



Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights

The Director

Warsaw, 27 April 2020

Mr. Krzysztof Kwiatkowski
Chief of the Legislative Committee of the Senate of the Republic of Poland
Warsaw

Dear Mr. Kwiatkowski,

Further to your letter, dated 22 April 2020, please find attached ODIHR's legal review of the draft Act on Special Rules for Conducting the General Elections of the President of the Republic of Poland in 2020 (Senate's paper no 99). The opinion assesses the draft law's compliance with OSCE commitments, other international obligations and standards for democratic elections, and international good practice.

ODIHR remains at the disposal of the Senate of the Republic of Poland and your committees.

Yours sincerely,

Ingibjörg Sólrún Gísladóttir

cc: H.E. Ambassador Adam Hałaciński, Permanent Representative of the Republic of Poland to the OSCE

Warsaw, 27 April 2020

Opinion Nr ELE-POL/373/2020



**OPINION ON THE DRAFT ACT ON SPECIAL RULES FOR CONDUCTING THE
GENERAL ELECTION OF THE PRESIDENT OF THE REPUBLIC OF POLAND
ORDERED IN 2020 (SENATE PAPER NO. 99)**

*This Opinion has benefited from contributions made by
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I. BACKGROUND AND SCOPE OF THE OPINION

1. On 9 April 2020, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) received a request from Dr. Adam Bodnar, Commissioner for Human Rights of Poland, to provide a legal opinion (hereinafter “opinion”) on the Draft Act of 6 April 2020 on special rules for conducting the general election of the President of the Republic of Poland ordered in 2020 (hereinafter “Draft Act”). By letter of 15 April 2020, ODIHR confirmed the readiness to provide a legal opinion on the Draft Act.

2. Following the pandemic outbreak of the corona virus (COVID-19), the World Health Organization declared a global public health emergency in January 2020.¹ Governments across the world have imposed restrictions on freedoms of movement and assembly and enacted other measures to combat the spread of the virus. These extraordinary circumstances have led numerous countries to postpone elections and referenda.² Many of these countries have declared states of emergency.

3. In Poland, the government gradually restricted non-essential movement, the use of public spaces, and all meetings and gatherings.³ The above restrictions notwithstanding, the government of Poland did not declare a state of emergency under which the holding of the 10 May election would have been proscribed. The government of Poland has expressed its intention to proceed with the presidential election scheduled for 10 May 2020.

4. This opinion reviews the Draft Act for compliance with OSCE commitments, other international standards and good practice for democratic elections. The scope of this opinion covers only the Draft Act submitted for review.⁴ On 7 April 2020, ODIHR released a statement on the importance of genuine campaign and public debate for democratic elections.⁵ To the extent necessary, references are made to the Constitution, the Election Code, and other legislative acts of Poland. Thus limited, the opinion does not constitute a comprehensive review of the entire electoral legal framework of Poland.

5. The ensuing recommendations are based on OSCE commitments, other international standards and good practice and take into account findings of ODIHR’s previous election observation activities in Poland.⁶

6. This Opinion is based on an unofficial English translation of the Draft Act commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. This Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on electoral legislation of Poland in the future.

¹ See the [Statement](#) on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV).

² According to [International IDEA](#), between 1 March 2020 and 23 April 2020, at least 51 countries and territories across the globe have postponed national and subnational elections due to COVID-19, while at least 18 countries and territories have decided to proceed with elections as originally planned.

³ [Current restrictions](#) are published (in Polish).

⁴ The Draft Act is separate from the recent amendments to the Election Code passed on 28 March that provided that all eligible voters can choose to vote by postal voting in the 2020 presidential election.

⁵ See the ODIHR [statement](#) from 7 April.

⁶ See all previous [ODIHR election reports on Poland](#).

II. EXECUTIVE SUMMARY

7. The Draft Act provides for carrying out the upcoming presidential election solely by means of postal voting, accords the *Marshal* (Speaker) of the *Sejm* (lower chamber of parliament) the power to change the date of election under the “state of epidemic”, and alters the structure of election administration and the allocation of responsibilities for administering the 2020 presidential election. The Draft Act was adopted by a narrow majority in the *Sejm* on the same day it was submitted.

8. The changes stipulated in the Draft Act were proposed in the *Sejm* slightly more than one month prior to the 10 May presidential election. Introducing such substantial changes so close to the date of an election, and at the time when electoral preparations were already underway, diverges from the principles of stability of electoral legislation and legal certainty. The Draft Act has also not benefitted from an inclusive public consultation process which may have facilitated consensus of the key stakeholders.

9. The Draft Act transfers the responsibility for critical aspects of the electoral process away from the National Election Commission (NEC) to a government ministry with no prior experience in electoral administration. The Draft Act also envisages a change in the structure of election administration and methods of appointment of precinct election commissions. All this may create additional uncertainty and weaken public trust in the administration of elections.

10. The Draft Act contains specific provisions pertaining to practical aspects of the organization of postal voting on an unprecedented scale in Poland. Without prejudice to postal voting as such, this opinion highlights potential challenges and provides additional considerations concerning practical implementation of specific legal provisions in the Draft Act with respect to the registration of voters, delivery and retrieval of ballots, review of ballots for validity, provisions for out-of-country voting, and observation of elections by party proxies and citizen observers.

11. In ODIHR’s assessment, the Draft Act requires substantial improvements to be aligned with OSCE commitments and other international standards for democratic elections. Implementation of the Draft Act within the timeframe envisaged for holding the election on 10 May 2020 would require adoption of more detailed procedural guidelines, may place an unreasonable burden on the implementing bodies and jeopardize important principles of democratic elections. ODIHR makes the following key recommendations:

- to ensure that amendments to electoral legal framework are adopted through a public and inclusive process that respects the principles of legality and the rule of law, allows for a meaningful discussion and facilitates consensus of the key stakeholders;
- to adopt amendments to electoral legal framework well in advance of the election to preserve legal certainty and to allow sufficient time for administrative preparations and voter education;
- to reconsider the provision allowing the Marshal of the *Sejm* to change the election date;
- to retain with the National Election Commission the competencies assigned by the Draft Act to the Minister of State Assets;
- to clearly provide for observation of activities of municipal Precinct Electoral Commissions by proxies and citizen observers and to consider providing them with personal protection equipment;

These and additional recommendations, as highlighted in bold, are included throughout the text of this opinion.

III. ANALYSIS AND RECOMMENDATIONS

A. LEGISLATIVE PROCESS AND ADOPTION OF THE DRAFT ACT

12. Following restrictions on gatherings, on 26 March 2020, the Rules of Procedure of the *Sejm* were changed to allow for the remote participation of members of parliament in proceedings, including debating and voting via internet.⁷ The Draft Act was introduced in the *Sejm* on 6 April 2020 and went through three readings on the same day, all adopted by a narrow majority of votes.⁸ While it is beyond the scope of this opinion to provide a full analysis of the compliance of the process of adoption of the Draft Act with the Constitution and parliamentary rules of procedure, this opinion does endeavor to assess how the process respected the principles of legality and rule of law.⁹ It is important to emphasize that this process falls short of the long-standing ODIHR and the Venice Commission's position that electoral legislation be adopted through a public, inclusive, thorough and effective process facilitating consensus of the key stakeholders.¹⁰

13. Such considerations are even more important in the context of current restrictions limiting avenues for public discussion and an in-person debate during the parliamentary proceedings. The expedited manner in which the Draft Act was adopted under new remote procedures may have impacted the ability of those opposing the initiative to meaningfully participate in the process. The absence of opportunity for committee discussion, sufficient time for familiarization with the proposed legislation and a full plenary debate further challenges the principle of legality that necessitates a transparent and accountable process.¹¹ Building such consensus, including by soliciting opinion from the principal implementing institutions, including the election administration, would be of particular value for the initiative of carrying out a nationwide election solely by means of postal voting, unprecedented in Poland. It would also facilitate realistic planning and preparation for the election.

14. The adoption of legislation in an expedited manner may be justified by an emergency situation. However, such legislation should be strictly circumscribed and addressed to the

⁷ A limited number of MPs can participate in the sessions in the *Sejm* plenary hall.

⁸ According to the published [summary](#) of the *Sejm* proceedings (in Polish).

⁹ Paragraph 18 of the Venice Commission [Rule of Law Checklist](#) provides that the principle of legality includes “a transparent, accountable and democratic process for enacting law” and that the principle of rule of law “promotes the democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules.”

¹⁰ Paragraph 5.8 of the 1990 OSCE Copenhagen Document provides that “legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability.” See also, among many others, Joint Opinions of ODIHR and Venice Commission [on the draft electoral law of the Kyrgyz Republic](#) and [on the draft law amending the electoral legislation of Moldova](#). See also the Venice Commission [Rule of Law Checklist](#).

¹¹ See Communication from the European Commission to the European Parliament and the Council “[A new EU Framework to strengthen the Rule of Law, Annex I](#)” which provides that “the principle of legality in substantial terms includes a transparent, accountable, democratic and pluralistic process for enacting laws.” The European Court of Justice in [Commission v CAS Succhi di Frutta](#) has stated that “in a community governed by the rule of law, adherence to legality must be properly ensured”.

emergency needs, and adopted in a manner adhering to international standards and principles.¹²

It is recommended that amendments to electoral legal framework are adopted through a public and inclusive process that respects the principles of legality and the rule of law, allows for a meaningful discussion and facilitates consensus of the key stakeholders.

B. STABILITY OF ELECTORAL LAW AND LEGAL CERTAINTY

15. With less than a month remaining before the scheduled election and at the time when electoral preparations are already underway, the Draft Act seeks to introduce significant changes to the rules guiding the conduct of the 2020 presidential election, *inter alia*, in the method of voting, election day procedures, and competencies of the election administration. This timeframe is unreasonably short by any standard. Proposed legislative changes envision conduct of a nationwide poll solely by means of postal voting. These changes have considerable organizational and logistical implications and their proper implementation would require adequate preparation, including training of postal workers and polling officials on election-day procedures and on health-related precautions.¹³ Particular attention would need to be given to informing voters, most of whom have no prior experience with postal voting, about the procedure for using postal ballots, the voting hours, and the location of postal ballot boxes.¹⁴ Inadequate voter information campaign may heighten the risk of incorrectly filled and returned ballots, leading to invalidation of votes.

16. Stability of electoral law is regarded as crucial to credibility of the electoral process.¹⁵ Changes to the electoral law immediately prior to holding elections jeopardizes the application of the law and its implementation due to inadequate preparation and deprives electoral stakeholders of the possibility to plan their actions which may limit the ability of candidates to fully exercise their right to be elected. It may also result in confusion of voters and an overall perception that such amendments may favor certain political interests. Voters may conclude that the electoral law is simply a tool in the hands of the powerful.¹⁶ For these reasons, the Council of Europe's Venice Commission has advised that fundamental elements of electoral law, in particular the electoral system, membership of electoral commissions and

¹² See Paragraph 2 of the 2001 UN Human Rights Committee [General Comment No. 29](#) which states that "Measures derogating from the provisions of the Covenant [the International Covenant on Civil and Political Rights] must be of an exceptional and temporary nature." The 1990 Copenhagen Document states in Paragraph 25.3 that "measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation", and in Paragraph 25.1 that "measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments." The European Court of Human Rights (ECtHR) in the cases [Mehmet Hasan Altan v. Turkey](#) (Paragraphs 94 and 210) and [Sahin Alpay v. Turkey](#) (Paragraphs 78 and 180) evaluated "whether the measures taken...were strictly required by the exigencies of the situation and consistent with the other obligations under international law". The ECtHR in the case of [Lawless v. Ireland](#) (Paragraph 28) evaluated the necessity of the emergency situation applied by Irish Government.

¹³ The Council of Europe's Venice Commission Code of Good Practice in Electoral Matters ([Code of Good Practice](#)), Explanatory Report, paragraph 84: "Members of electoral commissions have to receive standardised training at all levels of the election administration. Such training should also be made available to the members of commissions appointed by political parties."

¹⁴ The Draft Act is silent on voter information campaign, while the Act of 16 April 2020 *On specific support instruments in connection with the spread of the SARS-CoV-2 virus* rescinds application of the Election Code provisions requiring mailing of information to voters in advance of the election by local mayors and by election commissioners (Article 102).

¹⁵ See the Code of Good Practice, Explanatory Report, paragraph 63.

¹⁶ *Ibid.*, paragraphs 63 and 65.

the drawing of constituency boundaries, should not be open to amendment less than one year before an election. Any reform of electoral legislation to be applied during an election should occur sufficiently early for it to be really applicable to the election.¹⁷ Stability of electoral law also serves to provide legal certainty, which is an essential corollary of the rule of law.

It is recommended that changes to electoral legal framework are adopted well in advance of the election to preserve legal certainty and to allow sufficient time for administrative preparations and voter education.

17. The Draft Act authorizes the Marshal (Speaker) of the *Sejm* to change the election date indicated in the previously issued decision “if a state of epidemic has been declared in the territory of the Republic of Poland” (Article 20.2 of the Draft Act). The term “state of epidemic” is not one of the emergency regimes recognized in the Constitution.¹⁸ The Draft Act would therefore supplant constitutional provisions on states of emergency with an *ad hoc* legal basis for changing an election date by the Speaker of the *Sejm*. Such a change could be open to a constitutional challenge and attract scrutiny as to its compliance *inter alia* with the principles of periodic elections, stability of the electoral law and legal certainty.

18. A change in the election date after the election calendar has been set would have implications for important deadlines in the electoral process, including voter and candidate registration, and regulation of the campaign, campaign finance and access to media, which may impact the right to vote and stand.¹⁹

It is recommended that the provision allowing the Marshal of the *Sejm* to change the election date be reconsidered.

C. ELECTION ADMINISTRATION

19. The management of elections by an independent body is an important guarantee of impartial application of electoral law and equal treatment of election contestants.²⁰ In Poland, the National Election Commission (NEC) is the highest institutional body authorized to administer elections and referenda (Article 157.1 of the Election Code). The NEC also has the responsibility to instruct lower-level election commissions (Article 161.1 of the Election Code) and supervise the implementation of electoral law (Article 160.1(1) of the Election Code).

¹⁷ See the Venice Commission’s Interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005)043), paragraphs 4 and 5.

¹⁸ The Constitution provides for three kinds of extraordinary regimes: martial law, a state of emergency and a state of natural disaster (Chapter XI). For the duration of any extraordinary regime, as well as within 90 days following its termination, national and local elections may not be held, and the term of office of elected bodies shall be appropriately prolonged (Article 228.7 of the Constitution).

¹⁹ Under Paragraph 7.6 of the 1990 OSCE Copenhagen Document States have committed to “provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities.”

²⁰ [General Comment No. 25](#) of the UN Human Rights Committee provides that “[a]n independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant” (paragraph 20). The Code of Good Practice advises that “[a]n impartial body must be in charge of applying electoral law” (Guidelines, paragraph II.3.1.a).

20. Articles 3.9 and 6.4 of the Draft Act assign to the Ministry of State Assets powers to design the ballot template, design the mail voting package and decide on additional materials to be included, and determine the manner of handling completed ballots and related materials, including regulations relating to unsealed ballots, ballots missing a voter's statement, and illegible information in these statements.²¹ Currently, these aspects of organizing elections fall under the specific responsibility of the NEC (Article 53.g.7, Article 40.5, and Article 53.j.3 of the Election Code).²² There may be justification for the engagement of other agencies to assist with procedures or logistical aspects of the election process, especially those that are new. For example, the NEC is currently supported by the Ministry of Interior and Public Administration, Ministry of Digital Affairs, Ministry of Foreign Affairs and others in carrying out certain tasks in administering the elections. The Draft Act, however, transfers the responsibility for several critical aspects of the electoral process away from the NEC and to a government ministry.

21. As the NEC is the established institution for administering all elections in the country, including presidential elections, placing many important responsibilities under a different state agency with no proven experience in electoral administration at this juncture may create additional uncertainty and weaken public trust in the administration of elections. Moreover, transferring authority for electoral matters to a branch of the government removes legal guarantees for balanced representation and serves to undermine the independence of election administration, contrary to international obligations and good practices in elections.²³

It is recommended that the competencies assigned by the Draft Act to the Minister of State Assets be retained with the National Election Commission.

22. Article 10 of the Draft Act also changes the structure of election administration bodies by eliminating the Precinct Election Commissions (*obwodowe komisje wyborcze*) in the presidential election (Article 249.1 of the Election Code) and transferring their duties in organizing the vote and counting ballots to Municipal Precinct Election Commissions (*gminne obwodowe komisje wyborcze*), or municipal PECs. The consolidation of precinct commissions into a municipality-wide commission is logical insofar as the casting of ballots will take place exclusively via postal vote it would not be necessary to administer voting in polling stations, and there is only one voting contest. However, it is unclear how this will work in practice, as each municipal PEC will need to organize the ballot return sites across the municipality, and receive, verify and count tens or even hundreds of thousands of mail ballots on election day.

23. In contrast to the Election Code, which provides for chairpersons and deputy chairpersons of PECs to be elected by the members themselves at their first meeting (Article 182.10 of the Election Code), the Draft Act envisages that chairpersons of the newly created municipal PECs would be appointed by election commissioners from among "persons from administration" (Article 10.6 of the Draft Act). The exact status of these "persons from

²¹ The Act also grants the Ministry the right to determine "additional items to be in the electoral package with a view to ensuring that voters can efficiently exercise their right to vote" (Article 3.4).

²² The Act of 16 April 2020 *On specific support instruments in relation to the spread of SARS-CoV-2 virus* also abrogates the responsibility of the NEC to provide voters with information on the elections and voting, issue certificates on the right to vote, conduct postal voting for the disabled and proxy voting, and design and print ballots (Article 102 of the Act of 16 April 2020).

²³ Paragraph 20 of the General Comment No. 25 provides that "an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant."

administration” is unclear. The abovementioned uncertainty notwithstanding, the proposed departure from the general rule established by the Election Code for selecting PEC chairpersons does not appear to have a sound rationale. Article 10.11 of the Draft Act provides an additional possibility for adding members to the municipal PEC at the discretion of the election commissioner. Considering that the current election commissioners were appointed by the NEC upon nomination of the Ministry of Interior and Public Administration, introducing these practices could be seen as executive interference and thus impact the perception of impartiality of election administration.

It is recommended that the chairpersons of municipal precinct election commissions are elected by commission members from among themselves at the first meeting of the commission.

D. OPERATIONAL IMPLICATIONS OF THE DRAFT ACT

24. The Draft Act proposes a voting process which constitutes a partial postal voting system. It is different from the current postal voting offered to voters with disabilities, which transmits ballots between the election administration and voters via mail. The proposed voting system will use the postal carrier, or “designated service provider” as specified in the November 2013 Postal Law, to distribute mail ballots directly to voters’ addresses per the voter registry. However, voters must deliver their completed ballots at designated locations, or “ballot return boxes”, and only on the election day. International good practice states that while additional means of voting may be offered given certain conditions are met, voters should always have the possibility to vote in a polling station.²⁴ The considerations in paragraphs 25-40 address provisions in the Draft Act that pertain to specific elements of the envisaged postal voting process.

Voter Registration

25. The current system of applying to a municipal office to be included in the voter list at a place of temporary stay, under Article 28 of the Election Code, is maintained. However, while the Election Code allows voters to do this until five days prior to election day, the Draft Act envisages that the process will be closed from the “day on which the Act comes into force” (Article 4), and the register is to be delivered to the designated service provider on that day (Article 15.1). This creates uncertainty for persons wishing to avail themselves to this practice as to when exactly the deadline will be, especially if the date of the election is changed, and may limit the right to vote.²⁵

26. Under Article 32 of the Election Code, voters who change their place of stay prior to election day can also obtain an Absentee Voting Certificate from their place of registration to vote at *any* location, including outside their municipality. The Draft Act removes this possibility by requiring voters to return a voted ballot only to the municipality where the voter is listed in the register (Article 5.2).

²⁴ See the Code of Good Practice paragraph I.3.2.ii. See also paragraph I.3.2.iii that states, “postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible.”

²⁵ In the 2019 parliamentary elections, 181,706 voter records were added or updated through in person and online requests prior to this deadline.

It is recommended that voters be given sufficient time to apply to be included in the voter list at a place of temporary stay and that this information is communicated during the voter education campaign.

Delivery of Ballots and Voting

27. The Draft Act envisages that ballots will be delivered to voters by the designated service provider beginning from seven days prior to and until the day before election day (Article 3.1). This period appears to be very short for the delivery of more than 30 million packages to registered voters and allows little opportunity to identify and remedy problems and omissions in delivering ballots.²⁶

28. The Draft Act envisages that the local administration (Mayor) will determine the location of the municipal commission (Article 12), but remains silent on whether it is this municipal PEC itself, local administration or mayor, delegate offices of the National Election Office (NEO) or other entity who decides on the location of the municipality's ballot return boxes, or who is to supervise the ballot return boxes. Nor it is clear from the Draft Act who will communicate information on these locations to voters.

29. Article 5.2 of the Draft Act allows a completed ballot to be returned by a person other than the voter. There is no limit on the number of voted ballots a person could return. This practice can lead to a practice of agents collecting completed ballots on behalf of a candidate or facilitate schemes to influence voters' choices, including family voting, or intentional spoiling of voters' ballots.

It is recommended that the provisions for returning ballots of other voters be subject to reasonable limitations and the Draft Act elaborate how the municipality ballot return boxes will be supervised and how any imposed limitation will be enforced.

30. In absence of provisions in the Draft Act, a procedure would be required to determine how the ballot return boxes will both "open" and "close" promptly at 06:00 and 20:00, respectively. Presumably, these boxes will be manned by municipal PEC representatives who will use seals for the period prior and after voting. Further elaboration is likewise needed on how municipality ballot return boxes and ballots will be secured while in position and during the transit of ballots to the municipal PEC representatives. Voting procedures should also clarify the right to vote for those present at the box at the time of "closing" but have not yet cast the ballot due to queues and maintaining social distancing.²⁷

Retrieval of Ballots

31. The Draft Act (Article 14.1) envisages that the designated service provider will continuously remove return ballot packages during the day and transfer them to the municipal

²⁶ Per current registration figures, this implies around 5 million ballot packages are to be delivered every day, or 208,000 ballots per hour, 3,500 ballots per minute, and 57 ballots per second (24 hours a day) during this period. Even if a delivery provider can handle this volume of packages, it is also a question of whether the assembly of the election materials, the transfer of these packages and other measures can be undertaken by the election administration and other entities within such a timeline.

²⁷ Per the Election Code (Article 39.4), only voters present an hour prior to the close of voting will be allowed to vote. It is not clear how this provision will be interpreted in the context of the proposed ballot return box.

PECs. It is not clearly prescribed in the Act, however, whether the commission will be able to immediately validate ballots received per the contents of the return envelope (without opening ballot secrecy envelopes), especially since this is a time-consuming process.

32. Article 14 of the Draft Act also states that ballots will be delivered to municipal commissions until 23:00. This would appear to conflict with Article 5.6 of the Draft Act which requires ballots delivered after the end of voting, i.e. 20:00, to be transmitted to the NEO branch.

33. Ballot envelopes must be returned by voters between 6:00 and 20:00 on election day. However, postal voting rules, including those for voters with disabilities in the current Election Code, generally allow ballots to be returned prior to the election day. This allows voters greater opportunity to cast ballots and renders retrieval and sorting of cast ballots easier for the election administration. Further, the lack of provisions for the voters with disabilities to cast their ballot by post as currently provided in the Election Code may limit their ability to participate.

It is recommended that consideration be given to increasing the time available for the return of ballots to provide for a reasonable period prior to election day and to including provisions for full postal voting for persons with disabilities as currently provided in the Election Code.

Review of Ballots

34. According to Article 5.5(1) of the Draft Act, a ballot from a return envelope that does not include the signed voter statement would be rejected. However, international practice shows that a common mistake could be to insert the statement in the ballot secrecy envelope. With an aim to make such votes valid, there could be a provision to inspect the ballot secrecy envelope, while protecting the secrecy of the vote, to determine whether the statement may have been misplaced in this envelope. Without disclosing the voter's choice this statement could be extracted and verified.

35. If a voter's statement is missing either the first or last name or PESEL identification number, a ballot will be invalid per Article 5.5(2) of the Draft Act. The article also states that if these details are "illegible" the ballot will be invalid. This provision requires further elaboration to ensure uniform application of determining what is "illegible" to avoid inconsistencies and wrongfully rejecting or including votes. Moreover, consideration should be given to adopting a reasonable margin of error on abbreviated names, initials, PESEL and so on.

36. Article 5.5.3 of the Draft Act stipulates that unsealed ballot secrecy envelopes will be considered a reason for rejection of the ballot. The utility of this provision is not entirely clear, as it is generally the ballot return envelope that should be intact. Further, the likelihood of the ballot secrecy envelopes being unsealed would depend on the method and material chosen for sealing the envelopes. The use of self-adhesive envelopes could help avoid unnecessary invalidation of ballots and a procedure for evaluating "open" seals should be established to provide guidance for election commissions and to create a consistent rule.

It is recommended that clear rules and procedures be established with the aim to evaluate ballots returned by voters, rejecting only those ballots whose authenticity cannot be established.

Provisions for Overseas Voters

37. The Draft Act restores the possibility of postal voting in the presidential election for voters abroad. To do this, a voter must request a mail ballot from a diplomatic mission and return the completed ballot by election day. Voters will no longer be able to cast their ballots at diplomatic missions and other designated locations, as is the current practice under the Election Code. In principle, restoring the postal vote for citizens abroad could enfranchise those voters who live too far from a designated voting place to vote in person.

38. While extending the possibility of voting to more Polish citizens abroad is welcome, there is a 14-day cut-off time for requesting a mail ballot (for the 10 May election the requests would need to be made by 26 April) (Article 7.1 of the Draft Act), and it is not clear whether voters abroad will be informed of the new rules and be able to request and receive ballots in time. Frequent changes to the system of voting abroad, with essentially new procedures in place for the past three national elections, may also be confusing to the electorate. Such conditions may present practical and organizational challenges and adversely impact the overall participation of voters abroad.

Observation of Elections

39. The Election Code provides for both candidate proxies and non-partisan citizen observers (Chapter I, Section 9a), including their right to be present during all activities of the commissions referred to Article 152.2 of the Code. However, Article 152.2 does not include the municipal PECs envisaged by the Draft Act.²⁸ The Draft Act should be clear on the rights and conditions to observe all activities of the election commissions, designated service provider and any other agency involved in organizing the upcoming presidential election.²⁹

40. Current restrictions on movement, travel and gatherings imposed to combat the spread of COVID-19 will make it practically difficult, if not impossible, to mobilize, train, and deploy proxies and citizen observers on election day. The Draft Act provides for personal protection equipment for members of municipal PECs (Article 12.5 of the Draft Act) but not for proxies or observers.

It is recommended that clear provisions be made for observation of activities of municipal precinct election commissions by proxies and citizen observers and consideration be given to providing personal protection equipment for candidate proxies and election observers.

²⁸ Article 152.2 lists the District, Regional, Territorial and Precinct Election Commissions.

²⁹ Paragraph 8 of the 1990 OSCE Copenhagen Document provides that “the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place”.

ANNEX: ACT OF 6 APRIL 2020 ON SPECIAL RULES FOR CONDUCTING THE GENERAL ELECTIONS OF THE PRESIDENT OF THE REPUBLIC OF POLAND ORDERED IN 2020

Article 1. This Act establishes special rules for conducting postal voting in the elections of the President of the Republic of Poland ordered in 2020, in connection with the state of epidemic announced in the territory of the Republic of Poland.

Article 2. 1. The elections of the President of the Republic of Poland ordered in 2020 shall be conducted exclusively by postal voting.

2. The provision of para. 1 above shall also apply to the run-off in the elections of the President of the Republic of Poland ordered in 2020.

3. Postal voting shall be conducted in person.

4. Voters who vote in the elections referred to in para. 1 above shall not submit requests to vote by post.

5. Voting shall take place continuously from 6 am to 8 pm.

Article 3. 1. The designated service provider within the meaning of the Act of 23 November 2012 – Postal Law (Journal of Laws [Dz. U.] of 2018 item 2188 and of 2019 items 1051, 1495 and 2005), hereinafter referred to as the “designated service provider”, shall ensure in the case of voting in the territory of the Republic of Poland, within the period starting 7 days before the polling day and ending on the day preceding the polling day, the delivery of electoral packages directly to the voters’ mailboxes or to the voters’ addresses indicated in part A of the electoral register referred to in Article 26(6)(1) of the Act of 5 January 2011 – Electoral Code (Journal of Laws [Dz. U.] of 2019 items 684 and 1504 and of 2020 item 568).

2. Electoral packages not delivered in accordance with para. 1 above shall be handed over to the municipal precinct electoral commission before the end of the vote. If it is not possible to hand over the electoral packages to the municipal precinct electoral commission before the end of the vote, such packages shall be handed over to the competent director of a National Electoral Office branch.

3. The electoral package shall include, without limitation:

- 1) a return envelope;
- 2) a ballot;
- 3) an envelope for the ballot;

- 4) postal voting instructions;
- 5) a statement that the voter voted in person and that secrecy was maintained.

4. The Minister in charge of state assets may determine by way of regulation additional items included in the electoral package with a view to ensuring that voters can effectively exercise their right to vote.

5. The ballot shall bear a mark ensuring that the ballot is authentic.

6. The envelope containing the electoral package and the return envelope shall be marked “przesyłka wyborcza” [“electoral parcel”].

7. The envelope for the ballot shall be marked “koperta na kartę do głosowania” [“envelope for the ballot”].

8. The return envelope and the envelope for the ballot may not bear any markings other than those listed in paras. 5–7 above and in Article 53k(3) of the Act of 5 January 2011 – Electoral Code, subject to para. 10 below.

9. The Minister in charge of state assets, after consulting the National Electoral Commission, shall determine by way of regulation the specimen ballot, including the manner of determining its authenticity, the design and size of the envelope for the electoral package, the return envelope, the envelope for the ballot, the statement referred to in para. 3, point 5 above and postal voting instructions, taking into account the need to ensure the secrecy of the voting process and the conciseness and comprehensibility of the instructions.

10. Electoral packages shall be produced on the order of the Minister in charge of state assets by the entity or entities indicated by him or her. Immediately after their production, electoral packages shall be handed over to the designated service provider.

11. The provisions of para. 3 and paras. 5–8 above shall apply *mutatis mutandis* to voting in districts established abroad.

Article 4. A voter shall be added to the electoral register referred to in Article 28 of the Act referred to in Article 3(8) upon the voter’s request submitted to the municipal office no later than on the day on which this Act comes into force.

Article 5. 1. The voter shall sign the statement referred to in Article 3(3)(5) and shall enter his or her first name, surname and the PESEL personal identification number in the space provided for this purpose.

2. After completing the ballot, the voter shall place it in the envelope for the ballot, which envelope for the ballot the voter shall seal and subsequently place it in the return envelope together with the signed statement referred to in Article 3(3)(5), and then place the

return envelope, himself or herself or through another person, not earlier than at 6 am and not later than at 8 pm on the polling day, in the specially prepared postal collection box of the designated service provider in the municipality where the voter is listed in the electoral register. The requirements to be met by the postal collection box of the designated service provider prepared for accepting return envelopes shall be determined, by way of regulation, by the Minister in charge of state assets, with a view to ensuring that the postal collection boxes are properly secured, and in particular guaranteeing that voting secrecy is ensured.

3. A voter who votes in the capital city of Warsaw shall place the return envelope in a specially prepared postal collection box of the designated service provider in the city district where the voter is listed in the electoral register.

4. Envelopes for ballots removed from the return envelopes delivered to a municipal precinct electoral commission shall be placed in a ballot box. Envelopes for ballots shall not be opened before being placed in the ballot box.

5. An envelope for the ballot shall not be placed in the ballot box and the ballot in question shall be considered invalid and shall not be counted in determining the results of the vote in the municipality if:

- 1) the return envelope does not contain a signed statement that the voter voted in person and that secrecy was maintained; or
- 2) the statement referred to in point 1 above does not include the voter's first name or surname or the PESEL personal identification number or these details are illegible; or
- 3) the envelope for the ballot is not sealed;
- 4) the voter whose details are entered in the statement referred to in point 1 above is not listed in the electoral register submitted to the municipal precinct electoral commission;
- 5) the return envelope with the statement referred to in point 1 above, which includes the voter's details, has been placed previously in the ballot box.

6. Return envelopes not delivered to the municipal precinct electoral commission before the end of the vote shall be handed over to the competent director of a National Electoral Office branch.

7. Parcels containing electoral packages and parcels containing return envelopes shall be considered unregistered letter mail within the meaning of the Act of 23 November 2012 – Postal Law.

8. Paras. 1, 4 and 5 above shall apply *mutatis mutandis* to voting in districts established abroad.

Article 6. 1. The Minister in charge of state assets in consultation with the Minister in charge of health shall determine by way of regulation the detailed procedure for:

- 1) the delivery of electoral packages by the designated service provider to voters;
- 2) the collection of the return envelopes placed in the specially prepared postal collection boxes of the designated service provider which are designed to accept return envelopes;
- 3) the delivery of return envelopes to the competent municipal precinct electoral commissions;
- 4) the collection of electoral packages or return envelopes where these are placed in return mail boxes

– with a view to ensuring that rules for conducting the elections are observed and the security of these parcels is guaranteed.

2. The Minister in charge of state assets shall determine by way of regulation the detailed manner and procedure for:

- 1) the delivery of electoral packages to voters who are subject to mandatory quarantine, isolation or home isolation as referred to in the Act of 5 December 2008 on the Prevention and Control of Infections and Infectious Diseases in Humans (Journal of Laws [Dz. U.] of 2019 items 1239 and 1495 and of 2020 items 284 and 374) on the polling day;
- 2) the delivery of electoral packages to voters who are staying at a medical establishment, nursing home, penitentiary or detention centre;
- 3) the collection of return envelopes from the voters referred to in points 1 and 2 above;
- 4) the delivery to the competent municipal precinct electoral commissions of return envelopes collected from the voters referred to in points 1 and 2 above;
- 5) the collection of electoral packages not collected by the voters referred to in points 1 and 2 above

– with a view to ensuring that rules for conducting the elections are observed and that the security of these parcels is guaranteed, as well as protecting the health of the persons collecting and handling these parcels.

3. Article 53j(3) of the Act of 5 January 2011 – Electoral Code shall apply *mutatis mutandis* to the handling of electoral packages not collected by the voters referred to in para. 2, points 1 and 2 above and to the handling of return envelopes collected from these voters.

4. The Minister in charge of state assets shall determine by way of regulation the manner of handling:

- 1) return envelopes delivered to the competent municipal precinct electoral commission before the end of the vote;
- 2) return envelopes delivered to the competent municipal precinct electoral commission after the end of the vote;
- 3) return envelopes containing unsealed envelopes for ballots;
- 4) return envelopes which do not contain a signed statement that the voter voted in person and that secrecy was maintained;
- 5) return envelopes containing an incorrectly completed or illegible statement referred to in Article 3(3)(5);
- 6) electoral packages or return envelopes placed in return mail boxes
– with a view to ensuring that rules for conducting the elections are observed and taking into account the need to secure electoral packages, in particular return envelopes and ballots.

Article 7. 1. A voter staying abroad shall notify the competent consul of his or her intention to vote by mail by the 14th day before polling day at the latest.

2. The notification referred to in para. 1 above may be made orally, in writing, by fax or in electronic form.

3. The notification referred to in para. 1 above shall contain the surname and first name(s), father's first name, date of birth, the voter's PESEL personal identification number, the number of a valid Polish passport together with the indication of the place and date of its issue, the indication of the address to which the electoral package is to be sent and – in the case of a Polish citizen temporarily staying abroad – the indication of the place where the voter is listed in the electoral register.

Article 8. 1. After completing the ballot, a voter who votes abroad shall place it in the envelope for the ballot, which envelope for the ballot the voter shall seal and subsequently place it in the return envelope together with the signed statement referred to in Article 3(3)(5) and then send it to the competent consul at his or her own expense.

2. The consul shall hand over to the competent district electoral commission, during voting hours, the return envelopes which he received until the end of the vote.

3. Article 230 of the Act referred to in Article 3(8) shall not apply to the elections of the President of the Republic of Poland referred to in Article 1.

Article 9. 1. During postal voting, the responsibilities of the head of a municipality or of an election commissioner in districts established abroad shall be performed by the competent consul. The provision of Article 14 of the Act referred to in Article 3(8) shall apply.

2. With respect to voting in districts established abroad, the Minister in charge of foreign affairs, after consulting the National Electoral Commission, shall determine by way of regulation the procedure for:

- 1) delivering the electoral package to the voter;
 - 2) collecting the return envelopes delivered by voters to the consul before the polling day;
 - 3) storing the return envelopes received by the consul before the end of the vote;
 - 4) delivering return envelopes to the competent district electoral commissions
- with a view to ensuring that rules for conducting the elections are observed and the security of these parcels is guaranteed.

3. With respect to voting in districts established abroad, the Minister in charge of foreign affairs shall determine by way of regulation the procedure for handling:

- 1) return envelopes delivered to the competent district electoral commission;
 - 2) return envelopes containing unsealed envelopes for ballots;
 - 3) return envelopes containing an incorrectly completed or illegible statement referred to in Article 3(3)(5)
- with a view to ensuring that rules for conducting the elections are observed and taking into account the need to protect electoral packages, in particular return envelopes and ballots.

Article 10. 1. In the elections of the President of the Republic of Poland ordered in 2020, a municipal precinct electoral commission shall be established in each municipality, which shall be competent for all the districts established in the area of the municipality in question. In the capital city of Warsaw, a municipal precinct electoral commission shall be established separately for each city district.

2. Municipal precinct electoral commissions shall be appointed by the election commissioner not later than on the second day after the entry into force of this Act and shall consist in equal numbers of the candidates nominated to the district electoral commissions referred to in Article 181a(1)(1) of the Act referred to in Article 3(8) by election agents representing the election committees whose candidate for President of the Republic of Poland has been registered by the National Electoral Commission, or by persons authorised by such election agents.

3. If the number of members of municipal precinct electoral commissions established pursuant to para. 2 above were to be greater than the statutory number of members of such commissions or greater than the number of members of such commissions determined pursuant to para. 11 below, candidates for the municipal district electoral commissions shall be selected by public drawing of lots from among the persons nominated by the election agents referred to in para. 2 above, with the proviso that an election agent or a person authorised by him or her cannot nominate more than one candidate for the drawing of lots.

4. As of the date of entry into force of this Act, municipal district electoral commissions established before that date in accordance with the procedure referred to in Article 182 of the Act referred to in Article 3(8) shall be dissolved.

5. A municipal precinct electoral commission shall consist of the following number of members:

- 1) in municipalities up to 50,000 inhabitants – not fewer than 3 and not more than 9 persons;
- 2) in municipalities with more than 50,000 inhabitants – 9 persons and 9 more persons for each additional 50,000 inhabitants, but no more than 45 persons in total.

6. A municipal precinct electoral commission shall include a chair who shall be designated by the election commissioner.

7. An election commissioner shall supplement the composition of a municipal precinct electoral commission if the number of candidates nominated is fewer than the number of members of the municipal precinct electoral commission provided for in para. 5 above from among the voters who meet the condition referred to in Article 182(4) of the Act referred to in Article 3(8). The provision of Article 182(6) of the Act referred to in Article 3(8) shall apply *mutatis mutandis*.

8. The first meeting of a municipal precinct electoral commission shall be convened by the election commissioner promptly after its establishment.

9. At its first meeting, a municipal precinct electoral commission shall elect a deputy chair from among its members.

10. The composition of a municipal precinct electoral commission shall be promptly made public by the election commissioner in a customary manner.

11. In particularly justified cases, the election commissioner may, to ensure the efficiency and effectiveness of the commission, appoint a greater number of persons to the municipal precinct electoral commission than that stipulated in para. 5 above.

Article 11. 1. Membership of a municipal precinct electoral commission shall expire in the following cases:

- 1) a commission member opting out;
- 2) in the case referred to in Article 153(2) of the Act referred to in Article 3(8);
- 3) the death of a commission member;
- 4) the loss of the right to vote by a commission member;
- 5) the dismissal of a commission member.

2. The competent election commissioner shall dismiss a member of a municipal precinct electoral commission where he or she fails to perform his or her duties or performs them improperly.

3. The composition of a municipal precinct electoral commission shall be supplemented in accordance with the procedure and rules laid down in the provisions concerning its establishment. The provision of Article 10(10) shall apply *mutatis mutandis*.

Article 12. 1. A municipal precinct electoral commission shall perform the tasks provided for the district electoral commission referred to in Article 181a(1)(1) of the Act referred to in Article 3(8), subject to the provisions of this Act.

2. The election commissioner shall determine the seat of a municipal precinct electoral commission no later than 3 days after this Act comes into force.

3. The seat of a municipal precinct electoral commission shall be at the premises indicated by the competent head of the municipality or mayor.

4. Where the head of the municipality or mayor does not designate suitable premises within the time limit referred to in para. 2 above, the election commissioner shall designate the premises indicated by the competent province governor as the seat of the municipal precinct electoral commission.

5. The head of the municipality, the mayor, or, in the case referred to in para. 4 above, the provincial governor, shall equip the premises of the municipal precinct electoral commission with sufficient personal protection equipment related to fighting the COVID-19 epidemic for all members of the municipal precinct electoral commission.

6. The Minister in charge of health, in consultation with the Minister in charge of public administration, shall determine by way of regulation the conditions to be met by the premises of a municipal precinct electoral commission and the list of personal protection equipment related to fighting the COVID-19 epidemic for members of municipal precinct electoral

commissions, taking into account the need to protect the health of members of the municipal precinct electoral commission.

Article 13. Provisions of the Act referred to in Article 3(8) concerning municipal district electoral commissions shall apply *mutatis mutandis* to matters not governed by this Act, in particular where these relate to the appointment, dissolution, expiry of membership, allowances for members and operation (including tasks) of the municipal precinct electoral commission.

Article 14. 1. On the polling day, return envelopes shall be successively delivered by the designated service provider to the municipal precinct electoral commission from the beginning of the vote until 11 pm.

2. The competent municipal precinct electoral commission shall verify the return envelopes delivered, including without limitation checking the first name and surname of the voter and the PESEL personal identification number against the data contained in the electoral register.

3. Before the polling day, the municipal precinct electoral commission shall determine the number of ballot boxes to be used on the polling day, taking into account the expected number of return envelopes in the municipality in question. If ballot boxes are completely filled during voting, the commission shall immediately inform the head of the municipality, the mayor or, in the case referred to in Article 12(4), the province governor of the need to deliver further ballot boxes.

4. If more than one ballot is present in an envelope for the ballot, the ballots present in that envelope shall be considered invalid.

5. A ballot shall be considered invalid if, as a result of a checking the mark referred to in Article 3(5), the municipal precinct electoral commission has determined that the ballot is not authentic.

6. After determining the results of the election, the municipal precinct electoral commission shall draw up the minutes of voting in the municipality in the elections of the President of the Republic of Poland and shall hand them over to the regional electoral commission.

7. The specimen minutes referred to in para. 5 above and detailed activities of the municipal precinct electoral commission during the vote shall be established by the National Electoral Commission.

Article 15. 1. The municipal electoral register referred to in Article 26(4) of the Act referred to in Article 3(8) shall be drawn up in three copies by the head of the municipality or mayor. The register shall be submitted to the designated service provider on the day on which this Act comes into force.

2. In the capital city of Warsaw, the electoral register shall be drawn according to the voters' places of residence separately for each city district. The provision of para. 1 above shall apply *mutatis mutandis*.

3. One copy of the electoral register shall be submitted by the head of the municipality or mayor to the chair of the competent municipal precinct electoral commission on the day preceding the polling day.

4. In the case referred to in Article 292(1) of the Act referred to in Article 3(8), the head of the municipality or mayor shall submit the updated electoral register not later than 12 days before the run-off date.

5. The detailed procedure and form of submission of the register referred to in para. 1 above to the municipal precinct electoral commission and to the designated service provider shall be determined by the Minister in charge of state assets by way of regulation, taking into account the need to provide these entities with the data necessary to conduct the elections.

Article 16. During the time when it performs the tasks referred to in this Act, the designated service provider shall be exempt from the obligation to provide other postal services.

Article 17. The provisions of the Act of 29 January 2004 – Public Procurement Law (Journal of Laws [Dz. U.] of 2019 item 1843) shall not apply to contracts concerning the services and supplies required to conduct postal voting in the elections referred to in Article 1.

Article 18. 1. A person who steals a ballot or statement referred to in Article 3(3)(5) – shall be liable to imprisonment for a period of up to 3 years.

2. A person who places in the postal collection box referred to in Article 5(2) a forged or counterfeit ballot or statement referred to in Article 3(3)(5) shall be subject to the same punishment.

Article 19. 1. A person who opens an electoral package or a sealed return envelope without authorisation

– shall be liable to a fine.

2. A person who destroys an electoral package or a sealed return envelope without authorisation shall be subject to the same punishment.

Article 20.1. The Act of 5 January 2011 – Electoral Code shall apply *mutatis mutandis* to matters not governed by this Act.

2. Article 289(1) of the Act of 5 January 2011 – Electoral Code shall not apply to the elections of the President of the Republic of Poland conducted pursuant to this Act. If a state of epidemic has been declared in the territory of the Republic of Poland, the Marshal of the Sejm may order a change in the election date indicated in the previously issued decision. The new date for the elections of the President of the Republic of Poland indicated by the Marshal of the Sejm must be in line with the dates for the elections of the President of the Republic of Poland provided for in the Constitution of the Republic of Poland.

Article 21. This Act shall come into force on the day following the date of its promulgation.

MARSHAL OF THE SEJM

Elzbieta Witek