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Participation of EU citizens in the Union's democratic functioning



The entry into force of the Lisbon Treaty and the now binding nature of the Charter of Fundamental Rights of the European Union have given new impetus to questions related to the participation of European Union (EU) citizens in the Union's democratic functioning. With the landmark judgment of the European Court of Human Rights (ECtHR) in relation to the right to vote, this area of law will play a vital role in ensuring the participation of EU citizens. 2010 also witnessed more intensive discussions on the European Citizens' Initiative, which is a new and potentially powerful participatory tool at EU level. Though it is too early to evaluate the full impact of this new mechanism, the Citizens' Initiative should help bring EU citizens closer to the important issues of European integration.

This chapter covers developments in EU and Member State policies and practices in the area of participation of EU citizens in the EU's democratic functioning. As this marks the first time the FRA has reported on developments in this area the following sections will serve as a starting point of a trend-oriented analysis that will be conducted in the years to come. The chapter begins with an overview of the current situation of non-national EU citizens' involvement in elections.¹ It then examines the circumstances in which the right to vote has been limited with respect to disability. The chapter concludes by considering various forms of participatory democracy, noting in particular the European Citizens' Initiative.

Key developments in the area of participation:

- as a result of the low participation rates of non-national EU citizens in municipal and European Parliament elections, discussions on electoral reform in this area began;
- the ECtHR extended its case law on the right to free elections (Article 3 of Protocol No. 1 to the European Convention on Human Rights (ECHR));
- following political consensus on the Citizens' Initiative Regulation at the end of 2010, the regulation was formally adopted in February 2011 and can be applied as of 1 April 2012.

7.1. Participation in elections by non-national EU citizens

7.1.1. The right to vote in elections

Article 22 of the Treaty on the Functioning of the European Union (TFEU) provides that EU nationals residing in a Member State other than their Member State of origin have the right to vote (otherwise known as active voting rights) and the right to be elected (also known as passive voting rights) in municipal and European Parliament

elections. These rights are also enshrined in Articles 39 and 40 of the Charter of Fundamental Rights of the European Union. More specifically, the right to vote in European Parliament and municipal elections is regulated by secondary law.²

¹ Articles 39 and 40, Charter of Fundamental Rights of the European Union.

² Council Directive 94/80/EC, OJ 1994 L 368, p. 34, and Council Directive 93/109/EC, OJ 1993 L 329, p. 38.

7.1.2. Participation in European Parliament elections: problems and reforms

According to the European Commission, there has been a steady decrease in voter participation in European Parliament elections since the first direct European Parliament election in 1979 – only 43% turnout in the 2009 elections.³ It seems that this decrease is not due to the migration of EU citizens between Member States as figures indicate that citizens who have changed their country of residence usually register to vote in European Parliament elections in the Member State of residence. The proportion of non-national citizens registered to vote in a Member State reached 11.6% in 2009, compared with 5.9% in 1994. However, due to lack of data, the European Commission could not survey the situation in all 27 Member States. The information gathered by the FRA confirms this lack of available data: many EU Member States do not keep records of the number of registered non-national EU citizens while only a small number of Member States have collected disaggregated data on how many non-national EU citizens have actually taken part in the European Parliament elections. For example, in **Cyprus** during the last 2009 European Parliament elections, 3,392 non-national EU citizens voted out of 6,458 registered non-national EU citizens,⁴ and in **Finland**, 2,231 non-national EU citizens voted out of 6,211 registered.⁵

In the EU Citizenship Report 2010,⁶ the European Commission identified problems encountered by EU citizens living in a Member State other than their own when both voting and standing for European Parliament elections. For example, the early publication of election results can be problematic as it may influence an ongoing poll in another Member State (this happened in the **Netherlands**). Another significant problem is the lack of information on topics such as voting rights, registration procedures for the electoral roll and conditions attached to the right to stand for election. The European Commission is currently assessing the situation in countries where these problems have arisen and has called on EU Member States to address some of these issues. The Commission is also proposing reforms to improve EU citizens' participation.

On 20 April 2010, the European Commission published its Action Plan for the implementation of the Stockholm Programme.⁷ For 2011 and 2012, the Commission announced, a legislative proposal amending Directive 93/109/EC on European Parliament elections. The Action Plan also envisages the publication of a report on national practices on elections for the European Parliament by 2012.

Furthermore, in 2010 the Committee on Constitutional Affairs of the European Parliament prepared a draft report on electoral reform at the EU level, aiming to modify the Act of 1976 on the election of the Members of the European Parliament (MEPs).⁸ Among its proposals, it raised the possibility of increasing the number of MEPs by 25 MEPs who would be elected by a single constituency formed of the whole territory of the EU. Also, the creation of transnational electoral lists composed of candidates from at least one third of the Member States was proposed. Each elector would be able to cast their vote for the national or regional list as well as the newly established EU constituency. The report further proposes establishing an electoral authority at EU level in charge of regulating the proper conduct of the election. The debate in the Committee is planned for the spring of 2011.

7.1.3. Participation in municipal elections

According to the Stockholm Programme Action Plan, a second implementation report of Council Directive 94/80/EC will be published by 2011. This directive sets out the conditions for the exercise of active and passive voting rights in municipal elections by EU citizens residing in a Member State of which they are not nationals. Without harmonising the electoral rules, the directive aims to facilitate the participation in municipal elections of EU citizens who have decided to reside in another Member State. The main achievement of the directive is the eradication of the nationality requirement which used to be necessary in many EU Member States in order to exercise voting rights. In 2002, the European Commission published its first report on the Directive's implementation, which concluded that the transposition process had been successfully completed with only a few instances of non-compliance.⁹ However, in practice, the proportion of non-national EU citizens who actually voted in municipal elections was rather low.

The FRA enquired whether some Member States allowed non-national EU citizens to participate in regional or national elections or in national citizens' initiatives. It was reported that no Member State gives voting rights to non-national EU citizens in any other elections than municipal and European Parliament elections. **Slovenia** is the only exception to this as EU citizens from other Member States may vote in elections for the National Council (the second chamber of parliament) where bodies representative of social, economic, professional and local interests are seated. If an EU citizen from another Member State residing in Slovenia belongs to one of these groups he or she will be able to vote and to be elected. In **Ireland**, United Kingdom (UK) citizens residing in the country may vote in Irish general elections; however, only Irish citizens are entitled to vote in the presidential elections.

3 European Commission (2010a), pp. 3 ff.

4 Information supplied by the Cyprus, Elections Service of the Ministry of Interior.

5 Statistic Finland: www.stat.fi/til/evaa/kas.html.

6 European Commission (2010b), pp. 17 ff.

7 European Commission (2010c).

8 European Parliament (2010a).

9 European Commission (2002).

It should be noted that almost no data is available concerning the actual participation of non-national EU citizens in municipal elections, which is similar to the situation in relation to European elections, as noted above. Data concerning the number of non-national EU citizens who are registered voters are available and were published by the Commission in its abovementioned report on municipal elections and in its 2010 report on European elections.¹⁰ However, only a limited number of Member States collect data on the number of non-national EU citizens who actually vote at municipal elections. For example, in the **UK** the figures that are collated by the Office for National Statistics show that there were 953,339 EU citizens registered to vote in the UK on 1 December 2008, and 955,844 on the same date in 2009. Statistics for 2010 are currently unavailable. Figures produced by the same body show that the number of EU citizens resident in the UK was 2,183,000 in 2009 and 2,115,000 in 2008. The proportion of EU residents in the UK who voted in local elections amounted to 44% in 2008 and to 45% in 2009, respectively.¹¹

During the reporting period, the ECtHR further developed its case law on the right to free elections (Article 3 of Protocol No. 1 to the ECHR) by handing down 10 judgments on that issue. Five of those cases concerned EU Member States – **Austria, Greece, Hungary, Romania** and the **UK**. The cases dealt with the right to vote – the active voting right – and the right to stand for elections – the passive voting right. They are particularly significant since they are likely to influence the interpretation of the instruments that currently regulate the right of EU citizens to vote in municipal and European Parliament elections since they are dealing with limitations to voting rights. The next section will look at one particular type of limitation linked to disabilities.

7.2. The limitation of voting rights in the case of disability

The case of *Alajos Kiss v. Hungary*¹² concerned a citizen's active right to vote. The ECtHR found that the automatic disenfranchisement of a person under guardianship due to a mental health problem constitutes a violation of Article 3 of Protocol No. 1 to the ECHR. According to the Constitution of **Hungary**, a person placed under guardianship does not have the right to vote. The applicant was diagnosed with a psychiatric condition and was placed under partial guardianship. He later realised that his name was not on the electoral register and that he could not vote in the legislative elections of 2006. The ECtHR rejected the validity of an absolute ban on voting being imposed on any person under partial guardianship irrespective of his or her actual faculties. The ECtHR stated that "a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny".¹³ The ECtHR held that only an individualised judicial evaluation could have legitimised the restriction on the applicant's voting rights.

Last year's FRA Annual Report reported on issues related to the accessibility of voting stations during the European Parliament elections for persons with disabilities.¹⁴ Additional work was carried out during this reporting period: One survey on the accessibility of polling stations in Poland revealed that protecting the right to vote is still subject to challenges. According to the Law on the Election of the President of the Republic of Poland (amended on 19 November

FRA ACTIVITY

Political participation rights of persons with mental health problems and persons with intellectual disabilities in EU Member States

In the context of its disability project, in 2010 the FRA published a report on the *Right to political participation of persons with mental health problems and persons with intellectual disabilities*. The report presents the international and European standards in this field and provides a legal comparative analysis of the situation in EU Member States. Its findings show that in a majority of EU Member States, persons with disabilities, who have lost their legal capacity, are deprived of their voting rights. These findings raise an issue of compatibility with the United Nations (UN) standards as guaranteed in Article 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD).

FRA (2010), *The right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities*, available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.

¹⁰ European Commission (2010a).

¹¹ United Kingdom, The Office for National Statistics (ONS). Figures are estimates and are determined through the Annual Population Service which is the Labour Force Survey plus various sample boosts. The figures are for the period of January to December of each year.

¹² ECtHR, *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010. The judgment is analysed in-depth by the European Union Agency for Fundamental Rights (FRA) (2010a). For a description of the overall FRA disability project, see: http://fra.europa.eu/fraWebsite/research/projects/proj_disability_en.htm

¹³ ECtHR, *Alajos Kiss v. Hungary*, *ibid.*, paragraph 44.

¹⁴ FRA (2010b), 'Chapter 8', *Annual Report 2010*.

2009), persons with disabilities are allowed to give power of attorney to another person, provided that he/she lives in the same municipality and is named in the register of electors. An inquiry by the Polish Ombudsman highlighted some challenges concerning the access to elections of persons with disabilities. The Polish Ombudsman inspected almost 100 polling stations that were supposedly fully accessible. The results of this monitoring showed that almost one-third of them were not adapted to wheelchair users.

In the context of its work in the area of disability, the FRA closely collaborated with the European Co-ordination Forum for the Council of Europe Disability Action Plan 2006-2015 (CAHPAH) on the reinforcement of civic rights of persons with disabilities. The European Commission for Democracy through Law ('Venice Commission') adopted an interpretative declaration of the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections.¹⁵

7.3. The European Citizens' Initiative

"[...] in the current debates that take place all over Europe concerning a democratic deficit of the institutions and the growing interests of democratic society and citizens in being more involved in the democratic process, the legislative initiative of citizens is increasingly regarded as a worthy corrector of the inevitable imperfections of indirect democracy."

Venice Commission (2008a), paragraph 80.

The Lisbon Treaty¹⁶ introduced elements of participatory democracy at the EU level for the first time in the EU's integration process, notably the European Citizens' Initiative. This type of initiative is rooted in the experience of a small number of EU Member States. It was first promoted by Austria and Italy during negotiations surrounding the Treaty of Amsterdam; it was then integrated into the proposed European Constitution. Now it is enshrined in the Treaty on European Union (TEU).

Article 11 TEU explicitly recognises the added value of participatory democracy. Citizens' participation takes two different forms. First, through "public exchanges", "dialogue with representative associations and civil society" and "consultations" – these mechanisms are now foreseen in Article 11 (1)-(3) TEU. Consultations have increased in number: in 2009, the European Commission organised 68 consultations¹⁷ of which two dealt with fundamental rights and justice

matters;¹⁸ and in 2010, the European Commission launched 95 consultations, seven of these on fundamental rights and justice-related issues. The second form of citizens' participation is prescribed in Article 11 (4) TEU on the European Citizens' Initiative, an institution of semi-direct democracy, whereby popular participation in public affairs is integrated as an element of representative democracy, which will now be discussed in greater detail.¹⁹

With the European Citizens' Initiative, the Lisbon Treaty introduced a new form of public participation in the European Union. Article 11 (4) TEU provides that "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties". In accordance with Article 24 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament and the Council had to determine the conditions and procedures for such an initiative to be filed: a regulation adopted in accordance with the procedure is to determine, in particular, the minimum number of Member States from which such citizens must come.

In line with the Action Plan implementing the Stockholm Programme, the required regulation was to be adopted by the end of 2010.²⁰ In November 2009, the European Commission published a Green Paper on a European Citizens' Initiative²¹ which served as a background document for the public consultation carried out from 11 November 2009 to 31 January 2010. A public hearing took place on 22 February 2010.²² On 31 March 2010, the European Commission submitted a proposal for a Regulation on the Citizens' Initiative to the European Parliament and to the Council of the European Union.²³ On 14 June 2010, the Council reached agreement on the draft regulation. On 15 December 2010 and on 14 February 2011, the European Parliament and the Council, respectively, adopted the regulation on the citizens' initiative.²⁴

"Today we are a step closer in putting flesh to the spirit of the Lisbon Treaty: to create a participatory, inclusive and transparent EU for citizens."

Jerzy Buzek, President of the European Parliament

15 European Commission for Democracy through Law ('Venice Commission') (2010a).

16 For more information, see its only recital, whereby it aimed at "... enhancing the ... democratic legitimacy of the Union".

17 www.ec.europa.eu/yourvoice/consultations/2009/index_en.htm.

18 www.ec.europa.eu/justice/news/consulting_public/news_consulting_public_en.htm.

19 European Economic and Social Committee (2010).

20 European Commission (2010c), p. 17.

21 European Commission (2009a). All relevant documents can be found on the European Commission website at: www.ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_en.htm.

22 European Commission (2010d).

23 European Commission (2010e). See also the European Economic and Social Committee (2010) and Committee of the Regions (2010) and the European Data Protection Supervisor (EDPS) (2010).

24 Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative, OJ 2011 L65/1.

The regulation requires one million signatures to come from at least one quarter of all EU Member States. Only EU citizens are eligible to sign such a Citizens' Initiative. The initiative organisers should form a citizens' committee of at least seven persons residing in seven EU Member States. A minimum number of signatories is foreseen per Member State.²⁵ Within two months of its receipt, the European Commission shall register the Citizens' Initiative, after having checked four admissibility criteria (Article 4 (2) of the Regulation). After registration, statements of support may be collected during a 12-month period (Article 5 (5) of the Regulation), either on paper or online. As to the latter, the Commission must provide adequate software free of charge to the organisers (Article 6 (2) of the Regulation). The organisers are fully responsible for complying with the collection provisions (Article 5 (1) of the Regulation), but EU Member States are required to use "appropriate checks" in order to verify the collected signatures (Article 8 (2) of the Regulation). Once the required signatures have been collected, the Commission has three months to prepare a communication with an initial assessment of the Initiative. A joint Commission-European Parliament public hearing will then be organised and a legislative proposal should be tabled within one year or in the next Work Programme. The Commission will submit to the European Parliament and the Council a first implementation report three years after the entry into force of the regulation.

Without waiting for the adoption of the regulation, on 6 October 2010 non-governmental organisations Greenpeace and Avaaz stated that they had already collected one million signatures calling for a Europe free of GMOs. The campaign was launched in March 2010, after the European Commission announced that it intended to authorise the cultivation of a GM potato variety introduced by BASF, breaking with a *de facto* moratorium that the EU had observed since 1998.²⁶ However, as the regulation was not in place at that time, the campaign could not be counted as the first European Citizens' Initiative.

Outlook

Participation of non-national EU citizens in local and European elections is an integral part of the development a full understanding of European citizenship. The European Commission has highlighted shortcomings in European Parliament participation; these should be addressed in the coming years, before the next European Parliament elections, together with a more ambitious reform of the electoral law of the European Parliament. At local level, the low rate of participation in elections of non-national EU citizens remains an issue that needs to be addressed in order to realise the

rights enshrined in the 1994 directive and in Article 40 of the Charter.

The possibility of participation of EU citizens in the Union's democratic functioning was significantly enhanced by the adoption of the European Citizens' Initiative during the reporting period. The importance of this new tool of semi-direct democracy should not be underestimated. Now that the enabling regulation is in place, EU Member States will need to organise structures at national level to facilitate the gathering of one million signatures needed to launch the Citizens' Initiative. At present, it is too early to evaluate the impact of this new mechanism. However, there is no doubt that the Citizens' Initiative should help bring EU citizens closer to the important issues of European integration.

²⁵ Annex I of the Regulation. The required minimum numbers amount to the number of Members of the European Parliament elected in each Member State multiplied by 750.

²⁶ Agence France-Presse (2010).

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UN & CoE

EU

January	January
February	February
March	31 March – European Commission proposes a regulation on the citizens' initiative to be adopted in early 2011 by the Council
April	March
11 May – CoE Committee of Ministers issues a recommendation on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education	April
20 May – European Court of Human Rights rules in the <i>Kiss v. Hungary</i> case on the right to vote of persons who are under guardianship due to a mental health problem	May
May	June
4 June – European Commission for Democracy through Law (the 'Venice Commission' is a CoE advisory body established in 1990) issues comments on the recommendations concerning 'Equal access to local and regional elections'	July
June	August
July	September
August	27 October – European Commission adopts EU Citizenship Report 2010 that is accompanied by a report on the progress towards effective EU Citizenship 2007-2010 and a report on the 2009 European Parliament elections
September	October
21 October – Venice Commission issues an interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections	November
October	December
November	January
December	Beginning of 2011 - EU adopts a regulation on the citizens' initiative (14 February 2011)
	February

