU_citizens_resident_abroad.pdf), last accessed on 5 September 2020).

<sup>53</sup> BVerfG judgment of 4.7.2012, 2 BvC 1/11 – 2 BvC2/11.

authorities. This means that it must arrive by post at the competent electoral authority before 17.00h of the day of the election; or be submitted to an Austrian representation abroad at least six days before the elections; or be submitted to an Austrian representation outside of the European Economic Area at least nine days before the elections.<sup>54</sup>

Also, Swedish citizens residing abroad must submit a form to the tax agency in order to remain in the electoral register, but they must do so only ten years after emigration and then every other ten years again, after which they may vote in elections either by mail or in person; then every other ten years again, after which they may vote in elections either by mail or in person.<sup>55</sup>

#### **4.5. No restrictions on the right to vote of citizens residing in another EU Member State**

Other Member States in turn do not impose any restrictions on the right to vote in national elections of their citizens residing outside their territory.

One of such countries is Greece. Article 51(3) of the Greek Constitution states that the law “cannot abridge the right to vote except in cases where a minimum age has not been attained or in cases of legal incapacity or as a result of irrevocable criminal conviction for certain felonies”. The constitution therefore does not allow for disenfranchisement on grounds of a residence abroad. In order to be able to vote in Greece, citizens must be registered in an electoral roll of a municipality in the Greek constituencies (article 6 Law on Election of Members of Parliament). As a matter of fact, the Law on Election of Members of Parliament makes a distinction between citizens residing in Greece and those living abroad only when it comes to the mandatory nature of voting: voting is generally compulsory in Greece (article 6 Law on Election of Members of Parliament) but an exception is made for voters living abroad (article 117). However, until 2019 Greek citizens had to cast their ballot in person. While the Constitution does foresee that matters “pertaining to the exercise of the right to vote by persons living outside the Country may be specified by statute, adopted by a majority of two thirds of the total number of Members of Parliament” (article 51(4) Greek Constitution), until recently the electoral laws in Greece did not allow for postal or in absentee voting, meaning that Greek citizens who have their residence abroad (and for instance elsewhere in the EU) had to take the trouble of returning to Greece in order to be able to vote. While this was not an additional requirement imposed on Greeks living abroad as such – the in-person voting rule applied to all voters equally – it of course imposed a higher burden on expatriates than on citizens residing in Greece. This was changed on 12 December 2019 when a new law entered into force, allowing for the establishment of polling stations outside of Greece in Greek embassies, consulates and other appropriate spaces, as long as the number of registered voters for such a polling station is at least 40.<sup>56</sup> The difference to voting in Greece is, however, that Greeks residing and voting abroad may only vote for a list on national level and not be able to choose a preferred candidate in their home constituency in Greece.<sup>57</sup>

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<sup>54</sup> Website Österreichs digitales Amt, *Stimmabgabe im Ausland*, available at: [https://www.oesterreich.gv.at/themen/leben\\_in\\_oesterreich/wahlen/6/Seite.320510.html](https://www.oesterreich.gv.at/themen/leben_in_oesterreich/wahlen/6/Seite.320510.html), last accessed on 7 September 2020.

<sup>55</sup> Website Embassy of Sweden, *Voting Abroad*, available at: <https://www.swedenabroad.se/en/about-abroad-for-swedish-citizens/usa/service-for-swedish-citizens/voting-abroad---usa>, last accessed on 7 September 2020.

<sup>56</sup> Website GlobalCit, *At last, a law on expatriate vote in Greece*, European University Institute, available at: <https://globalcit.eu/at-last-a-law-on-expatriate-vote-in-greece/>, last accessed on 7 September 2020.

<sup>57</sup> *Ibid.*

Equally, France does not impose any restrictions on the right to vote in national elections on its expatriates. According to article L2 of the French Electoral Code, citizens who have the age of 18 may vote. All voters are registered on the electoral roll, with French citizens living abroad being registered in a special registry for French people living abroad in their respective consular district. The latter may, upon request, also be registered on the electoral list of the municipality of their place of birth, the municipality of their last domicile; the municipality of their last residence, provided that they resided there for at least six months; the municipality where one of their ancestors was born, is registered or was registered on the electoral list; or the municipality on the electoral list of which one of their relatives is registered or has been registered up to the fourth degree (L12 French Electoral Code). The French Electoral Code does not provide for postal voting. The only possibility foreseen is the vote by proxy, whereby absentee voters may ask another voter to cast the ballot in their name (L71 French Electoral Code). Article L71 of the French Electoral Code provides for the right to vote by proxy in three circumstances: namely where voters due to a professional obligations, as a result of a disability, or for health reasons cannot be present at the voting both even though they are present in their commune on election day; where voters are on vacation, on training or residing in a commune different than the one in which they are registered as a voter; or where they are placed in detention or serving a prison sentence. Applications to vote by proxy can be submitted to the police station or district courthouse in France or at a French embassy or consulate when abroad, together with a declaration as to the reason for which the voter cannot vote in person him- or herself.<sup>58</sup> The proxy authorization may be issued for either a single election, for one year or a maximum of three years in the case of French citizens residing abroad.<sup>59</sup>

In Italy, citizens residing abroad may vote by post. Article 48 of the Italian Constitution provides that any citizen of age is eligible to vote and that the right to vote cannot be restricted but for civil incapacity, due to an irrevocable penal sentence or in cases of "moral unworthiness" as laid down by law. Residence in Italy is therefore not a requirement for the right to vote in national elections. To the contrary, the right to vote for Italian expatriates is in fact constitutionally enshrined in the same article: "The law lays down the requirements and modalities for citizens residing abroad to exercise their right to vote and guarantees that this right is effective. A constituency of Italians abroad shall be established for elections to the Houses of Parliament; the number of seats of such constituency is set forth in a constitutional provision according to criteria established by law." According to Law 459 of 27 December 2001 governing the right to vote of Italian citizens residing abroad, Italian expatriates are registered on the electoral rolls of the overseas constituency (article 1 Law 459), in which case they vote by post. The overseas constituency is divided into several electoral zones, which include the states and territories belonging to Europe, including the Asian territories of the Russian Federation and Turkey; South America; North and Central America; and Africa, Asia, Oceania and Antarctica (article 6 Law 459). Italian citizens residing abroad may, however, also choose to exercise their right to vote in Italy. In such a case they may cast their ballot in the constituency in Italy in which they are registered, by giving written notice to the consulate within a certain period of time. The choice for this option is only valid for one election (article 1(3) Law 459). In addition, voters residing in countries with no Italian diplomatic missions, who therefore must necessarily cast their vote in Italy, may even be entitled to having 75 percent of their traveling expenses reimbursed (article 20 Law 459).

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<sup>58</sup> Website Assemblée Nationale, *Questions about Voting*, available at:

<http://www.elections-legislatives.fr/en/voting.asp>, last accessed on 7 September 2020.

<sup>59</sup> *Ibid.*

In the Netherlands, the Constitution provides for the possibility of disenfranchisement of citizens residing outside of the Netherlands but parliament has not done so by statute. According to article 54 of the Dutch Constitution, all Dutch nationals who have attained the age of 18 are eligible to vote, “with the exception of any Dutch nationals who may be excluded by Act of Parliament by virtue of the fact that they are not resident in the Netherlands.” The Dutch Electoral Code does not, however, include such an exclusion. Section B1 merely excludes Dutch nationals who have their actual place of residence in Aruba, Curaçao or St Maarten from the elections of the ‘Tweede Kamer’. Dutch citizens who have their residence outside of the Netherlands may cast their ballot by post, by submitting a written request to this effect to the mayor of the Hague (Section M1 Dutch Electoral Code). The request must be submitted together with the request for registration in the electoral roll (Section D3 Dutch Electoral Code). Such registration must, however, only happen once, after which the voter will automatically receive the documents needed to vote in every Dutch (and European) parliamentary election by post.<sup>60</sup> If voting by post is not possible or feasible, for example because of unreliable postal services, it is also possible for Dutch citizens to vote by proxy (Chapter L Dutch Electoral Code).

#### 4.6. Concluding remarks

Different Member States in the EU have taken very different approaches to the question of whether to allow their nationals residing abroad to vote in national elections. While some Member States such as Denmark and Malta have a constitutionally enshrined residence requirement in order to be eligible to vote – albeit with many exceptions – other Member States such as France have no such restrictions. Even other Member States such as Greece or Italy even explicitly list exhaustive grounds on which the right to vote may be limited, residence in another country not being amongst those grounds, thereby explicitly excluding the possibility of disenfranchising citizens on grounds of residence abroad. In Germany and Ireland in turn, the limitations on the right to vote in national parliamentary elections for citizens residing abroad is not enshrined in the constitution but in secondary law. The crucial difference of this approach to the Danish or Maltese one is that it would be much easier and less cumbersome to amend the rules enshrined in ordinary statutes, as opposed to amending rules codified in the constitution. An amendment of the Danish constitution would, amongst others for example, require new elections as well as a referendum. It would hence be much more difficult to grant the right to vote in national elections to Danish expatriates than to German expatriates. Germany also is special in this regard in that it has included the notion of being “familiar, personally or directly, with the political situation in Germany and are affected by it” as an exception to the general disenfranchisement of expatriates. Other Member States such as Austria do not limit the right to vote of their citizens living abroad as such but impose more requirements on them than on citizens residing within their territory. While Austrian citizens living in Austria are automatically registered on the electoral rolls, Austrians living abroad must file a request to that effect. It is thinkable that such an extra requirement may have a deterrent effect on some voters living abroad, who would perhaps not take the extra step in order to be able to vote.

In conclusion, the rules differ between different Member States not only as regards the degree of limitations imposed on the right to vote of citizens residing in another EU Member State. But they also differ as regards the level of enshrinement, i.e. either constitutionally or in ordinary statutory law, which in turn affects the way the rules can be amended in the future.

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<sup>60</sup> Website The Hague, *Dutch voters abroad*, available at: <https://www.denhaag.nl/en/municipality-of-the-hague/elections/dutch-voters-abroad.htm>, last accessed on 7 September 2020.

From an EU perspective the legal and/or practical impossibility to vote for one's home parliament, whilst residing in another Member State, thus exercising a fundamental freedom under EU law, ought to be reconsidered and adjusted. In fact, since these EU citizens furthermore do not have the right to vote for the national parliament of their host country, they are effectively barred from being indirectly represented through the Council and European Council in EU affairs. Considering that these citizens furthermore usually pay taxes in their host country, this outcome violates one of the basic and original assumptions of the right to vote: no taxation without representation. We do appreciate that the right to vote for a national parliament is one of the sovereign prerogatives of national states as well as the choice for the national election system, however under human rights law rules about the right to vote do exist, and the EU legal order and its fundamental principle of freedom of movement and residence, make it essential to consider this issue.

## 5. ELECTIONS IN TIMES OF THE CORONA PANDEMIC

### 5.1. Introduction

Not only did the Corona epidemic/pandemic pose health and public order issues, but also did it and might/will it lead to questions about political participation, such as through assemblies or manifestations, public debate and parliamentary activity, transparency and scrutiny, but also about elections and election campaigns. Could, should, ought elections go through and if so how, without restricting the essence of electoral will-formation and the basic, fundamental principles of the right to vote; and without impairing the free debate and campaigning which precedes and surrounds elections, and without giving an undue head start to officials or majority parties who hold power and may have a (much) better and unfettered access to the media. In the following we will deal with these questions and will elucidate them by first of all pointing

### 5.2. Elections planned for 2020 (from March 2020 onwards)

In EU Member States quite a few elections have/had been planned for 2020; here follows a brief overview of most general elections on local, regional and national level:

- March 15: Regional elections in Bayern (Germany) first round/ first round French municipal elections
- March 22: second round French municipal elections second round: cancelled<sup>61</sup>
- March 29: Regional elections in Bayern (Germany) second round
- May 10: Presidential elections Poland: first round
- May 24: Presidential elections Poland: second round
- April 5: Basque Country and Galicia, Parliaments: Postponed during the corona crisis<sup>62</sup>
- June 7: Romania: County and local councils and mayors
- June 28: French municipal elections: second round
- June 28: Postponed presidential elections Poland
- July 12: Postponed Basque and Galician regional elections<sup>63</sup>
- September 13 and 27: Municipal elections North-Rhine-Westphalia (first and second rounds)
- September 20/21: Referendum Italy
- October 11: Parliamentary elections Lithuania first round
- October 25: Parliamentary elections Lithuania second round

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<sup>61</sup> See for an overview of elections postponed globally: International Foundations for Electoral Systems, "Elections Postponed Due to COVID-19 – As of August 25, 2020", 25 August 2020 (available at: [https://www.ifes.org/sites/default/files/elections\\_postponed\\_due\\_to\\_covid-19.pdf](https://www.ifes.org/sites/default/files/elections_postponed_due_to_covid-19.pdf), last accessed on 7 September 2020).

<sup>62</sup> For Galicia: Decreto 72/2020, de 18 de mayo, de convocatoria de elecciones al Parlamento de Galicia, DOG Núm. 96, available at: [https://www.xunta.gal/dog/Publicados/2020/20200519/AnuncioC3B0-180520-1\\_es.html](https://www.xunta.gal/dog/Publicados/2020/20200519/AnuncioC3B0-180520-1_es.html), last accessed on 7 September 2020); for Basq: Decreto 11/2020, de 18 de mayo, del Lehendakari, por el que se convocan elecciones al Parlamento Vasco, N.º94, available at: <https://www.euskadi.eus/y22-bopv/es/bopv2/datos/2020/05/2001986a.shtml>, last accessed on 7 September 2020).

<sup>63</sup> *Ibid.*

- October: Czech Republic: Senate<sup>64</sup> and regional elections
- December 23: Parliamentary elections Croatia
- December 2020/ January 2020: Parliamentary elections Romania

In this list in particular municipal elections (in France, North-Rhine Westphalia, Bavaria and Austria) are relevant for the purpose of this study because EU citizens from other Member States residing in the municipality may also participate in the elections. But also major presidential elections (Poland) and parliamentary elections in Lithuania, Croatia and Romania are good examples to examine because of their nationwide importance, whereas less attention will be paid to regional elections such as the ones in Spain.

The municipal elections in Bayern in two rounds have taken place on March 15 and the second round of March 29. Because of Corona the second round took place solely through voting by the post. The Basque and Galician parliamentary elections had also been postponed for the duration of the corona crisis.

The second round of the French municipal elections were cancelled and postponed due to the Corona lockdown measures in France; the first round of the Polish presidential elections de-facto did not take place.

In Poland an agreement was reached in parliament to set a new date for the elections; the PKW (national electoral commission) decided on May 7<sup>65</sup> that the polling stations remained closed and the elections were basically cancelled.<sup>66</sup> On the same day parliament however approved legislation to the effect that the elections were to be held via postal ballot. This law was initially stopped in the senate, one reason being that election rules may not be amended less than six months before the elections, but the lower house had the law adopted still. Also, a ruling was sought of the Constitutional Court. The announcement to hold a postal ballot had led to debate about the possibilities of effectively doing so, about the reliability of the mail services and about the secrecy of the vote, how to permit Polish citizens abroad to participate, as well as about the fairness or balance of the election campaign. Also a ruling was sought of the Constitutional Court. The announcement to hold a postal ballot had led to debate about the possibilities of effectively doing so, about the reliability of the mail services and about the secrecy of the vote, permit Polish citizens abroad to participate, as well as about the fairness or balance of the election campaign.

Effectively the elections were called off by decisions after a compromise in parliament and by decision of the PKW; and a law entered into force to enable future elections to be held by the post. The suggestion is now to have the (non) elections of May 10 to be declared invalid by the Supreme Court, and subsequently call for new elections (at short notice?) which might then take place by postal ballot. This issue is therefore related to the position of the Supreme Court. No matter what, the outcome will have to be that elections must be held, since effectively they did not take place, and the first fundamental of elections is that they must take place (at regular intervals). On June 3 it was decided by

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<sup>64</sup> A by election for the Senate (scheduled for 27/28 March 2020) (a consequence of the death of the incumbent senator) was cancelled by the Czech government due to the Covid-19 pandemic. The Supreme Administrative Court ruled that this cancellation was illegal since the government lacked the power to do so, and ruling that only parliament had such power. Subsequently parliament decided to hold an election on 5/6 June 2020.

<sup>65</sup> Website PKW, available at : <https://pkw.gov.pl/aktualnosci/wyjasnienia-stanowiska-komunikaty/komunikat-panstwowej-komisji-wyborczej-z-dnia-7-maja-2020-roku>, last accessed on 17 September 2020.

<sup>66</sup> Website Balkan Insights, "Polish Election Antics Show 'Collapse of Democracy'", 11 May 2020, available at: <https://balkaninsight.com/2020/05/11/polish-election-antics-show-collapse-of-democracy/>, last accessed on 7 September 2020.



parliament to hold the elections on June 28, with a mix of regular ballot voting in polling stations as well as through voting by post. And so it happened.

In The Netherlands the Minister of Home Affairs sent a letter to parliament (22 May 2020; 35 165 / 25295, nr. 21) indicating that the government is planning to investigate different scenarios for the regular Second Chamber/Tweede Kamer elections as planned for 17 March 2021. In the letter it was envisaged that postponement might not seem yet very likely; however, investigation will be started into the feasibility for corona measures (distancing) of polling stations; as well an indication was given that constitutionally spoken a postponement might be possible, if the legislature would so decide, until at the latest March 2022. Finally, the minister indicated to research possibilities of voting by post/letter-scenarios for the regular Second Chamber elections as planned for 17 March 2021. In the letter it was envisaged that postponement might not seem yet very likely; however, investigation will be started into the feasibility for corona measures (distancing) of polling stations; as well an indication was given that constitutionally spoken a postponement might be possible, if the legislature would so decide, until at the latest March 2022. Finally, the minister indicated to research possibilities of voting by post/letter.

### 5.3. Legal and constitutional issues

As was the case in Poland elections must be held with regular intervals and constitution or election law prescribe the intervals for elections and the latest day/ or the day and date on which an election must be held. The only escape would be to announce a state of emergency or natural catastrophe allowing elections to be postponed, until after 90 days of the lifting of the emergency. This route was not taken by parliament.

The other route would be to organize an election on paper, but bar it from occurring or from occurring in an obviously fair manner, so as to result in a nullification of the election outcome and the announcement of new elections, organise an election on paper, but bar it from occurring at all, or from occurring in an obviously fair manner, so as to result in a nullification of the election outcome and the announcement of new elections.

In France the second round of the municipal elections, to be held in March 22 was called off based upon health reasons and postponed until June 22. The first round had still taken place on March 15 in a setting wherein all else was in a lock down. Turnout was low: 45.5% only. Out of the 47,7 million registered voters more than 25 million chose not to cast their vote. Postponement was also already under discussion before the first round, but itself postponed since President Macron sought an all-party consensus before delaying such an important event as an election.

What was the legal basis, since the electoral law requires a second round to take place the Sunday following the first round? The government has included some articles in an emergency statute leading to a postponement of the second round.<sup>67</sup> Furthermore, in May 2020 the plans were announced to have the second round on June 28 on which day they indeed took place. This date was picked in order not to have the situation that also the first round had to be declared invalid, which had to be the case if the second round would be organized much later. The Conseil d'Etat said on March 18 that the postponement of the second round had to be strictly limited in time. So,<sup>68</sup> if not, in June, and considering the wish to allow for decent campaigns, a postponement to September 27 and October 4 may have been likely, instead. The date of June is to be set in a law, which will also contain a clause to

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<sup>67</sup> Article 19 of Loi no 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, JORF no 0072 du 24 mars 2020. Adopted with a large majority in the Assemblée Nationale: 510-37.

<sup>68</sup> Avis sur un projet de loi et un projet de loi organique d'urgence pour faire face à l'épidémie de COVID-19.

the effect that a further postponement might have to take place in case of health needs.<sup>69</sup> if not, in June, and considering the wish to allow for decent campaigns, a postponement to September 27 and October 4 may be likely, instead. The date of June is to be set in a law, which will also contain a clause to the effect that a further postponement might have to take place in case of health needs.

Municipal elections are also covered by the EU-Charter of Fundamental Rights since EU-citizens are entitled to participate in them. No European Parliament elections are scheduled before 2024, so in that respect no Corona caused impact in that respect.

## 5.4. Campaigning

One of the issues preceding the effective postponement of the Polish presidential elections to be held in May related to the lock down of the country effectively barring the 'opposition' candidates from campaigning and having access to the media, whereas the incumbent candidate could be seen in the media on a daily basis combating the crisis and having publicity. A similar occurrence can be seen in the US where the democratic candidate is effectively confined to his house whereas the incumbent candidate is on each media channel every day.

Reporting about Poland mentioned the fact that the opposition candidates had even spent their election budgets up to the May 10 elections; and it is important to note that public meetings and rallies were forbidding under corona related measures.

Campaigning may be covered by Article 10 ECHR, but also by Article 3, 1<sup>st</sup> protocol ECHR: that was shown in a case about biased media coverage of elections, which had been detrimental to opposition parties. In that respect the state has a positive obligation, which however does not amount to de facto equality of all competing political parties in the media.<sup>70</sup> Jacobs, White and Ovey conclude in this respect that Article 3 1<sup>st</sup> protocol does not contain a code on electoral matters, designing all matters of the electoral process; and that some degree of lack of neutrality in media coverage will be tolerated, however at the same time imposing an avoidance of deliberate manipulation of the media. No matter what, postponing elections and/or limiting election campaigns may be used or even abused to restrict campaigning unduly and in a partisan manner. The possibility of this consequence must be carefully monitored and balanced and decisions about elections and campaigning ought to be strictly supervised for non-partisan effects.

## 5.5. Concluding remarks

Indeed, it may be justified that a specific election is postponed due to an urgent crisis as exemplified by corona. The starting point ought to be that elections and all political campaigning that precedes and surrounds them, must be facilitated, since the frequency of elections and the need to follow the constitutional rules for the regularity of the democratic process and the holding into account of those in power, is of the essence. Provided that elections can be fair; and that secret and fair and transparent campaigns, with equal arms for those who participate, can take place. If in urgent situations of an epidemic it is crucial that an election must be temporarily postponed, however, we suggest that doing so requires meeting a variety of criteria; the same applies for a non-postponement but an organization

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<sup>69</sup> The CE does agree with a postponement considering the urgency of the crisis and at the same time states: " Le Conseil d'Etat observe que si la crise persiste à cette échéance, contraint à prolonger les mesures d'urgence sanitaire et rend impossible l'organisation du deuxième tour avant l'été, il appartiendra aux pouvoirs publics de reprendre l'ensemble des opérations électorales dans les communes où les conseils municipaux sont incomplets."

<sup>70</sup> *The Communist party of Russia and others v. Russia*, ECtHR 19 June 2012.

of the voting process and election campaign that are non-partisan and transparent and fair: urgent situations of an epidemic it is crucial that an election must be temporarily postponed, however, we suggest that doing so requires meeting a variety of criteria:

1. Adjusting the electoral laws in order to have a clause which enables a postponement when certain criteria are met, such as the harshness of the crisis and when no other means are available to have the elections take place.
2. The first point would also apply to EP elections, since it may not be excluded that in the future a similar or other epidemic may affect EP elections. Here special difficulties also must be foreseen, when a pandemic or other emergency would strike member-states in different intensities and result in different impacts. How to go about in such a situation?
3. Make sure to have the clause referred to in the first point made operable only with a qualified majority in parliament, so as to ensure a consensus, and to prevent such a clause becoming a tool in the hands of a simple majority.
4. Make sure to make the duration of a postponement as short as is absolutely necessary and to have procedures developed which allow for election procedures through mail or the internet at a short notice or by setting up a multitude of polling states which would allow for voters to keep a distance, or to have elections take place during more than one day. Many of these aspects may require changing the law and therefore ought to be realized now.
5. The urgency of the above is increased when elections relate to the national president and the national parliament. Parliaments may not be seen to unnecessarily prolong their own sitting; and the same would apply to a president, specifically when president and parliament originate from the same majority party/majority in parliament. For regional parliaments and officials, the same reasoning would apply the more so when these yield large powers as autonomous rule makers/assemblies/officeholders/officials the same reasoning would apply the more so when these yield large powers as autonomous rule makers/assemblies/officeholders.
6. For any postponement, due account must be had for a reasonable and practicable campaign period and for financial means for political parties to conduct (yet another) campaign. Here we submit a positive obligation for a state to consider wider media access and coverage, practical campaign period and for financial means for political parties to conduct (yet another) campaign. Here we submit a positive obligation for a state to consider wider media access and coverage.
7. Specifically, the non-majority parties and candidates must be given ample opportunity to have access to the media and to have a campaign which is visible to the electorate. Non majority parties and candidates must be given ample opportunity to have access to the media and to have a campaign which is visible to the electorate.
8. The same must be true for citizens' participation: if physical meetings and demonstrations cannot take place, it must be ensured that digital events of all parties are fully covered on an equal basis by the national media.
9. A willful de-facto not organizing of an election is a constitutional affront, specifically when the constitution provides for urgency measures to be taken to postpone an election. It would in our opinion constitute a violation of Article 3 1<sup>st</sup> protocol ECHR and of the fundamental EU principle of democracy and rule of law.
10. Now that States had the opportunity to note the need of postponing of elections by some States, it is to be recommended that they check their legislation in force and do adjust it when needed, to accommodate and take all measures necessary to ensure the elections process to

continue at the dates set (effective and open campaigns, voting by post or proxy, voting on more than one day, more polling stations etc).

11. Since postponing elections ought to be considered as option of very last resort, states are under a duty to make them happen by taking all measures possible for a safe and transparent election process, for instance by setting up spacious and a multitude of ballot stations and voting booths, so that voters do not have to stand in line and exercise their right to vote effectively and safely. This does also imply the necessity to have polling stations with easy access by foot, thus avoiding possibly unsafe or crowded public transport.
12. Voting by letter/ post seems also to be an attractive option, however this option could be open for abuse and infringement of the secrecy of the vote.<sup>71</sup> Proper procedures must be set up in order to prevent and limit these abuses as much as possible to ensure the will of the people is fully expressed. Here a choice has to be made between postponing elections, and the length envisaged for this postponement, and smaller infractions which may occur during elections (largely) enacted by post.
13. If an election has been postponed, we do also suggest that those who serve on an expired mandate (councils, mayors, parliaments, presidents) do not take major policy decisions and do not start new initiatives, with major implications for the near future, but to limit themselves to making sure the house is in order and that due care is taken of their responsibilities and tasks. No new legislative projects, but only legislation that is urgently needed, for instance tailored to combating the crisis at hand. This rule could be formulated as stating that a qualified majority in the assembly has to approve with all new projects that are voted upon after the extension of the sitting of the assembly.

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<sup>71</sup> For the US presidential elections 2020 a row has also started about voting by mail/post. In May quite some states sent a letter to their citizens to inquire about the intention to vote by post, so that later on they could receive a postal ballot paper. This led to challenges by President Trump that this might lead to falsified voting results, which politically was also motivated by the fear that voting by post might enable many more voters than usual to even participate in voting.

## 6. FINAL CONCLUSIONS

The following over-all conclusions do present themselves from the following, based upon the submission that the right to vote is an essential and fundamental right through which EU-citizens can express their preferences directly in EP elections and indirectly through national elections for the Council and the European Council. Furthermore, national parliaments do perform quite a few other fundamental roles under EU law in EU constitutional law, such as in the political and economic dialogue and the Early-Warning System.

Having said this, the following conclusions do result from our research:

1. Limitations, practical and legal, of the right to vote must be as limited as possible and any (legal and practical) limitation must be shown to be necessary and indispensable and proportional for the protection of a legitimate and pressing aim.
2. Member States are under a duty to not only recognize and respect the right to vote but also to take away as many practical hurdles and obstacles as can reasonably be expected so as to enable all those formally entitled to exercise the right to vote to express their vote: the positive obligation under the right to vote.
3. Conclusion 2 requires that ballot stations have sufficient opening hours, are well-accessible for all, that other means than voting in a polling station are made available (specifically in but not limited to, corona-times), that disabled or linguistically impaired voters can indeed avail themselves of their right to vote by making available to them easy to read ballot papers, information in the polling station, through the internet etc.
4. Member States should also take into account the special situation that voters who are homeless find themselves in. Registration as a voter should not exclusively be tied to registration as a resident in a municipality of the Member State in which elections are held, even though we recognize that the right of EU citizens to vote in municipal elections in another Member State of the EU is tied to residence in that municipality. We therefore suggest a separate electoral register for homeless voters, on the condition that they are not registered in another municipality, whereby information on voting and voting cards are handed out in person, and not sent out by post.
5. The right to vote and the secrecy that is inherent to it do also require that efficiency and secrecy are both protected and that states invest in technical and other means to indeed protect the frequency of elections and their secrecy and reliability, even in times of a pandemic.
6. The aspect of information about the voting process and political system and party programs does also relate to EU citizens that are entitled to vote in their host country for European and municipal elections. This does require information in at least some other EU languages than the language of the host country for EU citizens, through the Internet in relevant sites, in the polling station and possibly also on the ballot papers. But also, accessible procedures for EU citizens for registration to the right to vote process.
7. For the aspect of holding elections in times of a pandemic we do appreciate that many States were taken by surprise in 2020: however since the frequency of elections is another paramount aspect of the right to vote, we do suggest that states (and this does also apply to the EU related to European elections) do reflect on consequences of a pandemic for the voting process and to develop the necessary steps to ensure that elections can take place with all necessary precautions, and that a regular procedure exists for a possible postponement of an election in the gravest of circumstances. Such steps and regulations must ensure that the holding of elections or the possible postponement does not become a party-political issue.

8. In light of the fundamental freedoms of the right to vote and the right to movement and take up residence in another Member State of the EU, a discussion is needed about the right to vote and its practical exercise, for EU citizens residing in another Member State, for their home parliament, as well as about the right to vote for EU citizens in their EU Member State of residence. The number of EU citizens affected by practical or legal limitations and impediments, or paying taxes in the country of residence without being properly represented, makes it necessary to put this issue on the agenda.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, addresses some major issues of obstacles to elections in general and of obstacles to participation inside the EU more specifically. This is done by focusing on Member States and examples with regard to municipal elections, and European elections, but also in general on de-facto access to the exercise of the right to vote. Various recommendations are formulated.

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PE 658.593

Print ISBN 978-92-846-7130-4 | doi:10.2861/716381 | QA-02-20-733-EN-C  
PDF ISBN 978-92-846-7129-8 | doi:10.2861/052718 | QA-02-20-733-EN-N